

Manharan Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Apr-25-2000

Reported in : 2000(3)MPHT114

Judge : Arun Mishra, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 361, 363, 366 and 376

Appeal No. : Criminal Appeal No. 419/89

Appellant : Manharan

Respondent : State of M.P.

Advocate for Def. : P. Bharat, Adv.

Advocate for Pet/Ap. : G.K. Soni, Adv.

Disposition : Appeal allowed

Judgement :

Arun Mishra, J.

1. Present appeal has been filed by the appellant aggrieved by his conviction under Section 363, I.P.C. and sentence of 3 years R.I..

2. Prosecution case briefly stated is that on November 9, 1987, Munni @ Bhuneshwari was taken away from the guardianship of her father. Thus, an offence under Sections 363 and 366 of the Indian Penal Code was committed. In addition, charge under Section 376 I.P.C. was also levelled on the accused Manharan. Ramadheen, the father of Munni was sleeping in the night in his house alongwith other family members. Prosecution alleges that in the midnight, accused Manharan enticed away Bhuneshwari, aged about 14 years, and took her away to his house. Report, Ex. P-3 of the incident was lodged. General diary entry was made at serial No. 210 on November 10, 1987. Munni @ Ku. Bhuneshwari was sent for radiological examination and doctor, as per report Ex. P-6, determined that her age was 16 years at the relevant time.

3. Accused abjured the guilt and contended that they were falsely implicated.

4. Trial Court had acquitted Johatram and has convicted the appellant only under Section 363 I.P.C.. The appellant had been acquitted under Sections 366 and 376 of the Indian Penal Code.

5. Learned counsel for the appellant has submitted that it is a case where no offence under Section 366 of I.P.C. is made out, and the reference in respect of enticing away is entirely missing. Learned counsel has also submitted that from the statement of Ku. Bhuneshwari (P.W. 2), offence under Section 363 I.P.C. is not made out. Learned counsel for the appellant relied upon the decision of the Apex Court in the case of S. Varadarajan v. State of Madras. Learned counsel for the appellant has submitted that there is difference between taking away and accompanying a person. Element of 'taking' is missing in the instant case.

6. Learned counsel for the State has submitted that it is a case where Ku. Bhuneshwari was below 18 years of age and as such the offence under Section 363 I.P.C. is clearly made out.

7. In order to appreciate the prosecution case, it is necessary to have scrutiny of deposition of Ku. Bhuneshwari (P.W. 2). She has stated that she knew Manharan. She stated that Manharan had not done anything with her. She stated that Manharan had not taken away her anywhere. She also knew Johatram, the

accused. She herself was declared hostile and was subjected to cross-examination. She stated that she did not meet Manharan on November 9, 1987 and she was in love with Manharan. She lived with Manharan for about 5-6 days. She used to sleep with the sister of Manharan in the night. She has denied that in order to save Manharan, she was deposing falsely before the Court. She has not stated that Manharan had taken her to his house. House of Manharan is situate nearby house of the complainant. She has emphatically denied that any sexual intercourse was committed upon her by Manharan. In the case of S. Varadarajan, AIR 1965 SC 942 (supra) their Lordships have observed at Para 9 as follows :

Para 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 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 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.'

There is a very thin difference in taking away and allowing a minor to accompany a person. In the present case, element of enticing or taking away the girl is entirely missing. Ku. Bhuneshwari has nowhere stated that she had been taken away by the appellant. It is a case where no active part appears to have been played by the accused/appellant Manharan with regard to taking away the girl. It appears that she had left her house on her own. It is not a case where the girl was taken from place to place. She has stated that she used to sleep with the sister of the appellant and was not subjected to sexual intercourse.

8. Ramadheen (P.W. 3), the father of the girl Ku. Bhuneshwari has stated that he was informed by Pilaram Sahu that Ku. Bhuneshwari was in the house of Johatram. It appears that the girl had left the house on her own in the night. There is no evidence that in the dark night, when the girl left the house, the accused Manharan was present there. The witness has admitted that Bhuneshwari's entry of birth was mentioned in the register maintained by Kotwar in the Kotwari book but the evidence of Kotwar and Kotwari book has not been produced. Kotwar has not been examined to show that Kotwar book has been stolen as deposed by the witness Ramadheen. The date of birth of Ku. Bhuneshwari, as 5-3-1973, has not been proved. J. Saloman (P.W. 1), who was head mistress of the primary school, has produced the admission register. According to the admission register, Ku. Bhuneshwari was admitted in the school on July 8, 1980 and her date of birth was mentioned as March 5, 1973, but the witness has admitted that she was not posted in the school at the relevant time. The witness stated that an entry is made in the register on the basis of an affidavit of father/guardian. She further stated that a transfer certificate from the school has been issued to Ku. Bhuneshwari. Even necessity of issuing Ex. P-1, the transfer certificate is doubtful. It has not come on record that under what circumstances the transfer certificate was required to be obtained. The affidavit of father or guardian, which may have been a basis of entry in the register, has not been produced. The concerned person, who has made the entry, has not been produced to show on what basis the entry was made. Other register with respect to the transfer certificate has also not been produced. Entry of the original register has not been placed on record. Only the transfer certificate has been placed on record. This transfer certificate is of subsequent origin to the date of incident. It was issued on November 13, 1987, whereas incident took place on November 9, 1987. Thus, it is apparent that this transfer certificate was not issued in normal circumstances, but is a copy of procured one after the registration of the offence and is a subsequent origin. Dr. S.C. Vishnoi (P.W. 6) has mentioned in his report that age of Ku. Bhuneshwari was 16 years. He has opined that there could be difference of 3 years in the age so determined by him, on either side. Learned counsel for the appellant has relied on the decision of the Supreme Court in the case of *Jaya Mala v. Home Secretary, Government of Jammu and Kashmir and Ors.*, reported in AIR 1982 SC 1297, in which it has been laid down that in the

radiological examination, there could also be difference of age of two years on either side. Considering the statement of Dr. Vishnoi (P.W. 6) that there could be difference of three years of age in the instant case, the benefit of the same can be extended to the appellant, as Ku. Bhuneshwari appears to be around 18 to 19 years old.

9. Pilaram (P.W. 4) is the another witness produced by the prosecution. He has stated that Ramadheen's daughter had gone to the house of Johatram. The element of taking away or allowing the person to accompany does not appear in the evidence furnished by Pilaram. Harishankar (P.W. 5) stated that he has not seen the accused Manharan taking away Bhuneshwari alongwith him. His evidence is that of hearsay.

10. In the light of above discussion, it is not proved that offence under Section 363 I.P.C. is made out against the appellant. It is not established that the accused/appellant had taken away the girl or allowed her to accompany him. Further the prosecution has also failed to established that the age of Ku. Bhuneshwari was below 18 years. The girl has stated that she was in love with the accused Manharan and had gone to his house on her own and used to sleep with the sister of the accused/appellant.

11. In the result, the appeal is allowed. The conviction and sentence against the appellant is set aside.