
BEFORE

THE HON'BLE HIGH COURT OF JUDICATURE, AT BOMBAY

Criminal Appellate Jurisdiction

CRIMINAL APPEAL NO. ___ OF 2016.

IN THE MATTER OF

APPELLANT

RESPONDENT

HASAN JARDARI

Versus.

STATE OF MAHARASHTRA

WRITTEN SUBMISSION ON BEHALF OF APPELLANT.

Name: Niyati Shah.

Class: IV BSL. LL.B. Div: A

Roll no. 39

Ph. No: 9403356793.

TABLE OF CONTENTS

SR. NO.	PARTICULARS	PAGE NO.
1.	Bibliography / Webliography	3.
2.	List of Abbreviations	4.
3.	Index of Authorities	5.
4.	Statement of Jurisdiction	6.
5.	Statement of Facts	7.
6.	Issues for Consideration	8.
7.	Summary of Arguments	9.
8.	Arguments Advanced	10 – 17.
	Whether the conviction under Sec.361 and Sec.366 by the Sessions Court should be set aside?	10 - 17.
	1.1.Whether the ingredients of Sec.361 are met with to charge the appellant with the same?	10 – 14.
	1.2.Whether the ingredients of Sec.366 are met with to constitute the offence under this section by the appellant?	14 – 17.
9.	Prayer	18.

BIBLIOGRAPHY / WEBLIOGRAPHY

Books Referred:

1. Ratanlal & Dhirajlal, The Indian Penal Code, 32nd Edition.
2. Ratanlal & Dhirajlal, The Indian Penal Code, 34th Edition.
3. Ratanlal & Dhirajlal, Law of Crimes, Volume 2, 31st Edition.
4. Ratanlal & Dhirajlal, The Code of Criminal Procedure, 18th Edition.
5. Black's Law Dictionary, 9th Edition.

Statues Referred:

1. The Indian Penal Code, 1860.
2. The Code of Criminal Procedure, 1973.

Web Sources Referred:

1. www.manupatrafast.com
2. www.sconline.com
3. www.bombayhighcourt.nic.in

LIST OF ABBREVIATIONS

ABBREVIATION	FULLFORM
AIR	All India Reporter
SC	Supreme Court
CrLJ	Criminal Law Journal
LR	Law Review
WR	Weekly Review
Punj	Punjab-Haryana
Cal	Calcutta
Hon'ble	Honourable
v.	Versus

INDEX OF AUTHORITIES

Sr. No.	Case Name	Page no.
1.	<i>Asma v. State of U.P.</i> , AIR 1967 All 158.	16.
2.	<i>Bondal & Ors. v. State of Madhya Pradesh</i> , 1983 Cri LJ 607 (MP).	16.
3.	<i>Chote Lal & Anr. v. State of Haryana</i> , AIR 1979 SC 1494.	16.
4.	<i>Debprosad v. King</i> , AIR 1950 Cal 406.	13.
5.	<i>Deelip Singh v. State of Bihar</i> , AIR 2005 SC 203.	12.
6.	<i>Isree Pandey</i> , (1867) 7 WR (Cr) 56.	14.
7.	<i>Jai Narain v. State of Haryana</i> , 71 Punj LR 688.	13.
8.	<i>Khalil-ul-Rahman v. Emperor</i> , 1933 Rang 98: 34 CrLJ 696.	16.
9.	<i>Lalta Prasad v. State of M.P.</i> , AIR 1979 SC 1276.	16.
10.	<i>Lawrence Kannandas v. State of Maharashtra</i> , 1983 CrLJ 1819.	14.
11.	<i>Ramesh Singh v. State (Delhi Administration)</i> , (1988) 3 Crimes 890.	16.
12.	<i>S.Varadrajan v. State of Madras</i> , AIR 1965 SC 942.	11-14,16.
13.	<i>State of Haryana v. Rajaram</i> , AIR 1973 SC 819.	10,11.
14.	<i>State v. Harbansing</i> , AIR 1954 Bombay 339.	10.
15.	<i>State v. Rameshwar</i> , AIR 2005 SC 687.	14.
16.	<i>T. D. Vadgama v. State of Gujarat</i> , AIR 1973 SC 2313.	11,16,
17.	<i>The Queen v. Lock</i> (1872) LR 2 CCR 10, 11.	12.
18.	<i>The State v. Sulekh Chand</i> , AIR 1964 Punj 83.	16.

STATEMENT OF JURISDICTION

The Hon'ble High Court enjoys the right to preside over this matter by virtue of Section 374 (2) in Chapter XXIX of Appeals, of The Code of Criminal Procedure, 1973.

Section 374 – *Appeals from convictions.*

(1) ----

(2) *Any person convicted on a trial by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years ¹[has been passed against him or against any other person convicted at the same trial]; may appeal to the High Court.*

(3) ---

(a) ---

(b) ---

(c) ---.

¹ *Subs. By Act 45 of 1978, sec. 28, for "has been passed" (w.e.f. 18-12-1978).*

STATEMENT OF FACTS

1. Hasan Jardari is a Muslim, 22 year old Commerce Graduate from taluka Baramati. Falguni, is a Hindu, pursuing her junior college studies. They are neighbours.
2. They developed a relationship of love and affection and wanted to marry each other. The only impediment to this is was Falguni's father who was against inter-religious relationship and marriage.
3. They would meet clandestinely and Hasan used to assure Falguni of a married life in the city once he got a job there. He also promised to convince her father, Raghunath, for their marriage.
4. He, one day, tried to persuade her father but Raghunath did not accede to the persuasion. Hasan got a job in Pune and disappointed by the refusal, he shifts to Pune for the same.
5. Two months later, he receives a call from Falguni wherein she asks him to meet her at the outskirts of Baramati.
6. They meet and she shares her fear that her parents may force her to marry someone else. They then proceed to a nearby bus stand and leave for Pune. While boarding, Pandurang, Raghunath's friend, sees them.
7. Based on the information given by Pandurang, Raghunath filed a complaint against Hasan.
8. Two days later, Hasan and Falguni are caught living together in a small room. The police arrested Hasan and booked him under Sec. 361 and Sec. 366 of the Indian Penal Code, 1860.
9. Further they obtained the birth certificate of Falguni from the Gram Panchayat which indicated that she was seventeen years old.
10. The trial court convicted the appellant of both the charges. Aggrieved by the same the appellant has preferred this appeal.

ISSUES FOR CONSIDERATION

Issue that is presented via this appeal before the Hon'ble High Court for discussion and adjudication is as follows;

Issue I

Whether the conviction under Sec.361 and Sec.366 by the Sessions Court should be set aside?

- 1.1. Whether the ingredients of Sec.361 are met with to constitute the offence under this section by the appellant?

- 1.2. Whether the ingredients of Sec.366 are met with to constitute the offence under this section by the appellant?

SUMMARY OF ARGUMENTS

Issue 1:

Whether the order of conviction under Sec.361 and Sec.366 by the Sessions Court should be set aside?

The answer to the above question is an impregnable positive.

1.1. Whether the ingredients of Sec.361 are met with to constitute the offence under this section by the appellant?

'Taking' or 'enticing' a minor 'out of the keeping of the lawful guardian' constitute the ingredients of this section. However, it is most humbly submitted that, these ingredients have not been met with as the appellant has not induced the minor to leave the keeping of her lawful guardian. She has done so out of her own accord. Furthermore, merely accompanying a minor does not amount to kidnapping. Also, the ambit of the words 'keeping of the lawful guardian' is to be construed in such a way wherein the control of the guardian over the minor must be compatible with the independence of the same. Therefore, the appellant is not liable for the offence under Section 361 of the Indian Penal Code, 1860.

1.2. Whether the ingredients of Sec.366 are met with to constitute the offence under this section by the appellant?

The existence of intent in the mind of the accused to force or compel the woman to indulge in the activities mentioned in the section is of the utmost importance to constitute an offence under the same. In the matter at hand, this intent in the mind of the appellant is absent from the very outset. Furthermore, as stated above, the accused has not committed the offence of kidnapping, which is another essential ingredient that has not been met with. Therefore, the appellant is not liable for the offence under Section 366 of the Indian Penal Code, 1860.

ARGUMENTS ADVANCED

Issue I

Whether the conviction under Sec.361 and Sec.366 of the Indian Penal Code, 1860 by the Sessions Court should be set aside?

The answer to the above question is an impregnable positive.

1.1. Whether the ingredients of Sec.361 are met with to constitute the offence under this section by the appellant?

Aim and Objective of Sec. 361

- 1.1.1. The object of this section is to protect children of tender age from being abducted or seduced for improper purposes, as well as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons.² The mischief intended to be punished by this section partly consists of violation or infringement of the guardians' rights to keep their wards under their care and custody; but the more important object of this provision is undoubtedly to afford security and protection to the ward themselves.³
- 1.1.2. There are four essentials that must be met with-
- a. Taking or enticing away a minor or a person of unsound mind.
 - b. Such minor or person of unsound mind, if male, must be under 16 years of age; and if female, under 18 years of age.
 - c. The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
 - d. Such taking or enticing must be without the consent of the guardian.
- 1.1.3. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified under this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "take or entice any minor....out of the keeping of the lawful guardian of such minor" are significant. The use of the word "keeping" connotes the idea of charge, protection, maintenance and control; the guardians' charge and control appears to be compatible with the independence of action and

² *State of Haryana v. Rajaram*, AIR 1973 SC 819.

³ *State v. Harbansing*, AIR 1954 Bombay 339.

movement in the minor, the guardian's charge and control of the minor being available whenever necessity arises.⁴ Thus this relation between the minor and the guardian certainly does not dissolve so long as the minor, can at will take advantage of it and place herself within the sphere of its operation.

- 1.1.4. Therefore, it is most humbly submitted that, 'keeping of the lawful guardian' must be strictly interpreted, so as to not only fulfil the purpose and objective of this provision but also, safeguard the independence of the one that is brought within the scope of the same. The factors governing the aforementioned independence however, are multifarious as well as subjective. They take face of what is acceptable and necessary at that time, in that contemporary society.

Ambit of 'taking or enticing ... out of the keeping of the lawful guardian' under Section 361.

- 1.1.5. The law assumes that in the Indian context the true interest of the minor and that of the parent/guardian concur. That is the basic plank of parental (guardians') authority and right. It must however be considered that, there is a distinction between "taking" and allowing a minor to accompany a person.⁵ The two expressions are not synonymous and it is pertinent to note that in no conceivable circumstance can the two be regarded as meaning the same thing for the purpose of Section 361 of the Indian Penal Code, 1860.
- 1.1.6. Where a minor girl 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 the accused cannot 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.⁶
- 1.1.7. It is most humbly submitted that, in the matter at hand, the appellant and Falguni overtime developed a relationship of love and affection and wanted to marry each other. The appellant used to assure her of a married life in the city after he gets a job there. Pursuant to this, he promised Falguni that he shall convince her father to allow

⁴ *State of Haryana v. Rajaram*, AIR 1973 SC 819.

⁵ *T. D. Vadgama v. State of Gujarat*, AIR 1973 SC 2313.

⁶ *S. Varadrajan v. State of Madras*, AIR 1965 SC 942.

them to get married to each other. Following up on the same, he attempted to persuade her father; however, her father absolutely refused to accede to that persuasion. Disappointed by the refusal, when the appellant received a job opportunity, he availed it and shifted to Pune for the same. The act of the appellant of moving to Pune after a blatant refusal of permission to marry by the father of Falguni, is evident of the conclusion of those assurances made, of a married life in the cities. Moreover, that lack of indication of any sort of communication between Hasan and Falguni in the interim period of two months before she called him, further fortifies the end of his assurances that were made in the formative stage of their relationship.

1.1.8. Furthermore, it is abundantly clear that the appellant was in no way directly or actively involved in the formation of the intention of the minor to leave the house of the guardian and meet him at the outskirts of Baramati. The minor had called the appellant herself, and asked him to meet her there. No other information was divulged into and therefore the absence of the appellant's intention to influence her to leave her lawful guardian is evident. After Falguni shared her fear of the possibility of her parents forcing her to marry someone else, they were spotted boarding a bus.

1.1.9. Section 90 of the Indian Penal Code, 1860 speaks of Consent. This section does not define 'consent' but describes what is not 'consent'⁷. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.⁸ Consent means an active will in the mind of a person to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to consent to an act.⁹

1.1.10. The Supreme Court in *S.Varadrajana v. State of Madras*¹⁰ had come to the positive conclusion that the minor had gone out of the keeping of her guardian voluntarily and the appellant had no role whatsoever in such minor walking out of the keeping of the guardian, similar of which is the case herein. A person who allows such a minor, who is already out of the keeping of her guardian, to accompany him commits no offence under Section 361.

1.1.11. The word "take" implies want of wish and absence of desire of the person taken. Thus, where the prosecutrix leaves her father's house out of her free will and the appellant does not go to her house, does not persuade her and bring her from there no

⁷ *Deelip Singh v. State of Bihar*, AIR 2005 SC 203.

⁸ Story on Equity, 3rd edn, Section 222, p. 94.

⁹ *The Queen v. Lock*, (1872) LR 2 CCR 10, 11.

¹⁰ AIR 1965 SC 942.

kidnapping takes place and the accused cannot be convicted.¹¹ There is a distinction between taking and allowing a minor to accompany a person. In the matter at hand, whether the appellant has taken the minor out of the keeping of the lawful guardian cannot be ascertained as, the events that transpired between the appellant and the minor after she shared her fear are vague and unclear.

1.1.12. In *Debprosad v. King*¹² it was held that after the minor left the custody of the guardian and joined the accused, it was not clear whether the allurements to run first came from the side of the accused or the minor. In such a case, it is submitted that there is no kidnapping, for taking and allowing a minor to accompany are not the same thing. This principle was further reiterated and upheld by the Apex Court in *S. Varadrajana v. State of Madras*¹³. In the matter at hand, it is absolutely unclear as to, from whom the allurements first came, hence, this ambiguity does not prove the guilt of the appellant beyond reasonable doubt.

1.1.13. As stated above, it is most humbly submitted that, the minor had gone out of the custody of her father and later met with the appellant. Up until the point of meeting, there is no indication of an intention, on part of the appellant to lure her out of the keeping of the lawful guardian. The minor herself, had called the appellant at the outskirts of Baramati to meet her. Further, in the present case, prior to the minor leaving her leaving the guardian, there was no blandishment on part of the appellant.

1.1.14. It is most humbly submitted that, the appellant could not have anticipated the conduct of the minor leaving the keeping of the lawful guardian when they met. Also, boarding a bus together does not in any way indicate towards an act of active inducement on part of the appellant. Mere accompaniment does not amount to an offence under this provision. The appellant was under no legal obligation to return the minor to her lawful guardian.

1.1.15. If evidence to establish a passive form of inducement or a direct action is lacking, then it would not be legitimate to infer that the appellant is guilty of taking her out of the keeping of the lawful guardian. Merely because after she left the house of her lawful guardian, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him place to place; no doubt the part played for by the accused could be regarded as facilitating the fulfilment of

¹¹ *Jai Narain v. State of Haryana*, 71 Punj LR 688.

¹² AIR 1950 Cal 406.

¹³ *Supra* (footnote no.6)

the intention of the girl, it however, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian, and therefore is, not tantamount to 'taking'.¹⁴ It is most humbly submitted that, as stated earlier, the assurance of a married life in the city ended with the refusal of the father to grant permission, the appellant leaving for Pune after the same and the lack of an indication of any communication between the appellant and the minor for the next two months.

1.1.16. The words 'taking' and 'enticing' evidently have two different connotations. But neither of the expressions attracts the case when the girl of her own accord comes out of the custody of her guardian.¹⁵ Hence it is most humbly submitted that, the requisites to constitute an offence under this section have not been met with and therefore, the appellant must not be held liable for the same.

1.2. Whether the ingredients of Sec.366 are met with to constitute the offence under this section by the appellant?

Scope of Section 366

1.2.1. Section 366 is an aggravated form of the offence under Section 363 which states the punishment for the offence under Section 361. If a person kidnaps a minor girl with the intention that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, the appellant may be punished under this section. One of the basic conditions for the applicability of this section is that the person charged must have committed an offence of kidnapping as defined in section 363.¹⁶ It is therefore most humbly submitted and as is held in *Isree pandey*¹⁷, the offence under this section is merely an aggravated form of the offence under Section 363 and the same person cannot be convicted on the same facts under both the sections.

1.2.2. Furthermore, as stated in the former half of the submission, the appellant has not in any way committed the offence of kidnapping. The minor met the appellant at the outskirts of Baramati out of her own free will. The necessary ingredient of enticement on part of the appellant was also not met with since his assurances must be deemed to have been concluded when he moved to Pune which was further substantiated with

¹⁴ Supra (footnote no.6)

¹⁵ *Lawrence Kannandas v. State of Maharashtra*, 1983 CrLJ 1819.

¹⁶ *State v. Rameshwar*, AIR 2005 SC 687.

¹⁷ (1867) 7 WR (Cr) 56.

the lack of an indication of any communication between the appellant and the girl. Furthermore, the ambiguity in determining the allurements to board the bus on either of the person's behalf does not prove the guilt of the appellant beyond reasonable doubt to constitute the offence.

- 1.2.3. An intention to seduce subsequent to the elopement is an essential part of this offence. It has also been held that this section did not apply to a case in which a minor girl at the time of kidnapping from lawful guardian intended to co-habit of her own free will with the kidnapper. It applied where she was compelled to marry a person against her will or where she was forced or seduced to illicit intercourse.¹⁸
- 1.2.4. The essential ingredient of the offence under this section is that a person who kidnaps any girl should do so for the intent specified in the section. To bring home an offence under this section the prosecution must prove
- a. That the accused kidnapped or abducted the woman (as the case may be)
 - b. That the accused during the kidnapping or abduction had the intention or knew it likely that –
 - i. Such woman might or would be forced to marry a person against her will, or
 - ii. That she might or would be forced or seduced to illicit intercourse, or
 - iii. By means of criminal intimidation or otherwise by inducing a woman to go from any place with intent that she may be or knowing that she will be forced or seduced to illicit intercourse.

Scope of 'With intent that she may be compelled... etc.'

- 1.2.5. The intention of the appellant is the basis and the foundation of an offence under this section. The volition, the intention and the conduct of the appellant determine the offence; they can only bear upon the intent with which the appellant kidnapped or abducted the woman, and the intent of the appellant is the vital question for determination in each case.
- 1.2.6. Intention is a matter of inference from the circumstances of the case and the subsequent conduct of the appellant after the kidnapping or abduction has taken place. Where the girl was not taken by the appellant for the purpose of compelling her to marry him against her will but she wanted to marry him at that stage, and neither the

¹⁸ *Durga Das*, (1904) PR No.13 of 1904.

appellant seduced her to illicit intercourse, he could not be held guilty under this section.¹⁹ This section makes use of the words “compelled, or knowing it to be likely that she will be compelled”. If, therefore, a woman is not compelled to do the acts specified in the section no offence is committed.²⁰

- 1.2.7. It is most humbly submitted that, in the matter at hand, the minor has not, at any stage, been compelled or forced by the appellant to indulge into any of the activities that are imperative to constitute an offence under this section.
- 1.2.8. The law is well-settled that if a minor girl below 18 out of her own accord abandons her lawful guardian and joins the accused, who allows her to accompany him and commit sexual intercourse with her consensually, no offence u/s. 363 or 366, of the Indian Penal Code, 1860 is made out.²¹
- 1.2.9. The Supreme Court decisions in *S. Varadrajana v. State of Madras*²² and *T. D. Vadgama v. State of Delhi*²³ were relied on by Delhi High Court in a case where the prosecutrix on the relevant time was a girls of 17-½ years and she left the house of her parents voluntarily; met the accused in the street and went with him to a different place. The Delhi High Court observed that the conviction of the accused u/s. 366, of the Indian Penal Code, 1860 is not legally sustainable²⁴. Where a girl under 18 years of age is taken away from the keeping of her father by the accused with the object of marriage or seduction he is guilty of an offence under this section, notwithstanding the fact that the girl accompanied the accused out of her own free will and not as a result of force or misrepresentation.²⁵ Mere kidnapping or abduction does not make out an offence under Section 366 of the Code.
- 1.2.10. It must further be proved that the accused kidnapped or abducted the woman for any of the purposes mentioned in this section.²⁶ Before a person can be convicted of an offence under the first part of this section, the Court must be satisfied as a matter of fact upon evidence that the accused when he kidnapped or abducted the woman (as the case may be) did so with intent to compel her or knowing it to be likely that she

¹⁹ *Lalta Prasad v. State of M.P.*, AIR 1979 SC 1276.

²⁰ *Bondal & ors. v. State of M. P.*, 1983 Cri LJ 607 (MP).

²¹ *Asma v. State of U.P.*, AIR 1967 All 158.

²² *Supra* (footnote no. 6)

²³ *Supra* (foortnote no.5)

²⁴ *Ramesh Singh v. State (Delhi Administration)*, (1988) 3 Crimes 890.

²⁵ *The State v. Sulekh Chand*, AIR 1964 Punj 83.

²⁶ *Chote Lal & Anr. v. State of Haryana*, AIR 1979 SC 1494.

would be compelled to marry against her will, that is to say, in spite of her opposition and unless such an intent is proved, the accused is entitled to be acquitted.²⁷

1.3. Therefore to conclude, it is most humbly submitted that, from the abovementioned averments it is abundantly clear that the appellant, firstly, has not committed the offence u/s. 361 of the Indian Penal Code, 1860 as he has not kidnapped the minor or taken or enticed her out of the keeping of the lawful guardian and hence, subsequently, he cannot be held liable for the offence u/s. 366 and that there was no intent on the part of the appellant to force or compel the girl to indulge in the activities listed therein to constitute the offence.

²⁷ *Khalil-ul-Rahman v. Emperor*, 1933 Rang 98:34 CrLJ 696.

PRAYER

Wherefore, in the light of the factual matrix, issues presented for adjudication, contentions raised and authorities relied upon, it is most humbly prayed, that this Hon'ble Court may be pleased to;

1. Allow the appeal.
2. Set aside the conviction by the Sessions Court and acquit the appellant of all charges.

And/or pass any other order that this Court may deem fit in the interest of Justice, Equity and Good Conscience, for which the Appellant, shall in duty bound, forever pray.

COUNSEL ON BEHALF OF APPELLANT

Sg/Dt: