

Deep Chand @ Dipu Vs. State

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Court : Delhi

Decided On : Sep-08-1999

Reported in : 1999VIAD(Delhi)377; 2000CriLJ463; 82(1999)DLT339; 1999(51)DRJ528

Judge : Dalveer Bhandari, J.

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

Appeal No. : Cri. Appeal No. 24 of 1978

Appellant : Deep Chand @ Dipu

Respondent : State

Advocate for Def. : Mr. M.S. Butalia, Adv.

Advocate for Pet/Ap. : Naveen Thakur, amices Curia

Judgement :

ORDER

Dalveer Bhandari, J.

1. This appeal is directed against the judgment of learned Additional Sessions Judge Delhi dated 14.2.1978 by which the accused appellant was convicted under Section 363 IPC and sentenced to one year rigorous imprisonment. It may be

pertinent to mention that the appeal was admitted on 15.2.1978 and at that time, Shri, C.L. Prem, Advocate, appeared for the appellant. This appeal has been on Board for quite some time and no one has appeared for the appellant. therefore, the Court appointed Shri Naveen Thakur, Advocate, as amices Curiae in this case.

2. Brief facts which are necessary to dispose of this appeal are recapitulated as under.

3. On 31.7.1976 Santosh and Asha, both were around 15 years of age, started for school but never reached the school. On search it was found that one Deep Chand @ Dipu abducted them and took them, to Khurja and brought them back to Delhi. On 22.8.1976 both the girls were found present at the waiting room of Old Delhi Railway Station wherefrom they were recovered.

4. The case of the prosecution is that Ajit Kumar was reported to be friendly, with Santosh and he had also planned to accompany them but he left them in the company of Deep Chand, accused, and never joined them Ajit Kumar was acquitted by the trial court.

5. Deep Chand, accused was committed to the Court of Sessions For facing the trial under Sections 366, 376 IPC. Though the accused Deep Chand was acquitted of the charges under Sections 366, 376 IPC, he was convicted under Section 363 IPC and sentenced to undergo one year rigorous imprisonment.

6. The statement of both Santosh and Asha were recorded. PW-12 Asha in her statement has mentioned that she was acquainted with Deep Chand accused and they used to meet and roam about together and she used to go out with Deep Chand on her own accord. On 31.7.1976 she had asked Deep Chand to take her out of Delhi for an outing. Santosh had asked Asha to take her also along with her as her father used to beat her every day and if they did not take her along with them she would commit suicide. Further case of the prosecution is that both the girls Asha and Santosh reached the Old Delhi Railway Station. There they met Ajit and Deep Chand. Ajit did not accompany them but Deep Chand had taken the girls to Khurja and they returned on 22.8.1976.

7. Mr. Thakur, learned counsel appearing for the accused as Amices-Curiae submitted that the trial court has erroneously convicted the appellant under Section 363, IPC. He submitted that on the basis of the evidence on record, the appellant cannot be convicted under Section 363 IPC. The punishment of Section 361 IPC is provided under Section 363 IPC. Section 361 IPC is reproduced 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 of 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 ille-intimate 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.'

8. Mr. Thakur submitted that basic ingredients of the offence are absent because there is no question of any enticing or taking away of the minor girls. They had voluntarily gone to the Railway Station and accompanied the accused. As a matter of fact these girls persuaded the accused to take them for outing. The accused did not even go to take them from their residence. Mt. Thakur pointed out that Santosh had even gone to the extent of saying that in case she was not taken with them, she would commit suicide. According, to Mr. Thakur the basic ingredients of Section 361 are absent in the facts and circumstances of his case and the appellant could not legally convicted under Section 363 IPC.

9. Mr. Thakur placed reliance on some of the leading judgments of the Supreme Court. He placed reliance on State of Haryana Vs . Raja Ram : 1973 CriLJ651 .In para 9 of that Judgment their Lordships observed that 'there is no doubt a distinction between taking and allowing a minor to accompany a person.Thus, if

the minor herself leaves her father's house without any inducement by the accused who merely allows her to accompany him, he cannot be said to have taken her out of the keeping of her father'. It is further observed in the judgment that persuasion by the accused person which creates element of willingness on the part of the girls to be taken out of the lawful guardian would be sufficient to attract the section.

10. According, to Mr. Thakur in this case there is neither force nor fraud nor persuasion and both the girls had voluntarily gone and joined the accused at the Railway Station. He also placed reliance on the Supreme Court judgment in *Thakoral D. Vadgama Vs . The State of Gujarat : 1973 CriLJ1541* . The Court observed as under:-

'The expression used in Section 361 IPC is 'Whoever takes or entices any minor'. The words 'Takes' does not necessarily can not taking by force and it is not confined only to use of force, actual or constructive. This words merely, means, 'to cause to go', 'to escort' or 'to get into possession'. No doubt, it does not mean physical taking, but not necessarily by use of force or fraud. The words 'entice' seems to involve the idea of inducement or allurement 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 seem time, in achieving the ultimate purpose of successful inducement. The two words 'takes' and 'entices' as used in Section 361, IPC 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, IPC. 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. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his Act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defense and would not absolve him. The question truly falls for determination on the facts and circumstances of each case.'

11. Mr. Thakur placed reliance on the judgment of the Supreme Court delivered in the case of *S. Varadarjan Vs . State of Madras : 1965 CriLJ33* . Their Lordships of the Supreme Court observed that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredients of the offence of Kidnapping. According to Mr. Thakur both the ingredients of this offence are absent in this case.

12. Mr. Thakur also placed reliance on the judgment of the Supreme Court in the *State of Karnataka Vs . Sureshababu Puk Raj Porral : 1994 CriLJ1216* . In this case also their Lordships observed that taking or enticing away a minor out of the keeping of the lawful guardian is an essential ingredients of the offence of Kidnapping. If the girl was anxious to go with, the accused ,then it is difficult to hold that the accused had taken her away from the keeping of her lawful guardian. According, to Mr. Thakur, the facts of this case are akin to the said case of the Supreme Court because in the entire testimony of both Santosh and Asha they have clearly mentioned that they had gone to the Railway Station voluntarily.

13. Lastly, Mr. Thakur cited the judgment of the Supreme Court in the case of *Shyam and Another Vs . State of Maharashtra : 1995 CriLJ3974* .In that case their Lordships observed that if the prosecutrix appeared to be willing party, then culpability of the accused was not established. In this case, the conviction was set aside and the accused was acquitted by the Supreme Court.

14. On consideration of the evidence on record,it is one of those exceptional cases where both the girls Santosh and Asha categorically stated that they had gone voluntarily. There was no promise, persuasion, inducement or allurement of any kind emanating from the appellant. On the contrary both Asha and Santosh were

anxious to go for outing with the appellant. Santosh had gone to the extent of stating that in case she was not taken with them, she would commit suicide. In the instant case both these girls had in fact persuaded the accused appellant to take them for outing. The appellant can not be held guilty of enticing or taking away Asha and/or Santosh. In view of the evidence on record, it is difficult to endorse the findings of the learned Additional Sessions Judge, Delhi. Accordingly, the appeal filed by the appellant is allowed and the appellant Deep Chand's conviction under Section 363 IPC is set aside and he is acquitted of this charge.

15. Before parting with this judgment, I would like to place on record my deep appreciation for the able assistance rendered by Shri Naveen Thakur, learned amices Curiae, in this case.

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