

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.401 OF 1996

- 1) Shri Vilas Arjun Patil
- 2) Parshuram Gauru Shelke
- 3) Jagannath Balu Cherkar
- 4) Anant Nathuram Thakur
- 5) Bhaskar Laxman Patil
- 6) Harish Chandra Rama Shelke
- 7) Harish Chandra Laxman Patil
all adults, residents of Andoshi
Taluka Alibag, District Raigad
- 8) Shri Raghunath Pandurang Pitkar
adult, r/at Chawl Naka, Taluka Alibag,
District Raigad
- 9) Ashok Gauru Dhumal
adult, r/at Andoshi, Tal.Alibag, Raigad

... Applicants

Vs.

The State of Maharashtra

... Respondent

Mr.S. Malik for the Appellants

Mr.Arfan Sait, APP, for Respondent – State

CORAM: **MRS.MRIDULA BHATKAR, J.**

JUDGMENT RESERVED ON: **APRIL 16, 2015**

JUDGMENT DELIVERED ON: **APRIL 29, 2015**

JUDGMENT:

1. This appeal is directed against the judgment and order of conviction dated 6.6.1996 passed by the II Additional Sessions Judge, Raigad, Alibaug. Accused No.9 is dead and no relatives of accused No.9 have

applied to contest the appeal for accused No.9. Hence, the appeal abates against the accused No.9.

Accused Nos.1, 4 to 7 and the deceased accused No.9 are convicted for the offences punishable under section 384 r/w section 34 of the Indian Penal Code and sentenced to suffer R.I. for one year and payment of fine of Rs.1,000/-, i/d to suffer R.I. for 1 month each.

Accused Nos.1 to 9 are held guilty for the offences punishable under sections 363 and 366 r/w 34 of the Indian Penal Code and they are sentenced to suffer R.I. for 2 years and pay fine of Rs.1,000/- each, i/d 2 months for both the charges.

Accused Nos.1 to 9 are also held guilty under section 5 of the Child Marriage (Restraint) Act, 1929 and sentenced to suffer simple imprisonment for 15 days and to pay fine of Rs.500 each, i/d S.I. for 3 days.

2. It is the case of the prosecution that the applicants/accused are the residents of village Andoni, Alibaug, District Raigad. In the year 1994, the victim Deepa Madhukar Patil, who was minor, that is, below 18 years, was friendly with Madhukar Patil, who was also a resident of the same village.

At that time, she was staying in Mumbai and doing household work and by doing household work, was earning her livelihood. She used to visit her village and meet Madhukar. It is the case of the prosecution that these villagers did not approve these meetings of Deepa and Madhukar. So they asked their mothers to get them married. Their respective mothers did not agree for the same, as they were minors. Accused Nos.1 to 9 took away Deepa from the lawful custody of her mother to compel her to marry Madhukar against her will. They all in furtherance of their common intention, pressurised Deepa and Madhukar, who were minors, and performed the child marriage. The accused threatened their respective mothers, that they would be removed from the village and then they would be induced to pay fine of Rs.750/- each and so extorted the said amount from them. The incident of child marriage has taken place on 9.1.1994. Pramila, the mother of Deepa, who was upset because of this marriage, gave complaint to the police, pursuant to which the offence was registered on 16.1.1994 at C.R. No.1 of 1994. The police recorded statements of Deepa, Madhukar, Pramila, the mother of Deepa and Anandibai, the mother of Madhukar and other witnesses. They also recovered the extorted amount of Rs.1,500/- at the instance of accused No.9 under Memorandum. After completion of the investigation, the Investigating Officer submitted the chargesheet against the accused Nos.1 to 9 in the Court of Chief Judicial Magistrate, Raigad, Alibag. The learned Magistrate

took cognisance of the offences and as the offence under section 366 of the Indian Penal Code was exclusively triable by the Sessions Court, the case of committed to the Sessions Court on 17.3.1994. Charge was framed. All the accused pleaded not guilty. So the trial commenced and it was concluded in conviction. Hence, this appeal.

3. The learned Counsel for the appellants submitted that the appellants are innocent. They have not committed any offence muchless the offences like under section 366 or section 384 of the Indian Penal Code. The learned Counsel made both legal and factual submissions. He challenged the jurisdiction of the Sessions Court on the ground that the appellants are charged under section 5 of the Child Marriage (Restraint) Act, 1929 as they performed child marriage. This is a special legislation with a special procedure laid down in it. Section 8 of the said Act states that the Judicial Magistrate First Class is a competent Court to take cognisance or to try any offence under the Act. When this is a special Act and the charges are under the general law i.e., Indian Penal Code, then the trial under the Special Act ought to have been conducted by the Judicial Magistrate and the Sessions Court is not a Court having jurisdiction under the statute. He argued that section 10 of the said Act pursuant to which enquiry is to be conducted by the Magistrate after receiving the complaint is also not followed and the case of the

prosecution is completely demolished on the point of jurisdiction for not following the procedure laid down under section 8 of the Act. He argued that the charge framed by the learned Sessions Judge is without jurisdiction and illegal. The charge and conviction under section 363 and 366 is contradictory. He argued that section 366 cannot stand because it speaks of kidnapping of woman to compel her to marry and section 363 is of kidnapping of a minor child. Thus, section 366 does not contemplate kidnapping of a minor. In order to attract the conviction under section 363 of the Indian Penal Code and under the Child Marriage (Restraint) Act, the basic requirement is to prove that the child was minor. The certificate of Deepa disclosing her age is wishy washy. The prosecution ought to have collected best evidence that is extract from the birth register.

4. In support of his submissions on the point of jurisdiction, he relied on the judgments in **State of Gujarat vs. Fulsinh Bimsinh & Ors**¹; **State vs. Mahesh**² and **Kiran Singh & Ors. vs. Chaman Paswan & Ors.**³ The learned Counsel also relied on the case of **A.R. Antulay vs. R.S. Nayak**⁴ on the point of trial by Special Court.

On the point of holding enquiry u/s 10, he relied on the **State of Gujarat vs. Patel Jivraj Khimji & Ors.**⁵. He submitted that there should

1 AIR 1971 Gujarat 1

2 1999(2) KLJ 402

3 AIR 1954 SC 340

4 AIR 1988 SC 531

5 1966 Guj. L.R. Vol.3 935

not be a joint trial of all these charges as section 366 is a different charge. He argued that it is a misjoinder of charges. He also relied on **Bamwani & anr. vs. State of Uttar Pradesh**⁶. The learned Counsel also submitted that on joinder of charges, section 218 of the Criminal Procedure Code is violated.

Then he further submitted that the age of the child is not proved. It is a requirement under the Act that the prosecution has to give a direct proof of the fact. In support of his submission, he relied on **Ramamurthy vs. State of Haryana**⁷.

5. On facts, the learned Counsel submitted that from the evidence of witnesses like Deepa, Pramila and Madhukar and Anandibai, it is seen that marriage was not performed. It was only an engagement and it was not a marriage. In Hindus, Saptapadi is an essential ritual. Without that, it cannot be said that the marriage has taken place. In support of his submission, he relied on **Emperor vs. Phulabhai Bhulabhai Joshi**⁸. Considering the evidence of Deepa, no force was administered on her compelling her to marry Madhukar. But she admitted in the cross examination that after the ceremony, she herself started residing with Madhukar. It shows that she had agreed to go with Madhukar. At that

6 AIR 1962 SC 1198

7 AIR 1970 SC 1029

8 AIR 1940 BOM 363

time of the evidence, she deposed that she was staying with Madhukar, since last 2 years. He argued that in the evidence of the Investigating Officer, the Investigating Officer has deposed that 3 days prior to the FIR, the Investigating Officer had received written complaint from the mother of Deepa i.e., Pramila and that complaint was not treated as FIR. On the point of charge of conviction for extortion, he argued that it is not proved as there was no fear in the mind of the witnesses Pramila and Deepa. He argued that there is contradiction in the evidence of Pramila and Deepa as Pramila had stated that a threat was given that they would be taken to police station and the money was demanded. Then, Deepa had stated that they would be sent for cutting stones and would be driven out of village. He further argued that PW6 and PW7, the panchas on the point of discovery at the instance of the accused No.9, have turned hostile and thus, the said evidence is not credible. He also pointed out the omissions in the evidence of Deepa on the point of performance of marriage. The learned Counsel submitted that in such circumstances, the applicants/accused are entitled to a clear acquittal from all the charges and the order of the trial Court is to be set aside.

6. Learned Prosecutor submitted that the objections on the jurisdiction of the Sessions Court of trying the offences under the Child Marriage Act, is raised for the first time in the appeal. This point was never raised before

the Sessions Judge. Therefore, the trial was conducted. The challenge was also not raised before the Magistrate when the case was committed to the Sessions Court. He submitted that under such circumstances, when the judgment and order of conviction is delivered, then, it cannot be set aside only on the ground that the case was tried before the Judge having no jurisdiction. He argued that if the offences under the Child Marriage Act are clubbed alongwith the offences under the Indian Penal Code, then, all the offences are to be tried in one trial by the Sessions Court and even if it is considered that the trial was without jurisdiction, it is an irregularity under section 465 of the Criminal Procedure Code, which is curable and hence, the trial conducted and judgment delivered by the Sessions Court is valid. In support of this submission, he relied on the judgment in the case of **State of Madhya Pradesh vs. Bhooraji & Ors**⁹.

The learned Prosecutor also relied on the decision of the Madras High Court in the reference case of **Abdur Rahiman Kutty & Ors**.¹⁰

7. On the point of setting aside the order of committal, he relied on **State vs. Chand Khan**¹¹; **State of U.P. vs. Khushi Ram**¹²; **Rattiram vs. State of M.P. Through Inspector of Police**¹³. He also relied on **CBI vs.**

9 (2001) 7 SCC 679

10 1937 Mad.L.J.R. 498

11 1956 Cr.L.J. 402 Vol. 57 CN 151

12 AIR 1960 SC 905

13 AIR 2012 SC 1485

V.K. Sehgal & anr¹⁴ on the point that raising plea of illegality of jurisdiction at a later stage is not maintainable.

On the point of interpretation of statutes, he relied on **State of Uttar Pradesh vs. Baluram Upadhyay**¹⁵.

8. The learned Prosecutor then argued that the evidence of the witnesses is reliable and creditworthy. The applicants/accused have acted like 'khap' panchayat. As marriage is entirely a personal issue, they should not have dictated their terms on Deepa and Madhukar and their parents. He argued that the appellant Madhukar and Deepa have right to choose their own partners. He submitted that the order passed by the learned District Judge is legal and conviction is to be maintained.

9. The first and the foremost objection raised by the learned Counsel for the appellants is on the point of jurisdiction of the Sessions Court in framing of combined charges and its competency to try offences under the Child Marriage (Restraint) Act. Therefore, this point is taken up first and the cases referred to by the learned Counsel for both the sides are also discussed herein.

14 (1999) 8 SCC 501

15 AIR 1961 SC 751(1)

10. In the case of **State of Gujarat vs. Fulsinh Bimsinh & Ors. (supra)**, the learned Single Judge of the Gujarat High Court had an occasion to deal with the jurisdiction of the Sessions Court to try the offences under sections 5, 6 and 8 of the Child Marriage Act. In the said case, it is held that there is clear and express prohibition by virtue of section 8 to try the case by the Sessions Court. Hence, the committal order passed by the learned Magistrate was quashed and set aside. In the said Reference matter, the learned Single Judge has referred to the observations in the case of **Bas Deo vs. Emperor (AIR 1945 ALL 340)** thus:

“There is, I think, a great deal of difference between a case in which the Sessions Court is enjoined in certain circumstances not to take cognizance of an offence and a case in which the Sessions Court is not a Court of “competent jurisdiction” in relation to that offence. A committal by a Magistrate to another Court does not confer jurisdiction on that other Court. Jurisdiction is given to Courts by the statutes which create them. Jurisdiction is the definition of their legal powers in contradistinction to the machinery and procedure in accordance with which those legal powers are to be exercised. Moreover, “cognizance” of an offence or a case is, I think, something quite different from jurisdiction to deal with that case. A Court may very well be a Court of competent jurisdiction in regard to any particular offence or any particular case without being in a position to take “cognizance” of it; and, to my mind, it is a confusion of ideas to treat competence to take cognizance of an offence as the same thing as competence in respect of jurisdiction in relation to that offence. The two things are, as I see it, quite different”.

It is to be noted that the accused in the above case of *State of Gujarat vs. Fulsinh Bimsinh & Ors. (supra)* were charged under sections 366, 376 and

511 of the Indian Penal Code and also under sections 5 and 6 of the Child Marriage Act. However, the learned Single judge had quashed the proceedings.

11. The facts of the case in *Fulsinh Bimsinh (supra)* and the facts of the case in hand are distinguishable. So the ratio laid down by the learned Single Judge of the Gujarat High Court is not of any help to the accused. A basic difference I see in the case of State of Gujarat (supra) and the present case is that the hon'ble Single Judge has had an opportunity to deal with the issue when it was referred by the Sessions Court when the Sessions Court did not commence the trial. So at the threshold, the Sessions Judge has referred it to the High Court. In the present case, the accused were tried before the Sessions Court and it concluded in conviction. At no point of time, at that stage before the Sessions Court, such objection on the point of jurisdiction under section 8 was raised. True, that such objection can be raised at any time by the party. However, while dealing with such objection, the Court has to take into account whether there is failure of justice if the case is tried by the Sessions Judge which is supposed to be tried by the learned Magistrate? What are the repercussions of the de novo trial? What prejudice is caused to the accused? Considering these aspects, the Court needs to take a judicious view. Under the Child Marriage Act, the learned Magistrate has

power to take cognisance and also try the said offences. In the present case, the cognisance is taken by the learned Magistrate. However, these offences are not tried by him and rightly so, because the offences have taken place in the same course of transaction and the Investigating Officer has filed a single composite chargesheet for all these offences. The acts committed are interlinked and which cannot be separated. Filing of two chargesheets by separating offences will amount to not only laborious but will cause hardships to both the accused and also prosecution witnesses. It will be time consuming when we want speedy trial and justice to both the complainants and the accused. If the offences would have been committed only under the special Act i.e., the Child Marriage Act, then the submissions of the learned Counsel would have been accepted that it should have been tried before the learned Magistrate only. The learned Magistrate while committing the matter has used his discretion and has observed that section 366 is triable by the Sessions Court and accordingly committed the case.

In **State vs. Mahesh (supra)**, the Division Bench of the Kerala High Court held that the offences are exclusively triable by the Magistrate of First Class and has taken a view that if the offences under the penal code have been clubbed alongwith the offences under the Act, separate charges have to be framed.

In the case of **Kiran Singh & Ors. (supra)**, while deciding the civil appeal involving the question of property, the hon'ble Supreme Court has observed that the decree passed by the Court without jurisdiction is a nullity and its invalidity can be set up at any stage and the defect of jurisdiction strikes at the very authority of the Court and it cannot be cured by consent of the parties. This ratio is not of the use to the defence as it is a civil matter and procedure laid down in the criminal law is altogether different.

In the landmark case of **A.R. Antulay (supra)**, it is held that when a Special Court is set up, jurisdiction lies with the said Court. The issue was under the Prevention of Corruption Act & the objection was taken in the beginning like the case of *State of Gujarat vs. Fulsinh Bimsinh (supra)*.

In **State vs. Chand Khan (supra)**, the Court dealt with the powers of the Sessions Court and the learned Magistrate's power of committal of cases. The Court took view that the Court of Sessions is empowered to try every offence and no interference is required though there is illegal committal.

In **State of U.P. vs. Khushi Ram (supra)**, it was a case under the Prevention of Food Adulteration Act, wherein the Magistrate though was competent to award a full sentence under the said Act, committed the case to the Sessions Court and the trial was concluded in conviction by

the Sessions Court. The Supreme Court held that it is not without jurisdiction. In the said case, charges were under the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 alongwith section 302 and other sections of the Indian Penal Code. So, it was committed to the Sessions Court. However, it is under the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 and the proceedings are to be conducted by the specified Court under the Act. The High Court held that because of a wrong committal, the entire trial held by the Court below shall stand quashed and the trial Court was directed to return chargesheet and directed the prosecution to resubmit to the Magistrate for further proceedings. The said order of the High Court was set aside by the Supreme Court.

In **Emperor vs. Phulabhai Bhulabhai Joshi (supra)**, it was held that the words 'performs' and 'conducts' and 'directs' are used in section 5 and, therefore, the Legislature indicated solemnisation of the marriage. So performance of sacramental and religious ceremony should be there.

In **Abdur Rahiman Kutty & Ors. (supra)**, the jurisdiction of the additional District Magistrate was challenged to try a case under the Child Marriage Act. Under section 8 of the Act, power is given to the District Magistrate and under section 10(2) of the Criminal Procedure Code, there is a delegation of the power by the District Magistrate in favour of the

Additional District Magistrate. Therefore, the Court has taken a view that though there is a specific mention in the child Marriage (Restrain) Act of the additional District Magistrate, the interpretation of the two statutes should be reconciled. Therefore, such delegation of powers is possible under section 10(2) of the Criminal Procedure Code and the jurisdiction of the Additional District Magistrate to try the cases under the Child Marriage (Restraint) Act, was valid.

12. I rely on the Supreme Court decision in the case of **State of M.P. vs. Bhooraji & Ors. (supra)**. The Supreme Court in the case of **State of M.P. vs. Bhooraji & Ors. (supra)**, set aside the judgment of the High Court and held that *de novo* trial should be a last resort and that too, only when such a Court becomes so desperately indispensable and extreme exigency of “failure of justice”. It held that the superior Court cannot afford to overlook the realities and the serious impact on the binding cases in trial Court which are crammed with dockets. It held thus:

“....To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.”

In the case of **Bhooraji & Ors. (supra)**, the Special Court had taken the cognisance without committal proceedings. But the said Court was competent to try. In the present case, cognisance was taken by the

Magistrate, rightly so. However, assuming the Sessions Court committed error in trying the said offences, it cannot vitiate the trial. The Supreme Court has held that not following the procedure is an irregularity and it is curable which is covered under section 465 of the Criminal Procedure Code. So also, it is observed that the objections should have been taken at the earliest stage and so the remedial measures are possible.

13. In the case of **CBI vs. V.K. Sehgal (supra)**, there was issue of obtaining statutory sanction under section 19 of the Prevention of Corruption Act. While trying a public servant, the Court held that conviction could not be altered or reversed by the appellate Court on the ground of even absence of sanction and muchless on the ground of incompetent sanction. Such plea raised at a later stage cannot sustain, if made for the first time in the appellate Court. Thus, considering the ratio laid down by the Supreme Court and various High Courts, I am of the view that the objection taken by the learned defence Counsel that the trial was vitiated for want of jurisdiction of the Sessions Court is not sustainable.

14. Under the Child Marriage (Restraint) Act, the trial is a summary trial and it is enacted with a view to prevent the child marriages by specifying the age i.e., 18 years for female and 21 years for male. (Earlier, it was known as Sarda Bill and the age was 18 for male and 14 for female.

Subsequently, by way of amendment there was increase in the minimum age). It is a social legislation and, therefore, under section 6, a parent or guardian concerned in the child marriage can be punished for maximum 3 months and fine and are also liable to fine. However the Act took into account erstwhile ground reality and a status of a woman parent in the decision making process of child marriage. Therefore, the proviso puts a bar that no woman shall be punishable with imprisonment. This shows that the Act is very gender friendly. Evidence in the case in hand reveals peculiar facts. Both the mothers of bride and bride groom have deposed that their respective children were minor and, therefore, they do not want to perform their marriage and they were not willing. They endorsed their protest to the decision of Panchayat. However, they were forced to pay a fine to such opposition. Both the children were taken away next day for the marriage. From the evidence of Deepa and Madhukar, it is gathered that the mothers did not remain present for their wedding which is in fact always a happy moment for a mother.

15. I have no doubt from the evidence tendered by the prosecution – oral as well as documentary – that Deepa was minor at the relevant time. Both of them did not want to marry each other. They were taken away from the lawful guardianship of their respective parents and the marriage was performed. The submissions of the learned Counsel for the appellants that the prosecution could not prove that there was no actual

marriage as per the Hindu rites cannot be accepted. So also, it was only an engagement i.e., Sakharpuda, are also not convincing. Evidence of both Madhukar and Deepa cannot be considered as inconsistent but they have given details as per their memory. She has stated that Madhukar was there. She was given a green saree; there was homa; they performed all rituals and it was before the priest and what is important is that after the marriage, she was sent to Madhukar's house and then she started residing there. They all stated that there was insistence of the accused persons to perform their marriage. The motive for doing such an act was that their friendship or meetings were not acceptable as per the social norms of the village. In ***Ramamurthy vs. State of Haryana (supra)***, the appellant was facing charges of kidnapping and rape. The prosecutrix gave her age as 17 years. Then, before the Chief Magistrate, she told her age as 15 years. The Supreme Court opined that it is not safe to rely on her statement about her age. In the present case, school leaving certificate of Deepa is produced. Moreover, her evidence is consistent about her age. Her date of birth is not disputed. She was 15 years and 3 months when her marriage was performed. The prosecution has proved beyond doubt that the girl was taken forcibly out of the lawful guardianship of her mother and the marriage was performed. Hence, the offence charged under the Child Marriage (Restraint) Act so also of kidnapping and extortion are proved. There is no legal sanction for

imposing the amount as fine for such an illegal act. Moreover, there was force, threat of punishment and therefore it amounts to extortion. Therefore, I do not want to disturb the finding of the trial Court.

16. However, on the point of quantum, in my considered view, the sentence imposed is to be reduced. Though it is a kidnapping and extortion, this is out of regressive, orthodox and social norms existing at that time in the village. The accused unfortunately believed that meeting by young persons of opposite sex and talking with each other or having an affair is immoral and harmful to the society and, therefore, they could not digest the friendship and openness between Deepa and Madhukar and compelled them to marry. Considering this motive behind the kidnapping and the marriage, the sentence of extortion and kidnapping is to be reduced. At the same time, the culprits, who committed such illegal act cannot go scot free. Every person has a right to choose his or her partner. In child marriage, on decision taken by Panchayat, such right to choose is violated, if it is performed. It is to be noted that the learned Prosecutor in the course of arguments submitted that Deepa and Madhukar both after the conclusion of this trial, got separated and married to some other person of their choice. It is also a matter of consideration that the incident of child marriage has taken place in the year 1994. The conviction is prior to 19 years and, therefore, the delay is one more factor, which is to be considered in such a case while imposing the sentence.

17. Hence, I am of the view that the following punishment will be appropriate which will meet the ends of justice:

i) The conviction of accused No.1 Vilas Arjun Patil, accused No.4 Anant Nathuram Thakur, accused No.5 Bhaskar Laxman Patil, accused No.6 Harishchandra Rama Shelke and accused No.7 Harishchandra Laxman Patil under section 384 r/w section 34 of the Indian Penal Code is hereby confirmed, however, the sentence is modified to R.I. for 15 days and fine of Rs.500/- each and i/d. 7 days.

ii) The conviction of accused No.1 to 9 under section 363 r/w section 34 of the Indian Penal Code is hereby confirmed, however, the sentence is modified to R.I. for one month and fine of Rs.1,000/- each and i/d. 15 days.

iii) The conviction of the accused Nos.1 to 9 under section 366 r/w section 34 of the Indian Penal Code is hereby confirmed, however, the sentence is modified to R.I. for one month and fine of Rs.1,000/- each and i/d. 15 days.

iv) The conviction of the accused Nos.1 to 9 under Child Marriage (Restraint) Act is confirmed, however, the sentence is modified to S.I. for 7 days and fine of Rs.500/- each and i/d, 3 days.

- v) All the sentences shall run concurrently.
- vi) The period undergone by the appellants is to be given set-off.
- vii) The bail bonds stand cancelled.
- viii) The appellants are directed to surrender before the additional Sessions Judge, Raigad on 11.5.2015.

18. Appeal is disposed of accordingly.

(MRS.MRIDULA BHATKAR, J.)