

**Court No. - 7**

**Case :-** MISC. BENCH No. - 3519 of 2015

**Petitioner :-** Shaheen Parveen And Anr.

**Respondent :-** The State Of U.P Thru Principal Secy., Home Deptt.,  
And Ors.

**Counsel for Petitioner :-** Omkar Singh

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble Ajai Lamba,J.**

**Hon'ble Ashok Pal Singh,J.**

**(ORAL)**

1. Shaheen Parveen and Mohd. Sarfaraj have approached this Court to seek a writ in the nature of CERTIORARI to quash First Information Report bearing Case Crime No.-121 of 2014 under Sections 363/366 of the Indian Penal Code, Police Station Madiyawan, District Lucknow (Annexure-1).

2. Case set up by the petitioners is that the petitioners having attained marriageable age got married. Marriage, however, is not being accepted by respondent No.4 who happens to be the mother of petitioner No.1. Under the circumstances, aggrieved by the fact that the petitioner No.1 got married of her own accord, impugned criminal proceedings have been initiated.

3. Short counter affidavit on behalf of the Prosecuting Agency has been filed today alongwith medical examination report of the victim/prosecutrix and also the statement of prosecutrix recorded under Section 164 Cr.P.C. on 8.5.2015, which is taken on record.

4. In the short counter affidavit, it has been stated that the prosecutrix/victim is carrying a pregnancy of 31 weeks (Annexure No.- SCA-2). In paragraph 4 of the affidavit, it has been admitted that the prosecutrix/victim did not support the prosecution case in her statement recorded under Section 164 Cr.P.C. (Annexure No.- SCA-3). The Investigating Agency, however, is concluding that offence has been committed, on the ground that at the point in time when the prosecutrix

went in the company of petitioner no.-2, she was less than 18 years of age.

5. We have heard learned Counsel for the petitioners, Sri Deep Kamal, learned Counsel for respondent no.-4 and also the learned Counsel for the Prosecuting Agency.

6. Petitioner no.-2 is accused of committing an offence under Sections 363/366 of the Indian Penal Code.

7. Section 363 of the Indian Penal Code inheres that whoever kidnaps any person from lawful guardianship shall be punished in terms of sentence provided in the provision.

8. "Kidnapping from lawful guardianship" has been defined under Section 361 of the Indian Penal Code. The provision when extracted 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.*

*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."*

9. Section 366 of the Indian Penal Code inheres that whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with a sentence, as provided in the provision.

10. At the time of considering whether on admitting the allegations made in the F.I.R., offence has been committed or not, the ingredients of the offence are required to be considered, in context of the evidence collected during the course of investigation.

11. In the peculiar facts and circumstances of this case, the Court has

minutely examined the facts that have emerged on investigation of the case.

12. Documents placed collectively as Annexure SCA-2 indicate that the victim has been found to be above 18 years of age. The document further makes it evident that the victim is having pregnancy of 31 weeks gestation on 7.5.2015. The document also makes it clear that at the time of medical examination, the victim gave the history in the following words :

"The victim had gone last year with the boy and got married in February, 2014 staying with husband and at present, she is seven months pregnant."

13. Annexure SCA-3 is the statement of the victim recorded under Section 164 CrPC on 8.5.2015. When translated, statement reads as under :

"I on 10.2.2014, of my own free will, without coercion, left my house and went to Barabanki with Sarfaraj and stayed there for one week. On 18.2.2014, I got married to Sarfaraj in a Masjid in Sulemanpur, and also contracted a Court marriage. My marriage has been solemnized with Sarfaraj of my own free will. I want to live with him. I am eight months pregnant. Therefore, I want to go with my husband. My husband has fear of my family members."

14. The Investigating Agency is concluding that at the point in time when the victim left in the company of the accused, she was a few months less than 18 years, which is the relevant age mentioned in Section 361 of the Indian Penal Code, above extracted. Clearly, the Investigating Agency is taking a hypertechnical view of the issue. The other relevant facts and circumstances of the case are being ignored.

15. The issue whether the victim was kidnapped or abducted is required to be examined in context of the statement of the prosecutrix recorded under Section 164 Cr.P.C.

16. If the statement of the prosecutrix, above noted, is taken into account, it becomes evident that ingredients of the offence under Sections 363/366 of the Indian Penal Code in regard to coercion, kidnapping or abduction allegedly committed by Sarfaraj, are not satisfied. The provisions of Section 363 of the Indian Penal Code are

required to be considered in context of provisions of Section 361 of the Indian Penal Code. So as to satisfy the ingredients of Section 361 of the Indian Penal Code, it has to be established by the prosecuting agency that the accused/sarfaraj took or enticed the prosecutrix out of the keeping of the lawful guardian of the prosecutrix, without the consent of the guardian/respondent no. 4. In the case in hand, it is the case of the prosecutrix herself that she of her free will went with Sarfaraj, lived with him, wants to live with him and is expecting his child. Element of coercion and enticement by Sarfaraj is absent, although consent of the guardian had not been taken.

17. The writ court, being a court of equity, must take into consideration all relevant factors brought before it to deliver substantial justice. Equity justifies bending the rules, where fair play is not violated, with a view to promote substantial justice. A writ court cannot contemplate any limitation on its power to deliver substantial justice. It has to be ensured that a consumer of justice gets complete justice, instead of going into the nicety of law. Under the circumstances, the court cannot be a mere onlooker if injustice is likely to be caused.

18. Petitioner No.1 the victim/prosecutrix would be the best witness, rather the only witness of commission of offence under Sections 363/366 I.P.C. Surely, the victim will not support the prosecution case, as has been made evident by her in her statement, recorded in the course of investigation under Section 164 Cr.P.C., and therefore the trial would result in acquittal. During course of trial, considerable number of man hours would be wasted in prosecution/ defending and judging the case. No useful purpose would be served and the entire exercise of trial would be in futility because the victim has declared that she was not victimised or kidnapped.

19. The facts that have emerged from the record make it evident that the impugned criminal proceedings have been initiated because mother of the Prosecutrix/victim ( respondent no.-4) has not accepted the marriage of her daughter with petitioner No.2.

20. In case, despite the evidence that has come on record, as noted above, proceedings are not quashed, petitioner no.-2 would be required to face criminal charges and undergo the agony of a trial.

21. We have also taken into account the fact that in case the petitioner No.2 is allowed to be prosecuted, the matrimonial life of petitioner

No.1/the alleged victim would be disrupted. Her husband would be incarcerated and there would be no one to take care of her child, who is yet-to-be-born.

22. If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.

23. A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are required to be considered accordingly, and not in mechanical or technical interpretation.

24. Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.

25. So as to show an act of criminality on the part of the accused, 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, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to

establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. ( The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. *Varadarajan versus State of Madras*).

26. When the above noted situation is considered in context of the facts and circumstances of the present case, it would become evident that the victim (petitioner No.1) was a few months short of attaining age of 18 years. The said petitioner had attained age of discretion, however, not age of majority. Petitioner No.1, the victim in her statement recorded under Section 164 CrPC has clearly demonstrated that it was she who went of her free will and accord on 10.2.2014 with Mohd. Sarfaraj, without any coercion, and stayed with him, and got married to him willingly. It is a consensual act on the part of petitioner No.1 all through. Such clear stand of the victim makes it evident that Mohd. Sarfaraj respondent No.2 cannot be attributed with coercing petitioner No.1, inducing petitioner No.1 or kidnapping or abducting her in commission of offence, as alleged. Surely, a girl who has attained an age more than 17 years and who is already carrying pregnancy cannot be stated to have not attained age of discretion. In such circumstances, a technicality in law would not be attracted. The Court has not been shown any material which would indicate coercion, inducement or forceful act on the part of Sarfaraj (petitioner No.2) so as to conclude that offence has been committed by him.

27. The writ Court considering totality of fact and circumstances, cannot ignore or disregard the welfare of the petitioners, particularly when the exercise of trial is going to be in futility, as observed hereinabove.

28. In view of the facts and circumstances of the case noted above, the Court is convinced that the impugned proceedings have been initiated in abuse of process of the Court and process of the law. A personal grudge against marriage of choice of the daughter is being settled by virtue of initiating impugned criminal proceedings, which would not be permissible in law. Such prosecution would abrogate constitutional right vested in the petitioners to get married as per their discretion, particularly when there is no evidence to indicate that the marriage is void.

29. The stand of the Prosecuting Agency that the victim was a few months below age of majority when she joined the company of the accused/petitioner No.2, and therefore offence has been committed, cannot be accepted if ground reality is taken into account. It has come on record that the prosecutrix is an expecting mother and is carrying a pregnancy of 31 weeks. Coupled with this fact is the statement of the prosecutrix wherein she has said that she was neither kidnapped nor abducted, rather has been living with petitioner No.2 as his wife. It is the prosecutrix who went in the company of the accused, willingly, knowingly, and rather than the accused taking the prosecutrix out of the custody of the lawful guardian; the victim herself had eloped with petitioner No.2. In the considered opinion of the Court, substantial justice cannot be sacrificed at the altar of technicality, as is being concluded by the Investigating Agency.

30. In view of above, petitioner No.2 cannot be said to have committed offence either under Section 363 I.P.C. read with Section 361 I.P.C. or under Section 366 I.P.C.

31. In the above noted facts and circumstances, we are of the view that ends of justice would be served if the petition is allowed.

32. The writ petition is allowed. Accordingly, First Information Report lodged as Case Crime No.-121 of 2014 under Sections 363/366 of the Indian Penal Code, Police Station Madiyawan, District Lucknow and all consequent proceedings are hereby **quashed**.

33. Let a copy of this order be forwarded to Senior Superintendent of Police, Lucknow.

**Order Date :- 23.7.2015**

Jyoti/kkb