

Rasool Vs. the State

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Court : Allahabad

Decided On : Mar-14-1975

Reported in : 1976CriLJ363

Judge : D.N. Jha, J.

Appellant : Rasool

Respondent : The State

Judgement :

D.N. Jha, J.

1. The appellant Rasool has been convicted under Section 363, I. P.C. by the II Temporary Civil and Sessions Judge, Rae Bareli and has been sentenced to undergo rigorous imprisonment for two years. This appeal has been directed against the said order.

2. The prosecution story has been narrated by the prosecutrix Sheo Kumari who was aged about 14 years at the time of the incident. It is stated that the appellant belongs to her village Pure Ori, P.S. Lalganj, district Rae Bareli and he had a flour mill on the outskirts of the village. Shiv Kumari used to go to the mill for grinding the wheat. The appellant used to tell her that her life at home is miserable and that he could get her married with a good Brahmin boy provided she accompanied him. On 4-8-1969 she had gone to the flour mill at about 3 or 4 p.m. and the appellant

had told her that he was going to Rae Bareilly on that very day and requested her to come prepared for going with him to Rae Bareilly where he would arrange for her marriage. The prosecutrix fell prey to the temptation and at about 8 p.m. when her parents were taking their meals she left the house telling that she was going to the house of one Bachai Lai Tewari, a neighbour, She came out on the pretext and went to the flour mill where the appellant was waiting for her. The appellant brought her to Lal-ganj on a cycle and thereafter she was brought to Rae Bareilly where they reached at about 11 p.m. The appellant awakened one Saghir (acquitted by the trial Court) who arranged for their sleeping in the night. Shiv Kumari went to bed which was arranged in the verandah of the house while the appellant and Saghir kept on talking on the cot lying nearby. At about 2 or 3 A. M. in the night the appellant committed rape with Shiv Kumari in spite of her objections. In the morning she was taken to the Railway station and was offered tea in the waiting room. The appellant and Saghir then took the girl to a hotel near the clock tower. On way she met Sri Nath and Narendra Singh who were known from before. On enquiry by Narendra Singh the appellant replied that the father of Shiv Kumari was lying in the hospital with toothache and she was being taken there. After taking the meals the appellant brought her to the Railway station and from Rae Bareilly they came to Lucknow and by the night train she was taken by the appellant to a place known as Bhogai in Assam where she was kept for about 10 or 15 days and during this time Shiv Kumari was raped several times by the appellant. During all these days the appellant had been assuring her that he would get her married. During this time the appellant ran short of money and thereafter he expressed his desire to go back to bring money so that her marriage may be arranged soon.

3. Badri Bishal, father of the girl, kept on searching and then ultimately on receiving information from Harish Chandra Bajpai (P.W. 4) and Bharat Singh that they had seen Shiv Kumari going on a cycle with appellant Rasool at Lalganj bus stop, a written report of the occurrence was lodged at P.S. Lalganj on 14-8-1969 at about 6.45 p.m.

4. On the basis of the report the investigation started and Satya Deo Singh, Station Officer (P.W. 7) arrested the appellant along with Shiv Kumari on 24-8-

1969. Shiv Kumari was sent to Rae Bareli Civil Hospital for medical examination where she was medically examined on 25-8-1969. The girl was thereafter given in the Supurdgi of her father Badri Bishal. After completing the investigation a charge-sheet was submitted for the trial of the appellant along with Saghir.

5. The prosecution examined 7 witnesses in all and tendered in evidence the statement of Dr. Smt R. K. Tripathi. Ext. Ka-5 is the X-ray plate. Badri Bishal (P.W. 3) is the father of Shiv Kumari. He has proved the report. P.W. 5 Sri Nath stated to have seen the girl at Rae Bareli. P.W. 4 Harish Chandra had seen the girl at Lalganj Bus stop, with the appellant. P.W. 1 Shiv Kumari is the principal witness who has deposed about the prosecution story.

6. The appellant in his defence denied the prosecution story, He stated that Badri Bishal father of Shiv Kumari was serving at his flour mill but he had started stealing hence he was turned out and on account of enmity he has concocted a false case against him. He further stated that Harish Chandra (P.W. 4) had appeared as a witness against his father in a case between his father and one Baba Rajitram.

7. The learned Sessions Judge after examining the evidence recorded conviction of the appellant as mentioned above and acquitted Saghir. It may be mentioned that the learned Sessions Judge also acquitted the appellant on the charge under Sec. tion 376, Indian Penal Code.

8. I have heard the learned Counsel for the parties. In this case the finding with respect to the age of the girl has not been questioned by the learned Counsel for the appellant. It is admitted that on the date 4-8-1969 when she left the house of her father she was not major, and was of about 15 years in age. It is therefore not necessary to enter into the question and I accept the finding recorded by the learned trial Court about the ago of the girl. The learned Counsel, however, vehemently argued that the prosecutrix had left the house of her own sweet-will and she had abandoned the guardianship of her father. He maintained that the appellant in doing what he did, did not in fact take away the prosecutrix out of the keeping of her lawful guardian. He further maintained that taking away of the prosecutrix out of the keeping of her father has not been established beyond

reasonable doubts. In this connection I would like to refer to the statement of P.W. 1 Shiv Kumari. She has categorically stated that she used to visit the flour mill of the appellant for the purpose of grinding of wheat. She has also mentioned that the appellant used to represent to her that he would, if she desired, get her married with a Brahmin boy who is his friend provided she accompanied him. This in my opinion clearly gives an indication that time and again the appellant had been impressing on the mind of the girl Shiv Kumari that he can get her married to a good Brahmin boy. There is also no dispute that she belonged to a poor family and according to her own admission, her mother was of cantankerous nature. On the date she left the house in the morning some rough behaviour had been shown by her mother. This gives an impression that her life at home was not very happy. It is also not disputed that she left the house at 8 p.m. on her own after having fixed an appointment with the appellant at about 3 or 4 p.m. in the day. She left her house at about 8 p.m. in the night by giving a false information to her parents that she was going to one Bechai Lai Tewari. The question that has to be examined in the instant case is whether 'taking away' by the appellant from the lawful guardianship amounts to an offence punishable under Section 363 of the Indian Penal Code. The learned Counsel relied on a decision, *S. Vara-darajan v. State of Madras* : 1965 CriLJ33 . It is observed by their Lordships at page 944:

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 the learned Counsel argued that where the minor leaves 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. He vehemently argued that in the instant case the girl was on the verge of attaining majority though she had not become major yet she was capable of exercising discretion and was aware of her own actions and deeds; as such the appellant could not be

held guilty for the offence of kidnapping. I have given my anxious thought to the argument advanced by the learned Counsel and I am constrained to observe that there is no substance in his submission. Section 361, I. P.C. reads as under:-

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.

In the instant case there is no doubt that she candidly admitted that on 4-8-1969 at about 8 p.m. she herself left the place to meet the appellant who was waiting at the flour mill and then the appellant took her on her own accord. It is also born out from the evidence that when at Rae Bareli Shri Nath of Manpura and Narendra Singh of Dhanipur had met her, she did not object when the appellant replied that her father was in hospital with toothache and that she was being taken there. In my opinion this would not be sufficient to exonerate the appellant of the offence. It is to be analysed what is the act done by the appellant and whether it constitutes 'taking' as defined in Section 361, I. P.C. It is to be examined whether the prosecutrix left at the suggestion of the appellant or it was she who had initiated it. I find from the evidence that a representation had been made by the appellant at about 3 or 4 p.m. in the day that he was going to Rae Bareli and if she desired she could accompany him. It was on this suggestion of the appellant that she came out from the house at about 8 p.m. I do not find anything on record to show that there was insistence on the part of the prosecutrix to go or stay at places taken by the appellant. She was no doubt a conniving party but there can be several reasons for that. It may be that finding herself alone she may not have developed courage enough to raise any alarm or to display any gestures to anyone for being rescued. It may be that she might be harping under the impression that the appellant would ultimately fix up her marriage with some Brahman boy for which assurances had been extended to her. The learned Counsel argued that the evidence of the prosecutrix indicates that the girl was of easy virtues as the medical report shows that she was used to sexual intercourse. In my opinion this would not be sufficient for the exoneration of the appellant. The law does not permit a girl of easy virtues

to be taken away from the lawful guardianship without the consent of the parents. In my opinion the penal section intends not only to safeguard the rights of the guardians but also intends to punish the persons who violate or infringe the rights of the guardians who keep their wards under their care and custody. The object of the provision in my opinion intends to provide security and protection to the wards themselves. In the circumstances the mere fact that the prosecutrix complied with the wishes of the appellant can by no stretch of imagination provide a good defence for taking her away from the lawful guardianship. The word 'takes' implies want of wish and absence of desire of the person taken. On the evidence on record it is difficult to appreciate how the appellant could be absolved of his complicity in taking the prosecutrix out of the keeping of her father who was her lawful guardian without his consent. Similarly the fact that the prosecutrix had agreed to accompany the appellant does not take the case out of the purview of the offence of kidnapping from the lawful guardianship as contemplated by Section 381, I. P. C. On plain reading of the section consent of the minor who is taken or enticed is wholly immaterial. It is only the guardian's consent which takes the case out of its purview. It is not necessary that taking or enticing must be shown to have been by means of force or fraud. Persuasion by the appellant in my opinion created a willingness on the part of the prosecutrix to be taken out of the keeping of the lawful guardian; as such it would, in my opinion, be sufficient to attract the penal section. The learned Counsel for the State relied on a decision, *Thakorlal D. Vadgama v. State of Gujarat* : 1973 CriLJ1541 . Their Lordships of the Supreme Court while considering the English reported cases observed with respect to Section 361:-

Section 361 uses the expression 'whoever takes or entices any minor'. The word 'takes' no doubt, means 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 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 read together suggest 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 of kidnapping. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him.' In the instant case I am of opinion that this case applies with full force and no plausible distinction can be drawn with respect to the proposition laid down. The case relied by the learned Counsel for the appellant in my opinion is distinguishable on facts. There the age of the girl was verging on the majority and she also did not belong to a poor family. Moreover she was receiving higher education and as such their Lordships of the Supreme Court were of opinion that she was in a position to exercise her discretion.

9. In the present case I would like to point out that the prosecutrix undoubtedly belonged to a much poorer family as compared to the appellant and in my opinion a person in the position of the appellant cannot be exempted for displaying dishonourable behaviour towards the young, impressionable, immature and poverty-stricken girl. A man who had suggested to provide a decent and well to do Brahmin boy in marriage naturally would have led the girl to temptation of getting rid of her poverty and unhappy surroundings. In the circumstances I am of opinion that there was sufficient allurement extended by the appellant to the girl for achieving his ulterior satisfaction of lust.

10. I, therefore, altogether find no force in this appeal and it is accordingly dismissed. The appellant is on bail he will surrender forthwith to serve out the sentence imposed on him,