

Neutral Citation No. - 2025:AHC:160289

AFR

Reserved

Court No. - 76

Case :- APPLICATION U/S 482 No. - 28653 of 2023

Applicant :- Himanshu Dubey

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Bhagwan Dutt Pandey

Counsel for Opposite Party :- G.A.

Hon'ble Vikram D. Chauhan,J.

1. Heard Sri Bhagwan Dutt Pandey, learned Counsel for Applicant and Sri O.P. Dwivedi, learned A.G.A. for the State-respondent.

2. This application is preferred by applicant for quashing the charge sheet dated 19.1.2021 as well as cognizance order dated 7.7.2023 and the entire proceeding of Case No. 9029 of 2023 (State Vs. Himanshu Yadav), arising out of Case Crime No.0382 of 2020, under Section 363 I.P.C., Police Station-Gauri Bazar, District Deoria pending in the court of Chief Judicial Magistrate, Court/Room No.17, Deoria.

3. Learned counsel for Applicant submits that as per version of first information report, the prosecution case is that on 24.12.2020 the Applicant had enticed away niece of first informant, who was aged about 16 years and thereafter, informant lodged first information report against the applicant under Section 363 I.P.C. at Police Station-Gauri Bazar, District Deoria on 25.12.2020 in Case Crime No.0382 of 2020. The alleged incident took place on 24.12.2020 at 7.30 p.m. while the first information report was registered belatedly on

25.12.2020 at 19.40 HRS. but there is no explanation of delay in the first information report, which itself show that the entire story is false, fabricated and concocted because of malafide intention to implicate the applicant in the aforesaid case.

4. Learned counsel for Applicant further submits that during investigation, statement of alleged victim was recorded under Section 161 Cr.P.C. on 26.12.2020 who has taken the name of applicant and only stated that her family members had beaten her and also given electric shock that is why on 23.12.2020 at 6.30 p.m. she left the house alone and went to Siwan by bus and remained there for two days and thereafter, she was carried to Police Station-Gauri Bazar on 26.12.2020. The statement of mother of victim under Section 161 Cr.P.C. was also recorded who has stated about the love affairs of victim and applicant. The Investigating Officer has also recorded the statement of first informant under Section 161 Cr.P.C. who has reiterated the version of first information report.

5. Learned counsel for applicant submits that victim was produced for medico legal examination on 28.12.2020 where she denied for her internal and external examination. For ascertaining the age of alleged victim she was referred for X-ray, which was conducted on 29.12.2020 and as per X-ray report the age of victim was determined about 18 years by Chief Medical Officer concerned.

6. It is further submitted that the statement of victim under Section 164 Cr.P.C. was recorded on 1.1.2021, in which she stated that she left the house and no one was with her and the name of Himanshu Dubey has been taken by her family members willingly. The victim came under custody of her family members and thereafter her medical was conducted on 28.12.2020 and X-ray was conducted on 29.12.2020 and thereafter, her restatement under Section 161 Cr.P.C. was recorded.

7. Learned counsel for Applicant urges that from perusal of statements under Sections 161 and 164 Cr.P.C. there is no involvement of applicant and the victim has not admitted the fact that she eloped with applicant, as such no offence under Section 363 I.P.C. is made out as there is no ingredient for constituting the offence under Section 363 I.P.C.

8. Learned counsel for Applicant further states that Investigating Officer without conducting the investigation properly and also against the evidence collected during investigation submitted charge sheet against applicant under Section 363 I.P.C. and the Magistrate took cognizance of offence vide order dated 7.7.2023.

9. Learned A.G.A. for the State submits that opposite party no. 2 lodged first information report against applicant under Section 363 I.P.C. with the allegation that daughter of complainant was abducted and victim who has been recovered and her statement under Section 161 Cr.P.C. has been recorded and she refused to conduct her medical examination and formal medical examination has been conducted and the statement of victim under Section 164 Cr.P.C. has also been recorded and she made allegation against her family members regarding giving electric shock and she stated that she herself had gone to Siwan and her family members given the name of Himanshu Dubey and first information report has been registered and on the basis of evidence collected during investigation charge sheet under Section 363 I.P.C. has been submitted against accused-applicant on 19.01.2021 on which the learned Magistrate has taken cognizance on 7.7.2023.

10. The first information report is lodged by opposite party no. 2 on 25.12.2020 with the allegation that on 24.12.2020 at about 7:30 p.m. the niece of informant, who is minor, is enticed away by the Applicant. The aforesaid first information report was lodged against

the Applicant under Section 363 of Indian Penal Code.

11. During investigation, statement of victim was recorded by Investigating Officer under Section 161 Cr.P.C. The victim in her statement has stated that her family members have beaten and electrocuted her and as a result of the same on 23.12.2020 at about 6:30 p.m. she left the home and went to Pandey Biswa, thereafter came to Gauri Baazar & thereafter by bus came to Salempur and subsequently to Siwan and thereafter she was brought to police station.

12. The victim was medically examined on 28.12.2020 where she has stated before the doctor who examined her that she had left the home voluntarily on account of harassment by family members. Further, doctor after examining the victim has specifically recorded that no opinion regarding sexual assault can be given.

13. The statement of victim under Section 164 of Criminal Procedure Code was recorded before the concerned court where the victim has stated that she is aged about 17 years and on 23.12.2020 at about 6:30 p.m. the uncle of victim has beaten her on account of talking to applicant and as a result of the same victim sustained injuries and he further electrocuted the victim and as such she left the home alone and went to Siwan. The victim in her statement has specifically stated that she went alone from the home and there was no one else along with her and the informant has incorrectly given the name of applicant as victim was in talking terms with applicant.

14. As per learned counsel for Applicant, victim was taken into custody by family members and thereafter in her second statement under Section 161 Cr.P.C., victim has stated that she and applicant were in talking terms over mobile phone which came to the knowledge of family members of victim and thereafter Applicant

taken away victim on 23.12.2020 at 6:30 p.m. after victim leaving home alone and thereafter met the applicant at Pandey Biswa. Thereafter, applicant was with the victim till Salempur to Siwan and came back on 26.12.2020. The victim has specifically stated that during the said time victim was with the applicant, the applicant has not committed any sexual assault.

15. The Investigating Officer thereafter submitted chargesheet against applicant under Section 363 of Indian Penal Code and court concerned has taken cognizance on 7.7.2023. A perusal of the aforesaid chargesheet would go to show that victim has not been made a witness in the aforesaid chargesheet on behalf of prosecution and only the informant and Sandhya Devi has been made the witness of fact. It is further to be noted that no explanation has been offered by learned counsel for the opposite parties with regard to victim not being made witness to prosecution chargesheet. The chargesheet has been submitted under Section 363 of Indian Penal Code against applicant.

16. The offence under Section 363 of Indian Penal Code prescribes punishment for kidnapping. Section 359 of Indian Penal Code provides Kidnapping of two kinds: Kidnapping from India and Kidnapping from lawful guardianship. In the present case, the issue involved in respect of kidnapping from lawful guardianship. The offence with regard to kidnapping from lawful guardianship is prescribed under Section 361 of Indian Penal Code. Section 361 of Indian Penal Code is quoted 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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

17. The provision of Section 361 of Indian Penal Code would stand attracted when a person 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 lawful guardian of such minor or person of unsound mind, without the consent of such guardian. It is imperative for applicability of above mentioned section of Indian Penal Code that there must be any promise, offer, inducement or force, from the accused which resulted in the minor being taken away or enticed away from lawful guardianship.

18. In **Thakorlal D. Yadgdama Vs. The State of Gujarat, AIR 1973 Supreme Court 2313**, the Supreme Court while interpreting Section 361 of Indian Penal Code has observed as follows : -

"9... The expression used in Section 361, I.P.C. is “whoever takes or entices any minor”. The words “takes” does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, “to cause to go” , “to escort” or “to get into possession”. No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word “entice” seems to involve the idea of inducement or allurements by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but

imperceptible impression culminating after some time in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361, I.P.C., are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 I.P.C."

19. It is further to be seen that the rigours of Section 361 of Indian Penal Code will have its effect where the minor is taken away from the lawful guardianship without the consent of guardian or she is allured or given any promise or inducement or offer which has resulted in enticing away the minor from the lawful guardianship. The element of non-voluntary leaving of minor from the lawful guardianship on the basis of force, promise or inducement or offer is an important aspect to attract the penal provision. An eventuality may arise where the minor voluntary and on his own accord, leaves the lawful guardianship then in such circumstances the applicability of Section 361 of Indian Penal Code may not arise. In this respect, the Supreme Court in **S. Varadarajan Vs. State of Madras, AIR 1965 SC 942** has observed 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 circumstances 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.”

20. In the present case, as per allegation in first information report it is alleged that applicant has enticed away victim from the home of informant as the victim was in talking terms over mobile phone with applicant. The victim in her first statement under Section 161 Cr.P.C has not supported the prosecution case and has stated that she had voluntarily left the home as the family members of the victim have beaten her and electrocuted her. Further, the victim in her statement under Section 164 of Criminal Procedure Code before the court concerned has specifically stated that uncle of victim had seen the victim talking to applicant on phone and as a result of same she was beaten and given electric shock, as such she went out of house alone. She has also stated that family members of victim has deliberately given the name of applicant in criminal prosecution.

21. It is further to be seen that statement of mother of victim has also been recorded under Section 161 of Criminal Procedure Code where she has stated that victim was in talking terms with the applicant and wanted to marry applicant. However, when she was asked not to talk with applicant then the victim left the home. She has also stated that she is confident that the applicant has enticed away the victim.

22. The statement of father of victim (informant) was also recorded by Investigating Officer who has stated that applicant has enticed away the victim. The statement of informant does not disclose the manner in which the victim has been enticed away by applicant. The statement of informant only raises suspicion without there being any material particulars as to how the victim has been taken away by the applicant-accused. It is further relevant to note that

in support of chargesheet only two witnesses of fact are cited by prosecution, the first being the informant and the second being Sandhya Devi, who is the mother of victim. Both the aforesaid witnesses have not given any material particulars or details as to how the victim has been enticed away. Mere being in talking terms with another person resulting in victim leaving home would not attract penal provisions. The statement of victim under Section 164 of Criminal Procedure Code is not being denied by the prosecution/opposite party before this Court. The victim in her statement has stated that she was in talking terms with applicant and she has stated that she has voluntarily left the home.

23. The material particulars and circumstances with regard to enticing away the victim by the applicant has not been disclosed by prosecution. Mere talking to victim by itself cannot be a circumstance which would be treated as enticing away the victim. The victim in her statement has also alleged that family members of victim has beaten her and electrocuted her and as a result of same she has left the house.

24. The prosecution has failed to show that victim was enticed away by the applicant. The essential ingredients of offence under Section 363 of Indian Penal Code is not made out by learned counsel for opposite party before this Court. The cognizance order also does not disclose the material circumstances which were before the trial court.

25. In view of the aforesaid, the criminal proceedings against the applicant in the above mentioned case is not tenable under law as such the charge-sheet dated 19.1.2021, cognizance order dated 7.7.2023 and the entire criminal proceedings arising out of Case No. 9029 of 2023 (State Vs. Himanshu Dubey) arising out of Case Crime No. 0382 of 2020 under Section 363 of the Indian Penal Code, Police

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Station Gauri Bazar, District Deoria pending before the Chief Judicial Magistrate, Court/Room No. 17, Deoria are hereby quashed.

26. Accordingly, the present application filed under Section 482 Cr.P.C. is **allowed**.

Order Date :- 10.9.2025

VMA

(Vikram D. Chauhan, J.)