

<u>IN THE COURT OF JYOTI BHAGCHANDANI, JUDICIAL MAGISTRATE FIRST CLASS, COURT NO. IV, DISTRICT SHIMLA, HIMACHAL PRADESH.</u> Presided by: Ms. Jyoti Bhagchandani, Judicial Magistrate, First Class. Date of Judgment : 25.07.2026 Case No : 32/2005 FIR :106/2004 Police Station : Sadar, Shimla	
COMPLAINANT	State of Himachal Pradesh.
REPRESENTED BY	Ms. Maridula, Ld. APP.
ACCUSED	Mushtaq Ahmad, S/o Sh. Abdul Ahad Sher Googri, R/o near Masjid Sharee, Nawgam, Bona Gund, Anatnag, Verinaaag, Jammu & Kashmir.
REPRESENTED BY	Mrs. Pooja Sharma, Ld. Advocate

Date of Offence	01.08.2003
Date of FIR	21.04.2004
Date of Charge sheet	22.03.2003
Date of Framing of Charges	08.08.2005
Date of commencement of evidence	27.10.2005
Date on which judgment is reserved	25.07.2026.
Date of the judgment	25.07.2026.
Date of the sentencing order, if	NA

any.	
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Accused Details:-

Rank of the accused	NA
Name of the accused	Musthaq Ahmad, S/o Sh. Abdul Ahad Sher Googri,
Date of arrest	20.12.2004
Date of release on bail	30.12.2004
Offences charged with	363 IPC
Whether acquitted or convicted	Acquitted
Sentence imposed	NA
Period of detention undergone during trial for purpose of section 428 Cr.P.C	NA

Judgment:

The accused has been forwarded to face trial before this Court on allegations of committing offences punishable under Sections 363 of the Indian Penal Code, 1860 (henceforth 'IPC') as per the report submitted by the SHO, Police Station Sadar Shimla.

Prosecution case

2. Briefly stated the case of the prosecution is that the accused has allegedly enticed a minor namely Meera out of the keeping of lawful guardianship of her mother. An FIR was lodged

and investigation was conducted. After completion thereof and collection of evidence, charge sheet was filed by concerned SHO, P.S. Sadar, Shimla, H.P. under section 363 IPC. On finding prima facie material, this court took cognizance upon the police report under section 190(1)(b) of Code of Criminal Procedure, 1973 (henceforth, 'Cr.P.C') and issued process under section 204 Cr.P.C

3 After procuring the presence of the accused, copies of final report and other documents were supplied to him in compliance of Section 207 Cr.P.C. Thereafter, on finding sufficient grounds against the accused, charge for commission offences punishable under Sections 363 of IPC was framed against the accused to which he pleaded not guilty and claimed trial.

4. In order to prove the case, the State examined a total number of 13 witnesses which shall be discussed later on. In statement under section 313 CrPC, the accused person has denied every evidence put to him and has stated that he and Meera married in the year 2009, her name is now Mariam. They live together and that he has been falsely implicated.

5. I have gone through the statements of the witnesses as well as the documentary evidence placed on the record. The following points arise for determination in the present case.

1. Whether the prosecution has been able to prove beyond all reasonable doubts that on given date,

time, place and in given manner, the accused has committed offence punishable under Section 363 of IPC?

2. Final Order.

6. For the reasons to be recorded hereinafter while discussing the aforesaid points for determination, my findings on the aforesaid points are as under:

Point No. 1: No

Final order: The accused is ***acquitted*** of the offence under Section 363 of IPC as per operative part of the judgment.

Evidence on record

7. **PW-1** is the mother of victim who has stated that her daughter, Meera was in eighth standard, and on 01.08.2003, her daughter, Meera went to school as usual but did not return to home. She personally searched for her daughter with relatives and friends but nothing could be found out. She told, she reported the matter to police. However, the police told her that when any information will be received, only then they will investigate. After

12 to 13 months, one person came and told her that Meera was taken to Kashmir by the accused and that they have got married. She submitted written application, Ext. PW1/A, to police. She stated that Meera called PW2 and told her that she was in Kashmir, and that accused also called PW2 and told her that he has taken Meera and that he has realized his mistake.

8. During cross examination, she denied the suggestion that her daughter, Hemlata's matrimonial house is in Kashmir. Self stated that her matrimonial house is in Muzaffarnagar. She stated that her other daughter, Geeta told her that her matrimonial house is in Jammu. She has admitted that the complaint was lodged by her after one year of her missing. She explained that she believed that her daughter was dead. She showed her ignorance as to whom told her about the accused taking her daughter. She stated that she was alone when she submitted written complaint to police. She stated that police had already done the investigation and had written contact number of the accused on their own after doing investigation. She denied that she already knew about the accused and self stated that she got to know about the accused only after police complaint. She stated that her daughter refused to go back with her and that she was sent to Nari Niketan. Thereafter, she showed willingness to live with the accused. She denied the suggestion that since she used to trouble her daughter, her daughter left her company and started living with her sister.

9. **PW-2, Hemlata** is the sister of the victim who has testified that neighbors used to tell them that the accused had taken Meera with himself, but they did not believe such fact. She stated that around one year later, when one person told them that he had seen Meera with the accused in Kashmir. It was then that the matter was reported to police. She has stated that the accused called her and asked for forgiveness, and that Meera also called her and told her about her well-being, and also that she would return to Shimla. She stated that Meera was 12 years of age at the time of incident. In her cross examination, she stated that complaint Ext. PW1/A is written by her and admitted that she did not have personal information regarding the contents of the complaint Ext. PW1/A. She admitted that she had written the name and contact number details of the accused in the complaint. She had admitted that her elder daughter is married to a person of muslim religion and that her elder daughter lives in the Sate of Jammu and Kashmir. She stated that she had told the police about her sister, Meera having gone with her brother in law, Javed. She admitted that complaint was submitted after one year and also admitted that she did not complaint to police because they did not know the whereabouts of Meera and when they got to know the same, they submitted complaint. She denied the suggestion that the accused was not on visiting terms with her family. She stated that she was accompanied by her mother at the time of submitting complaint to police.

10. **PW-4, Meera** is the victim who stated on oath that in the year 2003, she studied in eighth class when she met the accused. She started liking him and told him to marry her. She stated that the accused did not agree but she forced him. He eventually agreed and they both got married to each other. She testified that she lived with her elder sister in Kashmir after getting married to the accused. She resided with the accused for two to three days and thereafter, the accused returned to Solan for work but she remained with her sister in Kashmir. She was telephonically informed about the arrest of the accused and then she returned Shimla. In her cross examination, she admitted that her family members used to trouble her. Her mother asked her to do immoral things which she did not comply. She admitted the suggestion that her elder sister's matrimonial house is in Kashmir and that her husband is of Muslim religion. She has admitted the suggestion that she went to Kashmir on her own will. She also accepted that she had informed her mother about her departure to Kashmir but no one from her family came to take her back. She stated that she had converted to Muslim religion in Kashmir and her mother also knew about the same. In the ends, she stated that accused never forced her and that she herself went to Kashmir with the accused.

11. On careful scrutiny of evidence, hearing the Ld. APP for the State and the Ld. defence counsel and perusing the record, the prosecution has failed to prove the allegations

resulting in culpability of the accused beyond reasonable doubt, and the reasons thereof shall be discussed in the reasoning.

Reasons for findings

12. In a criminal case, the burden of proof is upon the prosecution to prove its case beyond reasonable doubts before the accused is asked to put his defence.

13. The relevant provision defining the offence is section 361 IPC which is reproduced hereunder:

“361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

14. The ingredients that are required to be fulfilled by the prosecution are:

- (i) taking or enticing away a minor or a person of unsound mind;
- (ii) such minor must be under sixteen years of age, if a male, or under eighteen years of age if a female;
- (iii) the taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind;
- (iv) such taking or enticing must be without the consent of such guardian.

15. The taking need not be by force, actual or constructive. There must be a taking of the child out of the custody of the guardian. The Explanation to the section provides that the words 'lawful guardian' in the said section include any person lawfully entrusted with the care or custody of such minor or other person. The word 'take' means to cause to go, to escort or to get into possession. It implies want of wish and absence of desire of the person taken. There is, however, a distinction between taking and allowing a minor to accompany a person. The word 'entice' involves an idea of inducement or allurement by exciting hope or desire in the other.

16. In present case, the age of victim appears on basis of her testimony as well as Ext. PW3/A to be below eighteen years

in the year 2003. Moreover, she has herself stated that in the year 2003, she was in eight standard. In any case, it cannot be doubted that the victim was minor at the time of incident. What is required to be proved by the prosecution is that the accused had enticed or took the victim out of the keeping of her mother.

17. In order to appreciate the case of the prosecution, it becomes imperative to anatomize the testimony of the principle witness, who is also the victim in the present case i.e. PW4. If her testimony is perused, she has categorically stated that she was the one who asked the accused to marry her and he refused. Eventually, when she pushed, they got married. In the present case, there is no evidence whatsoever in support of the allegations that the accused enticed the victim to leave her maternal place and accompany him to go somewhere else. There is no word in her deposition which could lead this court to infer that she left the house at the instance of accused. It is found that the victim herself asked accused to marry her and go with her out of keeping of her mother. In other words, the insistence of marriage came from her side. The accused by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her guardian. The law did not cast upon the accused a duty of taking her back or even of telling her not to accompany him. Something more is to be shown in this case that the formation of intention to leave the house by victim was a result of any act of the accused in the form of inducement or persuasion.

Therefore, the role of the accused at best stated as a facilitator and cannot be held that he either took her or enticed her away from lawful guardianship of her mother. The facts of a celebrated judgment in **S. Varadarajan vs. State of Madras 1965 AIR 942** aptly apply to the facts of this case.

18. The FIR was registered after one year. There is no probable reason for delay in lodging FIR. PW1 explained that they believed that her daughter was dead and PW2 stated that they did not believe what the neighbors were telling them about accused having taken victim with him. Their testimony to such extent do not corroborate with each other. There is no satisfactory explanation regarding delay in lodging FIR.

19. Now, on the basis of foregoing discussion, this Court is of considered opinion that preponderance of probabilities indicate that the victim had voluntarily gone with the accused and in the process accused did not play an active role, therefore, the charge under section 363 IPC. cannot be set to have been proved against him.

20. The prosecution has miserably failed to fulfill the ingredients of the offence so charged and the whole case of the prosecution has fallen on the ground. As such, the charge under section 363 of IPC fail. Accordingly, point is answered in favour of the accused and against the prosecution.

FINAL ORDER:-

21. In view of my findings above, the accused is **acquitted** of the offence under Section 363 of IPC. His personal bonds stand canceled and surety(s) stand discharged. Case property, if any, is ordered to be disposed off as per rules after the expiry of the period for appeal and in case of appeal, be dealt with as per the orders of the learned Appellate Court. File after due completion be consigned to the record room.

Announced and signed in the open Court on this 25th day of July. This judgment contains 15 pages and each page has been signed by the undersigned.

(Jyoti Bhagchandani)
Judicial Magistrate First Class,
Court No. IV District Shimla, H.P.

AV//

A. PROSECUTION:

Rank	Name	Nature of evidence
PW1	Smt. Basanti Ram	Prosecution
PW2	Ms. Hem Lata	-do
PW3	Smt. Gaura Gautam	-do-
PW4	Ms. Meera	-do-
PW5	Sh. Abdul Rahman	-do-
PW6	Sh. Mehar Singh	-do-
PW7	ASI Nain Singh	-do-
PW9	HASI Kalam Singh No. 928	-do-
PW10	Inspector Vijay Sharma	-do-
PW11	HC Baldev Singh	-do-
PW12	ASI Rishi Raj	-do-
PW13	Smt. Dipti Singh	-do-

LIST OF PROSECUTION/ DEFENCE/ COURT EXHIBITS:
A. PROSECUTION:

Sr. No.	Exhibit Number	Description
1.	Ext.PW3/A	Certificate
2.	Ext.PW1/B	Seizure memo
3.	Ext.PW8/B	Marriage agreement
4.	Ext.PW8/C	Affidavit
5.	Ext.PW8/D	Seizure memo
6.	Ext.PW10/A	Written application
7.	Ext.PW8/K	FIR

8.	Ext. P1/PW10	Endorsement
9.	Ext.P1/PW11	Application form
10.	Ext.P2/PW11	Affidavit
11.	Ext.P1/PW14	Letter
12.	Ext. P2/PW14	Birth certificate
13	Ext. PW1/A	Application
14	Ext. PW1/B	Seizure memo

B. Defence Exhibits:

Description	Exhibit Number	Sr. No.
-NIL-	-NIL-	

C. Court Exhibits:

Description	Exhibit Number	Sr. No.
-NIL-	-NIL-	

D. Material Objects:

Description	Exhibit Number	Sr. No.
-NIL-	-NIL-	

(Jyoti Bhagchandani)
Judicial Magistrate First Class,
Court No. IV District Shimla, H.P.

PARTICULARS REGARDING ACCUSED AND SURETY TAKEN
UNDER SECTION 437-A Cr.P.C.

Sr. No.	Name of Accused	: Name and Address of Surety
<u>1</u>	Mushtaq Ahmad, S/o Sh. Abdul Ahad Sher Googri, R/o near Masjid Sharee, Nawgam, Bona Gund, Anatnag, Verinaaag, Jammu & Kashmir.	Sh. Roop Chand, S/o Sh. Narotam, R/o V.P.O. Chanawag, Sub Tehsil Dhami, District Shimla, H.P.

(Jyoti Bhagchandani)
Judicial Magistrate First Class,
Court No. IV District Shimla, H.P.