HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

SINGLE BENCH : RAJEEV KUMAR DUBEY, J

Criminal Appeal No. 1392/1997

Shakil Khan and Anr.

Vs.

State of M.P.

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Shri Manish Datt, learned Sr. counsel with Shri Amber Mishra, counsel for the appellants.

Shri Sunil Gupta, P.L. for the respondent / State.

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J U D G M E N T

(Reserved on 11.11.2021
Delivered on 06.12.2021)

This criminal appeal has been filed under Section 374(2) of the Cr.P.C. against the judgment dated 9th July, 1997 passed by Ist Additional Sessions Judge, Balaghat in Sessions Trial No.133/1996, whereby the learned Sessions Judge found appellants No.1 Shakil Khan & appellant No.2 Vahid Khan guilty and convicted and sentenced them as under:-

Appellants	**conviction**	**Sentence**	**Fine**	**Default stipulation**
Shakil Khan & Vahid Khan	under Section 363/34 & 366/34 of IPC	only under Section 366/34 of IPC which is graver one **Four years R.I**.	**Rs.1,000/-**	**Six months S.I.**
Shakil Khan	342 IPC	Three months R.I.		

2. Brief facts of the case which are relevant for disposal of this appeal are that prosecutrix PW-1, (her name and identity imposed by law contained in Section 228A of IPC is not disclosed) was a minor at the time of the incident and was studying in VIII class. Appellant No.1 Shakil Khan used to come to her house for tuition. On 08.01.1996, she came out from her house to go to school. At around 11:00 am, when she reached near Ram temple, one auto-rickshaw was standing there. When she passed by the auto-rickshaw, appellant no.1 Shakil Khan got down from the auto-rickshaw and told her that her course was incomplete, which she needed to complete, so she should go with him. Prosecutrix told appellant No.1 Shakil Khan that she is going to school now, she would complete the course later, but Shakil Khan forcibly dragged her and made her sit in the said auto. Appellant No.2 Vahid Khan, the auto driver took the auto from the street in front of the high school to Lavra Road, Narsingh Tola, where he stopped the auto at the behest of appellant No.1 Shakil Khan in front of a house. Appellant No.1 Shakil Khan took her out of the auto and forcibly took her in a room of that house which was taken by Beniram Rajak (PW-4) on rent and bolted the door of the room from inside and forcibly took off her clothes. When she objected he threatened to kill her and raped her. She tried to run away, but appellant No.1 Shakil Khan did not let her go out of the room. Hemraj (PW-3) and Satish (PW-4) saw the Shakil Khan taking the prosecutrix in the auto, they informed the uncle of Prosecutrix, Ramchand Awasthi (PW-2). He went to the school, where he did not find the prosecutrix in the school, so he went to the police station Baihar, Distt. Balaghat and lodged the report (Ex.P-1). S.R. Marskole (PW-9), Station House Officer, P.S. Baihar, wrote that report and registered Crime No.02/96 for the offences punishable under Sections 363, 366 of IPC against the appellant No.1 Shakil Khan and investigated the matter. During the investigation, he called appellant no.2 Vahid Khan, who informed the police that he had left appellant No.1 Shakil Khan and prosecutrix at the house of Beniram Rajak (PW-4) located at Narsingh Tola, on which S.R. Marskole (PW-9) alongwith Hemraj (PW-3) and Satish went to the house where they found the appellant no.1 Shakil Khan and

prosecutrix in the room. S.R. Marskole (PW-9) recovered the prosecutrix from the possession of appellant No.1 Shakil Khan and prepared a recovery memo (Ex.P.-19). He also seized one packet of condoms and one brief from the spot, one auto from the possession of appellant no.2 Vahid Khan, two condoms and one sweater from the possession appellant No.1 Shakil and prepared seizure memo (Ex.P-2 to P-4) respectively. He also prepared the spot map (Ex.P-15) and sent the prosecutrix for medical examination to the District Hospital, Balaghat, where Dr. Paraskar examined her and gave a report. She also prepared the slides of her vaginal swab and sent it to P.S. Baihar through Constable in a sealed packet, which was seized by S.R. Marskole (PW-9), and prepared a seizure memo (Ex.P-17). During investigation S.R. Marskole (PW-9) also sent appellant no.1 Shakil for medical examination at Civil Hospital Baihar where Dr. R.K. Chaturvedi examined him and gave a report (Ex.P-8). He also prepared the slides of his semen and sent it to P.S. Baihar through Constable in a sealed packet, which was seized by S.R. Marskole (PW-9). For knowing the age of the prosecutrix Dr. Sajnay Shukla (PW-6), Medical Officer, District Hospital Balaghat conducted ossification test and gave the ossification test report (Ex.P-9) to the effect that the approximate age of the prosecutrix is between 15 to 17 years. S.R. Marskole (PW-9) also recorded the statements of prosecutrix (PW-1), Ramchand Awasthi (PW-2), Hemraj (PW-3) and Beniram (PW-4). He also sent all the seized articles for chemical examination to Forensic Science Laboratory, Sagar alongwith a draft (Ex.P-21) through S.P. Balaghat, from where report (Ex.P-22) came and filed a charge-sheet against the appellants before the JMFC, Baihar. On that charge-sheet criminal case No. 246/96 was registered. Learned JMFC, Baihar committed the case to the Court of Sessions, where S.T. No.133/96 was registered.

3. Learned First Additional Sessions Judge, Balaghat framed charges under Section 363/34, 366/34, 342 and 376 of the IPC against appellant No.1 Shakil Khan and under Sections 363/34 & 366/34 of the IPC against appellant No.2 Vahid Khan and tried the case. Though appellants abjured the guilt, after trial, learned trial Court acquitted appellant No.1 Shakil Khan for

the offence punishable under Section 376 IPC and only found him guilty for the offence punishable under Section 363/34 & 366/34 and 342 of IPC and appellant No.2 Vahid Khan guilty for the offence punishable under Sections 363/34 & 366/34 of IPC and sentenced them as aforesaid. Being aggrieved by the impugned judgment, appellant No.1 Shakil and appellant No. 2 Vahid Khan have preferred this Criminal Appeal.

4. Learned counsel for the appellants submitted that it is alleged that at the time of incident prosecutrix studied in VIII class, but no documentary evidence, school entry registrar etc. were produced by the prosecution in the evidence to prove her age. The prosecution for proving the age of prosecutrix only produced an ossification test report in which the age of the prosecutrix is mentioned between 15 to 17 years, which is the approximate age, in which a variation of 3 years is possible, so in the absence of any other documentary evidence only on the basis of ossification test report in which the approximate age of the prosecutrix is mentioned as 15 to 17 years, it cannot be held that at the time of the incident the age of the prosecutrix was below 18 years. Learned trial Court committed a mistake in holding that at the time of the incident the age of the prosecutrix was below 18 years. From the statement of the prosecutrix, it is apparent that the prosecutrix was the consenting party and went with appellant no. 1 Shakil on her own will. Learned trial Court itself found that the prosecutrix was the consenting party and acquitted appellant No.1 Shakil from the charge under Section 376 of IPC. In these circumstances learned trial Court committed a mistake in finding appellants guilty for the aforesaid offences. He further submitted that the only allegation against appellant no.2 Vahid Khan is that he was the driver of the said auto by which appellant No.1 Shakil took the prosecutrix from the school to the house of Beniram Rajak (PW-4). Appellant no.2 Vahid Khan is the auto driver and he runs the auto for his livelihood. There is no evidence on record to show that appellant no.2 Vahid Khan knowingly that the prosecutrix was minor and she was being wrongfully taken by the appellant no.1 Shakil against her will, took her from one place to another place. On the contrary, the trial court itself held that the prosecutrix was the

consenting party and went with appellant no.1 Shakil on her own will. In these circumstances merely on the basis that appellant no.2 Vahid Khan who is the auto driver and runs the auto for his livelihood took prosecutrix and appellant no.1 Shakil from one place to another place by his auto, it cannot be said that appellant no.2 Vahid Khan was also involved in the crime. Learned trial court committed a mistake in finding appellant No.2 Vahid Khan guilty for the offence punishable under Sections 363/34, 366/34 of the IPC. So the judgment of the trial court be set aside and appellants be acquitted from all the charges.

5. On the other hand, learned counsel for the State submitted that from the evidence produced by the prosecution, the guilt of the appellants is clearly proved. So, the learned trial court did not commit any mistake in finding the appellants guilty for the aforesaid offences and prayed for rejection of the appeal.

6. Point of determination in this appeal is whether the conviction of appellant No.1 Shakil Khan under Sections 363/34, 366/34, 342 of IPC and appellant No.2 Vahid Khan under Sections 363/34, 366/34 of IPC and sentence awarded by the trial Court to appellant No.1 Shakil under Sections 366/34 and 342 of IPC and sentence awarded to appellant No.2 Vahid Khan under Section 366/34 of IPC are liable to be set aside for the reasons stated in the memo of appeal and arguments advanced before this Court.

7. Regarding the age of the prosecutrix Ramchandra Awasthi (PW-2), uncle of the prosecutrix deposed that the date of birth of the prosecutrix is 10/01/1982 and at the time of the incident the age of the prosecutrix was 15 years 6 months. For proving the age of the prosecutrix, the prosecution also produced the ossification test report (Ex.P-9), which was given by Dr. Sanjay Shukla (PW-9). He deposed that on 10/01/1996 he was posted as a medical officer at District Hospital, Balaghat and on examination of the X-ray plates of the prosecutrix, he found that the epiphysis of her knee joint was fused which is fused at the age of 15 years, but the epiphysis of her wrist joint which is fused in the age of 17 years and iliac bone of her hip joint

which is fused in the age of 19 years were not fused. On that basis, he found that the age of the prosecutrix was 15 to 17 years. Learned counsel of the appellants submitted that the age mentioned in the ossification test report (Ex.P-9) is the approximate age and not a conclusive and in that age a variation of 2 years is possible and when there is a possibility of margin of error of two years, then the view in favour of the appellant/accused should be taken and it should be held that on the date of the kidnapping, the prosecutrix was above 18 years of age. In this regard, learned counsel of the appellants also placed reliance on the judgments of Apex Court passed in the case of **Mukarrab and Ors. Vs. State of Uttar Pradesh reported in 2017(2) SCC 210**. But the facts of that case does not match with the present case. In that case when ossification tests of appellants/accused were conducted both the accused were much beyond 25 years of age. Their epiphysis of knee joint wrist joint and iliac bone of hip joint were fused due to which the medical board is not in a position to find their exact age and determine the age of appellants between 35 to 40 years. In these circumstances, the Apex Court held that the age determination based on the ossification test though may be useful is not conclusive. Learned counsel of the appellants also placed reliance on the judgment passed by Apex Court in the case of **Jaya Mala Vs. Home Secretary, Govt. of Jammu & Kashmir and ors. reported in AIR 1982 SC 1297, State of Rajasthan Vs. N.K. reported in (2000) 5 SCC 30.** In both these cases, the Apex Court held that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. However, in both these cases, the Apex Court has not held that the said margin of two years should always be taken on the higher side. Whether the margin of error of two years is to be taken on the lower side or on the higher side, would depend on the facts and circumstances of each case.

8. The Supreme Court in the case of **Ram Suresh Singh Vs. Prabhat Singh reported in (2009) 6 SCC 681** has held as under:

> "15. We are not oblivious of the fact that it is difficult to lay down a law as to whether in a case of this nature, the lower or the upper

age or the average age should be taken into consideration. Each case depends on its own facts."

9. In the case of ***State of U.P. v. Chhotey Lal, (2011) 2 SCC 550*** Hon'ble Apex Court held as under :-

> "13. We find ourselves in agreement with the view of the trial court regarding the age of the prosecutrix. The High Court conjectured that the age of the prosecutrix could be even 19 years. This appears to have been done by adding two years to the age opined by PW 5. There is no such rule, much less an absolute one that two years have to be added to the age determined by a doctor. We are supported by a three-Judge Bench decision of this Court in *State of Karnataka* v. *Bantara Sudhakara* [(2008) 11 SCC 38 : (2008) 3 SCC (Cri) 955] wherein this Court at SCC p. 41 of the Report stated as under (SCC para 12)
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> > "*12*. … Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years age has to be added to the upper age limit is without any foundation."

10. In the case of **Jyoti Prakash Rai Vs. State of Bihar reported in (2008)15 SCC 223** Apex Court also clarify that position and held after a certain age it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests because of that apex court in a number of judgments has held that the age determined by the doctors should be given the flexibility of 2 years on either side.

11. From the above pronouncements of the Apex Court, it transpires that there is no such rule, much less an absolute one that two years have to be added to the age determined by a doctor. Whether the margin of error of two years is to be taken depends on the facts and circumstances of each case and the margin of error of two years is to be taken on the lower side or on the higher side, would also depend on the facts and circumstances of each case.

12. In this case, Dr. Sanjay Shukla (PW-9) who gave the ossification test report (Ex.P-9) clearly deposed that the epiphysis of the prosecutrix's knee joint was fused which is fused at the age of 15 years but the epiphysis of her

wrist joint which is fused in the age of 17 years and iliac bone of her hip joint which is fused in the age of 19 years was not fused and on that basis, he determined the age of prosecutrix between 15 to 17 years and in his cross-examination he clearly denied from the suggestion that in the given age a difference of two years is possible. So in these circumstances in the considered opinion of this court, the trial court did not commit any mistake in finding that at the time of the incident the age of the prosecutrix was above 16 years and around 17 years.

13. On the point that appellant No.1 Shakil Khan forcibly took prosecutrix from the Rammandir to the Beniram Rajak's house, where he committed rape with her, learned trial Court itself did not find the statement of prosecutrix trustworthy and after evaluating all the prosecution evidence found that at the time of the incident the age of the prosecutrix was above 16 years and she was the consenting party and went with the appellant No.1 Shakil on her own will and appellant No.1 Shakil committed intercourse with her with her consent and acquitted appellant no.1 Shakil for the offence punishable under section 376 of IPC. The prosecution did not challenge that finding by filing an appeal against the acquittal of the appellant No.1 Shakil under Section 376 of IPC by the trial Court. Even otherwise in this regard, the finding of the trial Court appears to be correct.

14. However, the prosecutrix (PW-1) in her examination-in-chief deposed that on the date of the incident at about 11:00 am, when she was going to her school on foot, on the way near the school and Ram Mandir one auto-rickshaw was parked. Appellant No.1 Shakil and appellant No.2 Vahid Khan were sitting in that auto. When she passed by the auto-rickshaw, appellant No.1 Shakil Khan got down from the auto-rickshaw. He caught hold of her hand and made her sit in the auto and shut her mouth with his hand. Thereafter he told appellant No.2 Vahid Khan, to take the auto and appellant No.2 Vahid Khan took that auto towards Narsingh Tola, where appellant No.2 Vahid Khan stopped the auto at the behest of Shakil in front of a house. Appellant No.1 Shakil took her out of the auto and forcibly took her in a

room of that house and bolted the door of the room from inside and forcibly took off her clothes and committed rape with her. Prosecutrix in her cross-examination admitted that her school used to start at 11:00 a.m. while on the date of the incident she left for school at 11:30 a.m. When appellant No.1 Shakil caught hold of her hand she did not cry. She also admitted that Ram Mandir is 10 steps ahead of the school where the auto-rickshaw was standing. When she walked 10 steps ahead of the school then she got the auto. If she had entered inside the school main gate there would have been no incident. She has also admitted that the area around Ram Mandir is congested with a lot of shops around. Had the accused persons taken the prosecutrix by force in an auto, the incident would have been witnessed by the people present around the spot and the shouting of prosecutrix would have been heard by them.

15. Hemraj (PW-3), who deposed that he saw appellant No.1 Shakil taking the prosecutrix in the auto which was being driven by appellant No.2 Vahid Khan, has also not deposed in his statements that Shakil was holding her mouth. If Shakil Khan had taken the prosecutrix against her will and she would had resisted, then this fact must have been noticed by Hemraj (PW-3) also and he would have deposed so in his court statement. So, the statement of the prosecutrix on that point that appellant No.1 Shakil forcefully took her from Ram Mandir to Beniram Rajak's house against her will, where he made sexual relations with her against her will, does not appear to be trustworthy.

16. However from the statement of the prosecutrix which was also corroborated by the statement of Hemraj (PW-3) who saw the appellant Shakil taking prosecutrix with him in Vahid's auto and informed Ramchandra (PW-2) and the statement of Ramchandra (PW-2) who deposed that on the information given by Hemraj (PW-3) he searched prosecutrix in the school and when prosecutrix was not found in the school he reported the incident to the police station and the statement of S.R. Marskole (PW-9) who deposed that on the information of Ramchandra (PW-2) he wrote the FIR (Ex.P-1) and thereafter he alongwith Hemraj (PW-3) and Satish went to the

house of Beniram Rajak (PW-4), where they found appellant no.1 Shakil Khan and prosecutrix in the room and recovered the prosecutrix from the possession of appellant No.1 Shakil and prepared a recovery memo (Ex.P.-19). It is proved that on 08/01/1996 about 11:30 a.m. prosecutrix left her house and reached the Ram Mandir where appellant Shakil met her, who took her to Baniram Rajak's house situated at Nahar Tola by the auto which was being driven by appellant No.2 Vahid Khan. After dropping the appellant Shakil and prosecutrix at Beniram Rajak's house, appellant No.2 Vahid Khan went back with his auto, after which appellant No.2 Shakil made physical relations with the prosecutrix.

17. For proving the offence under Section 366 of IPC, it has to be proved that appellants abducted prosecutrix against her will with the intention to marry her against her will or in order that she may be forced to illicit intercourse. While from the prosecution evidence as discussed above it appears that the prosecutrix went with the appellant No.1 Shakil on her own will and she was the consenting party. So above mentioned two essential conditions for upholding conviction under Section 366/34 of IPC are not proved and, therefore, the conviction of the appellants under Section 366/34 IPC cannot be sustained. Likewise there is no evidence on record to show that appellant no.1 Shakil forcefully confined prosecutrix in the room. On the contrary as discussed above it appears that prosecutrix went to Baniram Rajak's house with appellant no.1 Shakil with her consent. So offence under Section 342 of IPC is also not proved against the appellant no.1 Shakil.

18. But an offence under Section 363 of IPC would be made out if a person takes away or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, out of the keeping of the lawful guardian of such minor without the consent of such guardian from lawful guardianship. Section 361 of the Penal Code, 1860, inter alia, provides, whoever takes or entices any minor under eighteen years of age in case of a female, out of the keeping of the lawful guardian of such minor, without the consent of such guardian, is said to kidnap such minor from lawful

guardianship. Explanation to Section 361 provides that the words “lawful guardian” include any person lawfully entrusted with the care or custody of such minor or other person. It is not the case of the appellant No.1 Shakil that he took the prosecutrix, who was a minor aged about 17 years, with the consent of Ramchand Awasthi (PW-2) uncle of the prosecutrix or her parents. So, an offence under section 363 of the IPC is clearly proved against appellant No.1 Shakil Khan.

19. Learned counsel of the appellants submitted that the prosecutrix was a fully grown-up girl and she was in the age of discretion, sensible and aware of the intention of the appellant No.1 Shakil went with him. Appellant No.1 Shakil himself did not take out her from the custody of her lawful guardian. On the contrary, prosecutrix herself left her house to meet the appellant Shakil and went with him on her own will, so offence under section 363 of IPC is also not made out against the appellants. In this regard, he also placed reliance upon the Apex Court judgments passed in the case of **Hari Ram Vs. The State of Rajasthan, 1991 AIR SCW 721, Shyam and Anr Vs. State of Maharashtra, AIR 1995 SC 2169, State of Karnataka Vs. Sureshbabu Puk Raj Porral (1994)1SCC 468 and S. Varadarajan Vs. State of Madras, AIR 1965 SC 942.**

20. But the facts of the above mentioned cases do not match with the present case. In the case of **Suresh Babu Puk Raj Porral (*supra*)** Apex Court found that regarding the age of prosecutrix the prosecution evidence is not convincing and prosecutrix in her Court statement did not depose that applicant committed intercourse with her, on that Apex Court held that the offence under Section 366 of IPC is not made out against the accused. In the case of **Shyam and Another Vs. State of Maharashtra (*supra*)** also Hon’ble Apex Court after evaluating the statement of prosecutrix on merits found that the prosecutrix was an unreliable witness and no credence can be given to her word. She was a fully grown up girl and she was in the age of discretion, sensible and aware of the intention of the accused that he was taking her away for a purpose, went with appellant on her own will, held that

no offence under section 366 of IPC is made out against the appellants. In the case of **Hari Ram (Supra)** Hon'ble Apex Court on the ground that the statement of prosecutrix is not reliable, therefore, difficult to accept and acquitted the appellant for the offence punishable under Section 366 of IPC. In all these cases Hon'ble Apex Court did not consider whether an offence under section 363 of IPC is made out against the accused or not. So on the point whether offence under Section 363 of IPC is made out against the appellants or not, these judgements do not assist the appellants.

21. In the case of **S. Vardarajan (supra)** also prosecutrix telephoned the appellant asking him to meet her on a certain road and then went to the road herself and thereafter she went with the appellant. Therefore, the apex court held that "*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".**o**ut of the keeping of her lawful guardian and is, therefore, not tantamount to "taking*". further held *"the facts established do not show that Savitri would not have left K. Natarajan's house in which her father had left her without the active help of the appellant."* While in this case on the date of the incident, prosecutrix, who was 17 years of age, left her house to go to school at 11;30 am while her school used to start at 11:00 am and she instead of going to school reached Ram Mandir which was located 10 steps away from her school, where appellant No.1 Shakil Khan was waiting for her in an auto and he took her to a room by that auto, shows that the prosecutrix left her house under a predetermined plan and met the appellant no.1 Shakil near the Ram Mandir, where Shakil was already standing and waiting for her, from where appellant Shakil took her in an auto to Beniram Rajak's house. These facts also show that the prosecutrix would not have left Ramchandra's house; without the active help of the appellant no.1 Shakil Khan, who used to go to the house of prosecutrix for tuition and in a position to influence her. So that judgement also does not help the applicant.

22. Apex Court in the case of ***Kuldeep K. Mahato v. State of Bihar*, (1998) 6 SCC 420** where it was found the age of the prosecutrix at the time of the incident was between 17 and 18 years and she was a consenting party held:-

> "9. As far as conviction under Section 366 is concerned, we find that the evidence of the prosecutrix in this behalf is not conclusive. Her evidence does not indicate that the appellant had kidnapped the prosecutrix with the intention to marry her against her will or in order that she may be forced to illicit intercourse. These two vital ingredients for upholding conviction under Section 366 are not proved and, therefore, the conviction of the appellant under Section 366 cannot be sustained."
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> 10. Coming to the conviction under Section 363 IPC, in our opinion, having regard to the age of the prosecutrix on the date of the occurrence being below 18 years as deposed to by Dr Maya Shankar Thakur, (PW 5), it will have to be held that the prosecutrix was a minor on the date of the occurrence. If this be so, we will have to examine whether prosecutrix(PW 1) was taken away from lawful guardianship.prosecutrix (PW 1) has stated that the appellant had forced her to sit in the tempo and thereafter at the point of a dagger, made her keep quiet. She was very much scared and lost her senses for some time. In the meantime, the tempo reached Ramgarh. On this issue, the defence of the appellant is that she herself came and sat in the tempo but the fact remains that the appellant carried her to Ramgarh out of lawful guardianship. There is no serious dispute that the prosecutrix was taken in a tempo to Ramgarh by the appellant. If this be so, then the offence of kidnapping under Section 363 is clearly made out against the appellant for which he has been rightly convicted for the said offence. There is no error in the judgments of the courts below in convicting the appellant under Section 363 IPC."

23. From the statement of prosecution witnesses as discussed above it is proved that at the time of incident the age of prosecutrix was 17 years and she was minor. Appellant No. 1 Shakil Khan took the prosecutrix from Ram Mandir to Nahar Tola by the auto. It is not the case of appellant no. 1 Shakil that he had taken away the prosecutrix after obtaining due permission from her father or Guardian Ramchandra (PW-2). Police recovered the prosecutrix from the possession of appellant no.1 from the house of Beniram Rajak (PW-4). Prosecutrix (PW-1) has also not stated in her statement that she

went with appellant no.1 Shakil with the permission of her immediate guardian Ramchandra (PW-2) or permission from her parents. So the offence under section 363 of IPC is clearly proved against the appellant no.1 Shakil.

24. As regard to appellant No.2 Vahid Khan, only allegation against him is that he took the prosecutrix and appellant no.1 Shakil in his auto from Ram Mandir to Beniram Rajak's house at the behest of appellant no.1 Shakil, where he left them, but only on that basis, in the light of facts and circumstances of the instant case, it cannot be said that the appellant no.2 Vahid Khan was also involved in the crime. There is no evidence on record to show that appellant no.2 Vahid Khan knowingly that the prosecutrix was minor and was being wrongfully taken by the appellant no.1 Shakil against her will took her from one place to another. On the contrary, the trial court itself held that the prosecutrix was the consenting party and went with appellant No.1 Shakil on her own will. In these circumstances merely on the basis that appellant No.2 Vahid Khan who is the auto driver and runs the auto for his livelihood took prosecutrix and appellant no.1 Shakil from one place to another place by his auto, it cannot be said that appellant no.2 Vahid Khan was also involved in the crime. Learned trial court committed a mistake in finding appellant No.2 Vahid Khan guilty for the offence punishable under Sections 363/34, 366/34 of the IPC.

25. For the foregoing reasons, the appeal is partly allowed the conviction and sentence of appellant no.1 Shakil Khan under Sections 366/34 and 342 IPC and conviction and sentence of appellant no.2 Vahid Khan under Sections 363/34 and 366/34 recorded by the trial Court are quashed and set aside and the appellants are acquitted of the said offences. The bail bond of appellant No.2 Vahid Khan is also discharged. But the conviction of the appellant no.1 Shakil Khan for the offence punishable under Section 363/34 IPC is altered under Section 363 and upheld.

26. Learned Trial court has not awarded any sentence to appellant No.1 Shakil Khan under Section 363 of IPC instead learned trial Court sentenced

appellant no.1 Shakil for the offence punishable under section 366/34 of IPC which is the graver offence. While the offence under section 366 of IPC is not proved against appellant no.1 Shakil. On the point of sentence learned counsel for the appellants submitted that appellant No.1 Shakil is first offender. He has been facing trial since 1996. He has remained in custody during the trial of the case from 10/01/1996 to 09/07/1997 and after judgment also remained in jail during the pendency of this appeal from 10/07/1997 to 16/07/1997. There is no minimum sentence prescribed under section 363 of IPC. So appellant No.1 Shakil be sentenced for the period he has already undergone.

27. Looking to the facts and circumstances of the case and as to the fact that appellant No.1 Shakil is the first offender, who has been facing trial Since 1996 and has remained in custody during the trial of the case from 10/01/1996 to 09/07/1997 and even after judgment remained in jail during the pendency of this appeal from 10/07/1997 to 16/07/1997. There is no minimum sentence prescribed under Section 363 of IPC. Appellant No.1 Shakil Khan is sentenced to 1 Year 7 months R.I. and a fine of Rs.1,000/- for the offence punishable under Sections 363 of IPC. In default of fine, he shall undergo 6 months R.I. The period already undergone shall be set off from the period of substantive Jail sentence. If any fine amount has been deposited by appellant no.1 Shakil for the offences punishable under Section 366/34 of IPC, that fine amount shall be set off against this fine amount.

A copy of this order be sent to the Trial Court for information and necessary compliance along with the record.

Certified copy as per rules.

(Rajeev Kumar Dubey)
JUDGE

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