



2026:AHC:144384

Reserved on 19.05.2026

Delivered on 16.07.2026

AFR

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 974 of 1984

Jhinkoo

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	: G.p.mathur, R.c.shukla, Sunil Kumar Singh, Vivek Prasad Mathur
Counsel for Respondent(s)	: A.G.A., Tripathi B.g.bhai

Court No. - 93

HON'BLE SANTOSH RAI, J.

1. Heard Shri Sunil Kumar Singh, learned counsel for the appellant and Shri Purshottam Maurya, learned AGA for the State.

2. The present appeal is preferred under Section 374 of Cr.P.C. by the accused-appellants Jhinkoo (died) and Jhabboo to set aside the judgment and order dated 28.03.1984 passed by 6th Additional Sessions Judge, Basti in Sessions Trial No.239 of 1981 under

3. The prosecution case, in brief, is that the appellants Jhabboo, his brother Jhinkoo (since deceased), and a woman named Smt. Kadora were frequent visitors to the house of the complainant Munni ("the prosecutrix"). On Saturday preceding the lodging of the First Information Report on 28.11.1975, Smt. Kadora is said to have called upon the prosecutrix to accompany her to a sugarcane field, where the appellants Jhabboo and Jhinkoo joined them. The three thereafter took the prosecutrix to the Purana Padav bus stand, where certain persons including a woman of Mustafabad and PW-1 Babu Ram and PW-2 Ram Narayan of the prosecutrix's own village are alleged to have seen them. Smt. Kadora did not board the bus. The appellants Jhabboo and Jhinkoo are alleged to have taken the prosecutrix by bus to Basti and thence to Gorakhpur, where they had rented a room. It is alleged that the prosecutrix was confined there overnight, that both accused committed rape upon her by turns under threat of a knife, and that cash of Rs1,500/- and various ornaments and sarees were forcibly taken from her. Jhinkoo, thereafter left Gorakhpur. On the third day, the appellant Jhabboo brought the prosecutrix back towards Basti, where, upon being recognised by one Ramujagir (the prosecutrix's cousin), the

4. On these allegations, a case was registered under Sections 363, 366 and 376 IPC against all three named persons, namely the appellants Jhinkoo, Jhabboo and Smt. Kadora. The charge-sheet, however, was submitted only under Sections 363 and 366 IPC, and the Trial Court proceeded to frame charge only under Section 366 IPC on 15.12.1981. Smt. Kadora was never arrested or put to trial. Upon conclusion of trial, the appellants Jhinkoo and Jhabboo were convicted under Section 366 IPC. Hence this appeal.

5. The prosecution has examined Babu Ram as P.W.-1, Ram Narayan as P.W.-2, complainant Munni as P.W.-3, Rajdei as P.W.-4, S.I. Gajnafar Ali as P.W.-5, Dr. Pushpa Srivastava as P.W.-6, Head Constable Surendra Pratap Singh as P.W.-7 and Dr. R.U. Pandey as P.W.-8.

6. The Investigating officer has collected documentary and oral evidences during the course of investigation. Ex. Ka.-1 is the FIR, which has been proved by P.W.-3, Ex. Ka.-2 is the chargesheet. Ex. Ka.-3 is the injury report of Munni Devi, which has been proved by P.W.-6. Ex. Ka.-4 is the x-ray report of Munni Devi, which has been proved by P.W.-6 and Ex. Ka.-5 is the copy of G.D. no.17, which as
been proved by P.W. 7

8. P.W.-2 Ram Narayan stated in his examination-in-chief that about 7 years earlier, he did not see Smt. Munni leaving towards Puraina Padav with Karoda, Jhinkoo, or Jhabboo.

9. P.W.-3 Munni stated in her examination-in-chief, in brief, that Karoda lured her from home on the pretext that Jhinkoo and Jhabboo would provide her food and clothes. She was taken to a sugarcane field and then via Puraina Bus Stand to Gorakhpur, where she was wrongfully confined for three days. During this period, Jhinkoo and Jhabboo repeatedly raped her, threatened her with a knife, and forcibly took her jewellery, 5–6 sarees, clothes, and Rs.1,500/- cash. On the third day, Jhabboo brought her to Basti Bus Station, where she met her cousin Ramujagir, narrated the incident, lodged the FIR, and was medically examined the same day.

10. P.W.-4 Durga Prasad (father of the prosecutrix) stated in his examination-in-chief, in brief, that on returning home from the fields, he found Munni missing, the box lock broken, and Rs.1,500/- cash along with jewellery (necklace, earrings, tika, silver anklets, etc.) missing. Babu Ram and Ram Narayan informed him that

Karoda, Jhinkoo, and Jhabboo had taken Munni towards Puraina

Munni from Basti Bus Station. Munni narrated the entire incident, after which the FIR was lodged at the police station.

11. P.W.-5 Gajnafar Ali stated in his examination in chief, in brief, that on 28.11.1975, while posted as Head Moharrir/Officiating A.S.I. at PS- Walterganj, the case was entrusted to him. On 05.12.1975, he inspected the place of occurrence, prepared the site plan (Ext. Ka-2), recorded the statements of Munni, Babu Ram, Ram Narayan, Shyam Raji, Durga Prasad, and the accused Karoda, Jhinkoo and Jhabboo, and on 24.12.1975 recorded Ramujagir's statement and submitted the charge sheet.

12. P.W.-6 Dr. Pushpa Srivastava stated in her examination-in-chief, in brief, that she examined Munni on 28.11.1975. She found no external or genital injuries; the hymen admitted two fingers, with old healed tears and no bleeding, congestion, or swelling. The smear report was negative, and the X-ray showed fused elbow epiphyses and unfused wrist epiphyses, assessing her age at 17–18 years. She opined that the prosecutrix was habituated to sexual intercourse and proved the medical report (Ext. Ka-3) and supplementary report (Ext. Ka-4)

363, 366 & 376 IPC on the basis of the prosecutrix's complaint and proved the Chik FIR (Ext. Ka-1). He also proved the corresponding G.D. entry (Ext. Ka-5) made on the same day.

14. P.W.-8 Dr. R.U. Pandey stated in his examination-in-chief that on 29.11.1975, while posted as Medical Officer at Sadar Hospital, Basti and also functioning as a Radiologist, he conducted the X-ray examination of the injured Munni. The X-ray plates bearing Plate Nos. 28/6 and 28/7 were prepared under his supervision and were duly identified by his signatures and thumb impression. He proved the X-ray plates, which were marked as Material Ext. I and Material Ext. II.

15. The grounds of the appeal in brief are that the judgement of the court below is against the weight of the evidence on record and conviction of the appellant is illegal and liable to be set aside. The sentence awarded by the trial court is too severe.

16. Learned counsel for the appellant has assailed the conviction on the broad grounds, which this Court has considered cumulatively. The FIR does not disclose a specific date of the alleged occurrence, and there is inordinate and unexplained delay in

framed only under Section 366 IPC, without any judicial application of mind reflected on record as to why the graver and cognate offences stood excluded. The FIR itself names Smt. Kadora as the person who instigated the prosecutrix to leave her house and proceed to the sugarcane field, yet she was never arraigned for trial, raising a serious doubt as to the true genesis of the occurrence. The prosecutrix travelled with the appellants Jhabboo and Jhinkoo by bus on more than one occasion, stayed with them for several days, and admittedly raised no alarm at any stage, at the bus stand, during the two bus journeys, or at Gorakhpur, despite the presence of numerous opportunities to do so. Her explanation for this silence was not found satisfactory. There is no reliable documentary evidence of her age. The finding of minority rests on oral testimony alone. The prosecutrix herself deposed to the commission of rape (PW-3), yet no charge under Section 376 IPC was ever framed or tried. She admitted breaking open her mother's box and removing the cash and ornaments herself, and admitted a five-to-ten-year-old enmity between the two families. She further stated that she left her house on the advice of Smt. Kadora. P.W.-1 Babu Ram and P.W.-2 Ram Narayan, cited as "last seen" witnesses, were declared hostile

ingredients of Section 366 IPC were not established by cogent, reliable and consistent evidence.

17. Learned AGA submits that the prosecution has proved the charge under Section 366 IPC beyond reasonable doubt through the cogent and reliable testimony of the prosecutrix, duly supported by the FIR, medical evidence and other material on record. It is argued that the trial court has rightly appreciated the evidence and recorded the conviction, and that the alleged discrepancies, delay in lodging the FIR and defects in investigation are not sufficient to discredit the prosecution case.

18. The following points arise for determination in this appeal:

- (a) Whether the delay and infirmities in the lodging of the FIR affect the credibility of the prosecution case,
- (b) Whether the age of the prosecutrix, and consequently the question of her consent, stands established,
- (c) Whether the essential ingredients of Section 366 IPC namely, kidnapping or abduction of a woman with intent that she may be compelled to marry any person, or in order that she may be forced or seduced to illicit intercourse, stand proved,

prosecution of Smt. Kadora, cast a reasonable doubt on the prosecution case as a whole,

(e) Whether the hostility of the "last seen" witnesses and the defects in investigation are fatal to the prosecution case.

19. It is well settled that delay in lodging an FIR is not, by itself, fatal to the prosecution case if it is satisfactorily explained. Equally, unexplained and inordinate delay, particularly where it affords scope for deliberation, embellishment and consultation, is a factor going to the root of the credibility of the prosecution version. Delay in lodging the FIR often results in embellishment, and prompt filing is a valuable guarantee of the truthfulness of the prosecution version. It is also true that mere delay in lodging the FIR cannot be a ground by itself for throwing out the prosecution case, provided the delay is properly explained on facts. Though, prompt and early reporting of an occurrence gives an assurance regarding the truth of the prosecution version.

20. In the present case, the FIR itself does not specify a clear date of occurrence, and there is a gap between the incident, the return of the prosecutrix, and the eventual lodging of the report. The

writing, which itself opens the door to the possibility of deliberation and embellishment of the narrative, particularly regarding the roles attributed to each accused.

21. The finding that the prosecutrix was a minor of about 16 years rests solely on oral assertion. No birth certificate, school admission register, or medical (ossification) evidence was produced or relied upon by the prosecution. The law requires that age be established through the best available documentary or medical evidence, and oral estimation, standing alone, is a weak and often unreliable basis for such a finding. In *Babloo Pasi v. State of Jharkhand*, (2008) 13 SCC 133, Hon'ble Apex Court held that in the absence of reliable documentary proof, ossification test evidence assumes importance in determining the age of a person.

22. This infirmity assumes importance because the ingredient of "kidnapping from lawful guardianship" under Section 361 IPC, which underlies the aggravated offence under Section 366 IPC applies, in the case of a female, only where she is under eighteen years of age, or, if she is of or above that age, where she has been taken or enticed away without her free and voluntary consent.

Where a young woman, on the verge of majority or of an age where

is not made out. In *S. Varadarajan v. State of Madras, AIR 1965 SC 942*, Honble Apex Court held where a girl, capable of knowing what she is doing, voluntarily leaves her father's protection knowing and having capacity to know the full import of what she is doing, and the accused has done nothing to "take" her out of her guardian's keeping, no offence of kidnapping is made out. In *Thakorlal D. Vadgama v. State of Gujarat, (1973) 2 SCC 413*, it was held that the words "takes" and "entices" mean that the accused must, in some manner, be an active participant in bringing about the minor's leaving the guardian's protection, mere passive receipt is not enough, but where the girl leaves entirely on her own initiative the offence is not attracted. Thus, the requirement of "taking" under Section 361 IPC connotes some active or direct part played by the accused which is the proximate cause of the minor leaving parental protection.

23. On the prosecutrix's own admission, she proceeded to the sugarcane field on the persuasion of Smt. Kadora, a co-accused never put to trial, and thereafter travelled by two buses and stayed for a few days without raising any alarm despite repeated opportunities before fellow villagers at the bus stand, before co-

the result of "taking" or "enticement" by the appellants within the meaning of Section 361 IPC, or was substantially an act of her own volition, at the instance of Smt. Kadora, in which the appellants' role, if any, was not shown to be the proximate and active cause contemplated by law.

24. Section 366 IPC requires proof that the accused kidnapped or abducted a woman (i) 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 (ii) in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be so forced or seduced. Both the act of kidnapping/abduction and the specific culpable intent or knowledge are essential ingredients, each of which must be established by the prosecution beyond reasonable doubt. The burden does not shift to the accused merely because the woman was, in fact, found in the company of the accused. In a prosecution under Section 366 IPC, the specific intent set out in the section must be proved as an essential ingredient of the offence, and cannot be presumed merely from the fact of the woman having been in the company of the accused

25. As noted above, the evidence relating to the very act of

intercourse is sought to be inferred principally from the prosecutrix's own testimony that she was raped at Gorakhpur. Yet, tellingly, no charge under Section 376 IPC was ever framed against either accused, despite this being precisely the testimony (P.W.-3) on which the prosecution now seeks to found the requisite intent under Section 366 IPC. The Trial Court cannot be permitted, in effect, to import the ingredient of an uncharged and untried offence to sustain a conviction for an offence that depends on proof of intent connected to that very uncharged offence, without the appellants having the opportunity to meet that specific charge at trial.

26. The FIR named three persons and invoked Sections 363, 366 and 376 IPC. The charge-sheet dropped Section 376 IPC, and even Section 363 IPC was not pressed into charge, leaving only Section 366 IPC for trial. Smt. Kadora described in the FIR itself as the person who first called upon the prosecutrix to go to the sugarcane field, and who, on the prosecutrix's own cross-examination, advised her to leave was never arrested, charge-sheeted or tried. No explanation for this appears on the record.

27. Selective and unexplained dilution of the offences charge-sheeted, coupled with non prosecution of a person assigned a

28. Taken together with the unexplained omission of Section 376 IPC despite P.W.-3's own testimony of rape, and the complete non-prosecution of Smt. Kadora, a reasonable doubt arises as to whether the prosecution placed the true and complete picture of events before the Trial Court, or whether the case, as prosecuted, was curtailed and selectively presented.

29. P.W.-1 Babu Ram and P.W.-2 Ram Narayan, cited in the FIR as persons who saw the prosecutrix in the company of the accused en route to the bus stand, were declared hostile and did not support the prosecution version. While the evidence of a hostile witness is not to be rejected in toto and may be relied upon to the extent it supports the prosecution, in the present case these were the only independent "last seen" witnesses cited, and their hostility leaves the prosecution without independent corroboration on the crucial link of the prosecutrix having left the village in the company of the named accused. In *Khujji v. State of M.P., (1991) 3 SCC 627* and in catena of judgements, Hon'ble Apex Court held that the evidence of a hostile witness is not to be rejected altogether. That part of the evidence which is consistent with the case of the prosecution or the defence may be relied upon. Thus, merely because a witness is

30. In the present case, however, with both cited independent witnesses turning hostile, and with no other independent witness examined to establish the initial taking away of the prosecutrix, the prosecution is left to rest almost entirely on the testimony of the prosecutrix herself, which, for the reasons discussed above, suffers from ‘material contradictions’ and admissions damaging to its reliability. The Investigating Officer's failure to prepare a proper site plan, and other material omissions in investigation, further weaken the corroborative structure of the prosecution case.

31. It is true that the conviction can, in an appropriate case, rest on the sole testimony of the prosecutrix if it is found to be truthful, natural and inspires confidence, without insistence on corroboration as a matter of rule. The evidence of a prosecutrix, if found truthful and natural, does not require corroboration as a matter of rule, and courts must not adopt an approach that treats her as an accomplice. These principles, however, presuppose a testimony that is otherwise consistent, natural, and free of material as opposed to minor or peripheral contradictions. Where the contradictions and admissions go to the very root of the prosecution case, they cannot be brushed aside as trivial.

home on the advice of Smt. Kadora, and that she raised no alarm through two bus journeys and several days of residence at Gorakhpur are not peripheral. They go directly to the core question of whether she was "taken" or "enticed" by the appellants, or whether she left of her own volition in circumstances coloured by long-standing family discord. Read with the hostility of the sole independent witnesses and the absence of any charge under Section 376 IPC corresponding to her own testimony of rape, these admissions create a reasonable doubt that this Court cannot ignore.

33. On a cumulative appreciation of (i) the delay and infirmity in the FIR; (ii) the absence of reliable proof of the prosecutrix's minority; (iii) the doubt surrounding the essential ingredient of "taking" or "enticement" under Section 361 IPC, given her own conduct and admissions; (iv) the absence of independent evidence of the requisite intent under Section 366 IPC, compounded by the unexplained omission of a charge under Section 376 IPC despite the prosecutrix's own testimony of rape; (v) the non-prosecution of Smt. Kadora, who finds a central and initiating role in the FIR; (vi) the hostility of both independent "last seen" witnesses; and (vii) the omissions in investigation including the failure to prepare a site

settled that where two views are reasonably possible on the evidence on record, the view favourable to the accused must be adopted, and the benefit of doubt arising from the infirmities discussed above must enure to the appellant.

34. In the result, this appeal is **allowed**.

35. The judgment and order of conviction dated 28.03.1984 passed by the learned 6th Additional Sessions Judge, Basti in Sessions Trial No.239 of 1981 convicting the appellant Jhabboo under Section 366 IPC, is set aside.

36. The appellant is acquitted of the charge under Section 366 IPC and shall be released forthwith. The bail bonds, if any, are cancelled and the sureties, if furnished earlier, stand discharged.

37. Let a copy of this judgment be transmitted forthwith to the trial court concerned along with trial court record for compliance.

38. The Registrar (Compliance) is also directed to send a copy of this order by FAX/e-mail to the concerned court through District & Sessions Judge, Gorakhpur within 48 hours for compliance.