2025:AHC:168183

AFR

Reserved on 20.8.2025

Delivered on 19.9.2025

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 6400 of 2007

Islam @ Paltoo

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Mayank Bhushan
Counsel for Respondent(s)	:	Govt. Advocate

Court No. - 90

HON'BLE ANIL KUMAR-X, J.

1. Heard learned counsel for the appellant and learned AGA for the State.

2. This criminal appeal has been preferred against the judgment and order dated 11.9.2007 passed by Additional Sessions Judge, Court No.8, Kanpur Dehat in Sessions Trial No.51 of 2006 (State vs. Islam @ Paltoo) arising out of Case Crime No.307 of 2005, under Sections 363, 366 and 376 IPC. Appellant was found guilty under Section 363 IPC and was sentenced for five years and fine of Rs. 1,000/-. Similarly, he was held guilty for offences under Sections 366 and 376 IPC. He was sentenced for seven years under Section 366 IPC along with fine of Rs. 1,000/- and was also sentenced for seven years and fine of Rs. 2,000/- for offence under Section 376 IPC.

3. On September 25, 2005, a written complaint (Ex. Ka. 1) was submitted by informant Fazal Ahmad. It was alleged that his daughter, aged approximately 16 years, had gone outside to answer the call of nature when she was enticed away by the appellant and two other persons. In response to the complaint, an FIR (Ex. Ka. 5) was registered on September 25, 2005, based on the application filed by the informant. The victim was recovered on September 25, 2005, and was subsequently produced for medical examination. Her statement under Section 164 Cr.P.C. was recorded. After

the investigation was completed, a charge sheet was submitted against the appellant. Charges u/s 363, 366, and 376 IPC were framed against appellant.

4. Seven witnesses were produced by the prosecution to prove the charges against the appellant. PW-1, the victim, testified that she had gone outside to answer the call of nature on August 25, 2005, and met the appellant there. Appellant asked her to accompany him on a trip. Together, they went to Kalpi, where she stayed with him for a day. Subsequently, appellant took her to Bhopal, where he rented a room for her and she stayed there for a month. During her stay in Bhopal, she was repeatedly raped by the appellant. When his money ran out, he abandoned her in Bhognipur, where she was rescued by the police personnel.

5. PW-2, Fazal Ahmad, stated that his daughter was enticed away by the appellant on August 25, 2025. She was recovered by the police and he met with her at police station. She told him that she had been taken by the appellant to Kalpi and Bhopal, where she had been forcibly raped. PW-3 Jahora Bano, the mother of the victim, stated that her daughter was enticed away by the appellant on 25.8.2005. She was recovered by police personnel after a month. After her recovery, she told her that the appellant had often committed rape against her.

6. PW-4, Dr. Achla, stated that the victim was brought before her on September 26, 2005. She further stated that there were no injuries, internal or external, on the victim's body parts. PW-5, Dr. R.K. Gupta, stated that the victim was referred to EMO Mahila Chikisalaya Kanpur Nagar for determining her age. PW-7 S.I. Omkar Nath Singh, conducted the investigation in this case and he proved spot map Ex. Ka. 7 and charge sheet Ex. Ka. 10.

7. The prosecution, after examining the above witnesses, closed its evidence. The appellant's statement was recorded under Section 313 CrPC, where he stated that he had performed Nikah with the victim on August 29, 2005. He further mentioned that this marriage was performed by their mutual consent. A registered compromise between them was also executed before Registrar Kalpi, Kanpur. In defence, the appellant produced certain documents, including Nikahnama Ex. 27 Kha, registered compromise Ex. 29 Kha, and the victim's and appellant's birth certificates. The defence witness, DW-1 Khwaja, was also examined.

Findings of learned Trial Court

8. Trial Court has considered the testimony of the victim and her mother, P.W.-3 Jahoora Bano. It was observed that victim stated that she was taken

away by the appellant, who asked her to accompany him on a trip. They boarded a truck after covering a distance of half an hour and reached Kalpi, where they stayed for a day and performed a Nikah before departing for Bhopal. However, the Trial Court ruled that it cannot be assumed that the victim was taken away or enticed by the appellant by referring to her statement made during cross-examination. She stated that her nikah with appellant was performed at Kalpi, where they stayed for a day at one of the appellant's relatives. Thereafter, she left with appellant for Bhopal and stayed there with him in a rented room. They resided there happily for a month as a married couple. The Trial Court has also observed that deposition of P.W.-3 Jahora is unreliable. It noted that she had stated that she had gone to answer the call of nature just two to three hours before the victim, making it impossible for her to have witnessed the incident. But considering that victim was found minor at the time of incident and the consent of victim is immaterial , it convicted the appellant under Sections 363, 366, and 376 of the Indian Penal Code.

Arguments of learned counsel for the appellant

9. The learned counsel for the appellant argues that the victim admitted in her cross-examination that she joined the appellant and resided with him for a month. She also stated that they resided in a rented room in Bhopal. The counsel contends that it's impossible for a minor girl, enticed by the appellant, to remain unnoticed while travelling from his village to Kalpi (Kanpur) and Bhopal. Since they were both residing in a rented room in a residential building with other tenants and the landlord, it cannot be assumed in given circumstances that presence of minor girl with any person will remain unnoticed. Prosecution claims that victim was an abductee. Abductee in all circumstances would offer resistance against her abduction, particularly if she is residing in a building inhabited by other persons. Again it cannot be said that no one will notice her resistance. The victim also admitted that they reached Kalpi by bypass, boarded a truck, and covered the distance by walking. She stated that they stayed in the appellant's brother-in-law's house in Kalpi, their nikah was solemnised at Kalpi and they left for Bhopal after solemnization of marriage where they lived as a happily married couple. Therefore, it's evident that the victim left with the appellant on her own free will, performed the Nikah, and entered into a nuptial relationship.

10. It was further submitted that Nikahnama was produced by the appellant in his defence, and no rebuttal was made by the prosecution. While the prosecution claims that the victim was approximately 16 years old at the time of the incident, her ossification test indicates that she was older than 16.

Even Dr. Achala, who has acknowledged the principles laid down by Modi's jurisprudence, admitted during her cross-examination that the victim's age could be two years more or less than 16. Considering these principles, it is evident that the victim was an adult when she solemnised her marriage with the appellant. Therefore, the allegations under Section 366 IPC against the appellant are not substantiated.

11. The prosecution has failed to prove the charges under Sections 363 and 376 of the Indian Penal Code. The victim herself has admitted to travelling in a truck with the appellant. In such circumstances, it is highly unlikely that she was enticed or abducted by him. Age of victim, as stated by doctor, seems to be above 18 years. Victim soon after leaving her house and reaching Kalpi performed Nikah with the appellant. It was only after the solemnisation of their marriage that they established a physical relationship. Therefore, the allegations against the appellant under Section 376 are also not substantiated. The victim and the appellant married with their consent, and the appellant was also a major at the time of their marriage. The age proof of the appellant was also produced before the trial court. In light of these circumstances, where a major boy and a major girl marry each other without any coercion or misrepresentation, no offence can be made out against the appellant. Hence, this appeal is liable to be allowed, and the impugned judgement of conviction should be set aside.

Arguments of learned AGA

12. Learned AGA has submitted that ingredients of Section 363 IPC are self explanatory. The moment a person takes or entices any minor girl under 18 years of age with an intention to keep her away from the lawful guardianship, he becomes liable for the offence. Victim was found to be of 16 years at the time of occurrence. If a person persuades any minor in a manner which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardianship, then such person becomes liable for the offence under Section 363 IPC even though minor has consented to leave his/her guardianship and to accompany the accused person. Consent of minor in such circumstances is immaterial and accused cannot take defence that minor on her own had accompanied him. Hence, in all circumstances, appellant cannot evade from culpability on the ground that minor had left with him out of her own free will.

Conclusion

13. In order to determine the culpability of appellant under section 363 and 366 I.P.C, it will be relevant to look into two factors. Firstly, whether she was enticed or taken away by the appellant? Secondly, whether victim was

minor at the time she was allegedly kidnapped by the appellant? The offence of "kidnapping from lawful guardianship" is defined, thus, in the first paragraph of s. 361 of the Indian Penal Code :

"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."

14. It is evident that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. **Hon'ble Supreme Court in Thakorlal D. Vadgdama v. The State of Gujarat (AIR 1973 SC 2313)** has thoroughly discussed the distinction between "takes" and "entices" in following words :

"The expression used in Section 361, I.P.C. is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go," "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "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 some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361, I.P.C. 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, I.P.C."

15. It is evident from **Thakorlal D. Vadgdama (Supra)** term "takes" as referred under Section 361 I.P.C means causing, with or without the use of force to move, escort or fall into possession. Taking does not need to consist of a single act. A whole series of acts could together constitute the act of taking. Similarly, "entices" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. The core difference is that "taking" a minor is a physical act of causing the minor to go with the offender, regardless of their consent. "Enticing", however, is a mental act where the offender uses manipulation or allure to influence the minor to go willingly, even if it's something they would not have done otherwise. In "taking" the minor's desire or mental state is irrelevant, but in "enticing", the minor's act is a direct result of the offender's inducement.

16. Now the point for consideration is the nature of evidence required to prove that victim was "taken" or "enticed" by appellant . In this context, it will be relevant to refer the observation made by **Hon'ble Supreme Court in S. Varadarajan vs State Of Madras, 1965 AIR 942**. In this case, daughter of informant frequently conversed with appellant and when her sister noticed her conduct, she informed her father. When her father asked victim of her conduct she said nothing but started weeping. Her father took her to one of his relatives and left her there to reside with them. On very next day, she left the house of her relative, called appellant and both of them proceeded to Mylapore where they went to the Registrar's office and got their marriage registered.

On the foregoing facts, it was held, "Here, we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to "taking", out of the keeping of the lawful L2Sup./64--3 246 guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan, She still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact, she candidly admits that on the morning of October 1st, she herself telephoned the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or, anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her own side." After considering the above facts, it was held :-

"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 circumstance can the two be regarded as meaning the same thing for the purposes of S. 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. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our, opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, 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 from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to 'taking".

17. In this case also, witnesses including parents and victim have not divulged any fact from were any inference can be drawn that victim was either enticed or taken by the appellant except making bald allegations of "enticing" and "taking". The victim's testimony in examination in chief that she was taken by appellant who asked her to accompany on a trip reflects that she was a consenting party; her mother has gone a step forward by deposing that she was behind her daughter when she was taken by appellant and could do nothing to stop him as nobody was present there to help her. The circumstances disclosed by victim also manifest that their elopement was premeditated. It is significant to note that none of the prosecution witness has stated any such fact which suggests that appellant had done any such act from which it can be derived that he manipulated victim to go with him. Similarly, there is no whisper in testimony of either witnesses which suggests that he attempted to allure the victim to accompany with him. Deposition of victim in her cross examination reveals that she on her own will left with appellant possibly with an intent to marry her. Statement of victim that she was asked by the appellant to accompany him on a trip alone is not sufficient to establish the act of "enticing" and "taking". Act of "enticing" and "taking" means that accused has played some active role by which victim was allured or influenced to accompany him. In the foregoing circumstances it can be safely concluded that prosecution has failed to lead any evidence to suggest that victim was either "enticed" or "taken" by

appellant. Hence offence under Section 363 I.P.C against appellant is not made out. Similarly, victim has categorically stated that she along with appellant reached Kalpi after leaving her house and Nikah with appellant was performed there. She stated that she stayed there for a day and then they left for Bhopal where they lived as married a couple. This evidence suggests that physical relationship between the two was established after their marriage was solemnised. Therefore evidence pertaining to kidnapping and abducting the minor in order to compel her to marry, or compel her to illicit intercourse is missing. Hence, offence under Section 366 is also not made out.

18. In continuation of above facts, it will be important to consider, whether marriage with minor even with her consent will make appellant liable for offence under Section 376?

19. In this context, it would be appropriate to consider the age of the victim first. P.W-4, Dr. Achala, who had referred the victim for ossification test. She after referring to X-ray report has opined that her age was above sixteen years. However, she has also mentioned that age of victim in any circumstance could not be above 18 years. Considering that victim was above 16 years at the time of her marriage, it would be relevant to see that whether her marriage at the age of 16 years could be held legal? In this case, both parties are Muslim and have performed marriage as per Muslim rites and customs. The victim has admitted that her Nikah was performed at Kalpi and appellant has produced Nikahnama. It will be significant to refer Article 195 from the book 'Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla' . Article 195 lays down the pre requites of valid marriage under Muslim law and same is reproduced below :

"195. Capacity for marriage - (1) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians. (3) A marriage of a Mahomedan who is sound mind and has attained puberty, is void, if it is brought about without his consent.

Explanation - Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years."

20. Hence, evidence led before Trial Court leads to only one conclusion that victim aged above 16 years had married with appellant on her own free will. It will also be important to consider whether the said marriage violates the provisions of Prohibition of Child Marriage Act,2006 . Section 2 of this Act

provides definitions of some of the relevant and important terms, as under:

"(a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party", in relation to a marriage, means either of the parties whose marriage is or is about to be thereby solemnised;

(f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority." Section 3 of the Act holds that Child marriages are voidable at the option of contracting party being a child. Similarly, Section 12 of this Act says that if marriage of minor is solemnised by enticing or taking out of legal guardians, or is compelled by force to marry or is sold for marriage, such marriage is void.

21. Therefore, it is apparent from the Act that marriage in this case would at most be held to be voidable. Again question arises whether the provision of Prohibition of Child Marriage Act,2006 would override the provision of Muslim Personal Law (Shariat) Application Act 1937? Section 2, whereof, is reproduced herein under: -

2. Application of Personal law to Muslims.-

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

22. Taking into account the exception (2) of Section 375 of IPC and Prohibition of Child Marriage Act,2006, **Hon'ble Supreme Court in Independent Thought vs Union Of India, AIR 2017 SUPREME COURT 4904** held that sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. In opening paragraph of judgment, it was held, "1. The issue before us is limited but one of considerable public importance – whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception

2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not." Further in para28 and 31 , it was held,

" 28. Section 375 of the IPC defines 'rape'. This section was inserted in the IPC in its present form by an amendment carried out on 3rd February, 2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of Page 19 the seven descriptions mentioned in the section. (A woman is defined under Section 10 of the IPC as a female human being of any age). Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; clause 'Sixthly' of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her - with or without her consent - is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential."

"31. Therefore, Section 375 of the IPC provides for three circumstances relating to 'rape'. Firstly sexual intercourse with a girl below 18 years of W.P. (C) No. 382 of 2013 Page 20 age is rape (statutory rape). Secondly and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. Thirdly sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 of the IPC (non-consensual sexual intercourse)."

23. In the said judgement, provisions of IPC and POCSO Act were also discussed and it was held that that there is no difference between the definition of rape as laid down in IPC and POCSO, but definition of rape is somewhat more elaborate. Considering Section 42-A of POCSO Act, it was held that provisions of the POCSO Act will override the provisions of any other law (including the IPC) to the extent of any inconsistency. Considering the provisions of POCSO Act and IPC, it was observed, "98. ……. In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory

distinction."

24. Thereafter, Hon'ble Supreme Court further dealt with incongruity between the exception (2) of Section 375, Prohibiting of Child Marriage Act, Hindu Marriage Act and Dissolution of Muslim Marriages, 1955 and Divorce Act, 1939 and it was held by Hon'ble J. Deepak Gupta in Para 19, "It is obvious that while making amendments to various laws, some laws are forgotten and consequential amendments are not made in those laws. After the PCMA was enacted both the Hindu Marriage Act, 1955 and the Dissolution of Muslim Marriages and Divorce Act, 1939 also should have been suitably amended, but this has not been done. In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned." Accordingly, Exception 2 of Section 375 I.P.C was struck down and it was held that :-

"88. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".

It is, however, made clear that this judgment will have prospective effect.

89. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code."

25. From the foregoing observations as held by Hon'ble Supreme Court in Independent Thought (supra), it is very much apparent that exception 2 of Section 375 IPC has been struck down on the ground that said provision is inconsistent with the provisions of POCSO Act and is also violative of Article 14, 15 and 21. But it has also been held that the said judgment of

Supreme Court will have prospective effect. In this particular case, it is apparent that alleged occurrence had occurred way back in the year 2005. Therefore, appellant cannot be held guilty for commission of rape because victim at the time of occurrence was above 16 years and physical relations between the two had taken place after solemnisation of their marriage.

26. In view of the above, the present appeal is **allowed** and the appellant is acquitted of the charges.

27. Accordingly, judgment of conviction and order of sentence is set aside. The appellant is on bail and his personal bond is cancelled and sureties are discharged and further directed to furnish bail bond in compliance of Section 437-A Cr.P.C. to the satisfaction of the Court concerned within two month from today.

28. The Trial Court's record be remitted back along with copy of this judgment.

29. Compliance report be submitted to this Court at the earliest. Office is directed to keep the compliance report on record.

September 19, 2025
Ujjawal

(Anil Kumar-X,J.)