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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1139 OF 2013.

Suchitkumar Vijayshankar Bind	]	
age: 28 years, r/o Krishna chawl	]	... <u>Appellant</u>
Bajrang Society, Premnagar	]	Ori. Accused No.3
Goregaon (W) Mumbai	]	
	]	
at present lodged in Kolhapur Central Jail	]	

V/s.

The State of Maharashtra	]	
at the instance of Kandivali	]	 Respondent
Station, Mumbai.	]	

ALONGWITH
CRIMINAL APPEAL NO.184 OF 2014

Sameer @ Sani Usman Khan	]	
age: 25, occn. Immitation jewellery	]	... <u>Appellant</u>
r/o room No.2 Saiprasad Society,	]	Ori. Accused No.1
Bandar Pakhadi Link road, Kandivali (W)	]	
Mumbai	]	
	]	
at present lodged in Kolhapur Central Jail	]	

V/s.

The State of Maharashtra	]	
at the instance of Kandivali	]	 Respondent
Station, Mumbai.	]	

Mr. Santosh Deshpande, for Appellant in Criminal Appeal No.1139 of 2013.

Mrs. Sonia Miskin, appointed advocate for the appellant in Criminal Appeal No.184 of 2014

Mrs. G. P. Mulekar, A.P.P., for the Respondent-State in both Appeals.

**CORAM : SMT. V. K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

DATE : 4th AUGUST, 2015.

ORAL JUDGMENT : [Per: Dr. Shalini Phansalkar-Joshi, J.]

1. Both these appeals are arising out of judgment dated 24.6.2013, of Additional Sessions Judge, Mumbai, in Session Case No.133 of 2011. By the impugned judgment, appellant/original accused Nos 1 & 3 are convicted for the offences punishable under Sections 364-A and 344 read with Section 34 of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.5,000/- each, in default to suffer rigorous imprisonment for six months, on the first count and rigorous imprisonment for two years and to pay fine of Rs.1,000/- each, in default to suffer rigorous imprisonment for six months, on the second count.

2. Brief facts of the case can be stated as under :-

P.W.15 Master Karnit is the son of P.W.1 Anand Shaha and P.W.14 Alpa Shah. On 6.4.2011, as usual he went to play in the compound of the building at about 5.15 p.m. However, he did not return to the house till 7.30 p.m. Hence after taking his search, Missing Report was lodged with the police. During the course of enquiry of the said report, it was revealed that accused No.1 Sameer @ Sani was coming to the society for playing cricket with Karnit and his friends and a suspicion was expressed that he might have kidnapped Karnit. Hence on 7.4.2011, Karnit's father, P.W.1 Anand Shah lodged complaint against accused No.1 Sani. On his complaint (Exh.18), C.R.No.87 of 2011 came to be registered. The investigation of the said case was taken over by P.W.40 Police Inspector Salunke. While he was recording statement of witnesses and taking search of missing child, on 15.04.2011 P.W.1 Anand Shah informed him that he has received a phone call on his mobile No.9870026253 demanding amount of Rs.2 lacs as reward for tracing out the child. The location of the said mobile phone was attempted to be traced.

3. On the next day i.e. on 16.4.2011, another phone call

was received by the father of child P. W. 1 Anand Shah, informing that the child was with the said person and Anand Shah should make arrangement of Rs. 1 crore. P.W.1 Anand pleaded his inability to arrange the said amount. However, he confirmed the child with the said caller was his son. On 17.4.2011, and again on 18.4.2011, calls were received from different phone numbers and in pursuance thereto, investigation was made and ultimately kidnapped child was traced in the house of P.W.19 Ramshankar Bind, the brother-in-law of accused No. 3 Suchitkumar in village Sujaula in Uttarpradesh.

4. The child was brought from there by a team headed by P.W.22 API Bhoir to Mumbai alongwith accused No.3. The child was handed over to his parents and then in the custodial interrogation of accused No.3, the names of accused No.1 and acquitted accused Nos 2 and 4 were transpired. Hence after carrying out due investigation, the chargesheet came to be filed in the Court against four accused, for the offences punishable under Sections 364-A, 344 read with Section 34 and Section 120B of Indian penal Code.

5. On committal of the case to the Sessions Court, the trial Court framed charge against accused vide Exh.2. Accused pleaded not guilty and claimed trial.

6. In support of its case, the prosecution examined in all 40 witnesses and on appreciation of their evidence, trial Court was pleased to acquit accused Nos. 2 and 4 of all the charges levelled against them; whereas trial Court held accused Nos. 1 & 3 guilty, for the offences punishable under Sections 364-A and 344 r/w. 34 of IPC and convicted and sentenced them as aforesaid.

7. This judgment of the trial Court is challenged in these appeals, by learned counsel for appellants; whereas supported by learned APP.

8. According to learned counsel, for appellants, even if entire case as made out by the prosecution is held to be proved , it does not spell out necessary ingredients of the offence under Section 364-A of IPC. According to him, from the proved facts on record, at the most charge under Section 363 and 344 read with

34 IPC can be made out, but in the absence of any convincing and reliable evidence as to the demand of ransom and threats of death or hurt to the child kidnapped or conduct of accused giving rise to reasonable apprehension that the child may be put to death or hurt in order to compel his parents to pay ransom, the charge under Section 364-A is not at all attracted.

9. As against it, learned APP has submitted that evidence of P.W.1 Anand Shah, the father of kidnapped child goes to prove demand of ransom of Rs. one crore and hence it necessarily follows that if the demand was not satisfied, there was reasonable apprehension of danger to the life of child. According to learned APP, therefore, the trial Court has rightly convicted accused for the offences punishable under Sections 364-A and 344 read with 34 of IPC.

10. In our considered opinion, the evidence on record is more than sufficient to prove that P.W.15 child Karnit was kidnapped from the lawful custody of his parents and he was recovered from the house of P.W.19 Ramshankar Bind, the

brother-in-law of accused No.3 at village Sujaula, Uttar Pradesh. There is evidence of parents of the child, namely P.W.1 Anand Shah and P.W.14 Alpa Shah, to the effect that on 6.4.2011, child left the house at 5:15 p.m. for playing in the campus of the building, however, child did not return till 8.00 p.m. Hence immediately missing report was lodged.

11. The evidence of friends of Karnit, who were playing with him, namely P.W.10 Yash, P.W.11 Sohan and P.W. 12 Ansha, reveals that accused No.1 used to play with those children. He has made himself friendly with those children and since the date of incident, accused No.1 was also not traceable. There is further evidence of P.W. 8 Umesh Jha, the watchman of the society to that effect.

12. Most importantly, there is evidence of P.W.15 child Karnit. According to him also, while he used to play with his friends in the campus of the society, accused No.1 was coming there to watch them. On the date of incident, Accused No.1 had taken him in the auto rickshaw for drinking Pepsi. Thereafter he

was taken to the house of accused No.3 Suchitkumar Vijayshankar Bind. In the house of Suchitkumar, he stayed for some days. Thereafter he was brought to Mumbai by police. The evidence of child Karnit further proves that he was taken by accused Nos.1 and 3 in the taxi to some village.

13. There is also evidence of P.W.17 Shailesh Ghole, in whose vehicle child was taken from Nallasopara to Nashik. As per his evidence, he has received phone call from accused No.1 for booking of the taxi and in the said taxi, he has carried accused Nos. 1 and 3 and the child to Nashik Railway Station, for which he has received hire charges of Rs.3,100/-.

14. Further there is evidence of P.W.19 Ramshankar Bind, who is brother-in-law of accused No.3. He is resident of village Sujaula, post Handia, Dist. Allahabad, Uttar Pradesh. He has deposed that accused No.3 had come to his house alongwith a boy of five years age. On enquiry, accused No.3 told him that said boy was the son of his master and he had been there for a tour. As per his evidence, that boy stayed in his house with

Accused No.3 for about 8 days and then police came there and took that boy and Accused No.3 Suchitkumar with them to Mumbai.

15. Further there is evidence of P.W.22 API Bhoir, who on the receipt of information from his network of informants, had been to Uttar Pradesh and traced the child in the house of P.W. 19 Ramshankar Bind. He brought that boy and accused No.3 to Mumbai. There is corroborating evidence of P.W. 36 PSI Chaturvedi from Varanasi, Uttar Pradesh and P.W.39 PI Nigam of Handia Police Station, proving that they had extended assistance to P.W.22 API Bhoir, when they raided the house of P.W. 19 Ramshankar Bind, from whose house child and accused No.3 were brought to Mumbai.

16. There is also evidence of P.W.37 Anilkumar Yadav, the developer of Nallasopara Chawl, in which the child was kept for some days. In our considered opinion, this evidence is more than sufficient to prove that P.W.15 Karnit, a child of five years, was kidnapped from the custody and lawful guardianship of his

parents on 6th April, 2011 by accused No.1 and on 20.4.2011, he was found in the custody of accused No.3 in village Sujaula, Uttar Pradesh. Thus the child was with accused Nos 1 & 3 for more than 14 days. Even if the evidence relating to test identification parade of the accused conducted by P.W.7 Executive Magistrate- Sugandha Shetty, is excluded from consideration, in that case also the evidence of these witnesses sufficiently proves kidnapping of the child by accused Nos 1 & 3. Similarly, even if we disbelieve the evidence relating to call details record, proved through the evidence of various Nodal Officers from different Mobile Companies, for want of certificate under Section 65B of Evidence Act, it does not affect the credibility of the prosecution case. The evidence on record is more than sufficient to prove that accused Nos 1 and 3 in furtherance of their common intention had kidnapped the child Karnit from the lawful guardianship of his parents and wrongfully confined and detained him secretly.

17. However, the real question posed before us is whether from proved evidence, the ingredients of the offence under

Section 364-A of IPC are made out or not. In this respect, learned counsel for the appellant has placed reliance on the reported decision of our High Court in **Prashant Dnyanraj Thorat -vs- The State of Maharashtra**¹. In para No.7 of the said judgment, it has been held that :-

“7. In order to prove the guilt for offence under Section 364-A, what is required to be proved is not only the kidnapping or keeping a person in detention after kidnapping, but in addition it has to be proved that after kidnapping there were threats of death or hurt held out to the person kidnapped or conduct of the accused gives rise to a reasonable apprehension that the said person might be put to death or hurt, or hurt or death would be caused to such person in order to compel him to do or abstain from doing any act or to pay a ransom.”

18. Section 364-A IPC also clearly warrants that in addition to proving the factum of kidnapping and the demand of ransom, it is also necessary for the prosecution to prove that there was threatening to cause death or hurt to the person

¹ Manu/MH/0573/2005

kidnapped or by his conduct accused gave rise to a reasonable apprehension that such person may put to death or hurt or causes hurt or death to the person kidnapped, in order to compel him to do or abstain from doing any act or to pay a ransom. Mere demand of ransom is thus not sufficient, unless such demand is accompanied with threatening to cause death or hurt or conduct of accused giving reasonable apprehension of such death or hurt to person kidnapped for payment of ransom.

19. In the instant case, the evidence on record does not satisfy these two essential ingredients. The evidence of P.W.1 Anand Shah, the father of the kidnapped child at the most goes to prove that there was demand of ransom of Rs.one crore, but nowhere there is a whisper in his evidence that any threatening was given by the accused for compelling him to pay ransom amount. His evidence also nowhere reflects that he has any apprehension that if the amount was not paid, the life of child was in danger. It is pertinent to note that first demand was made on 15.4.2011 and child was safe in custody of accused till 20.4.2011. After 15.4.2011 also, similar further phone calls for

demand were made by the accused, but in none of such phone calls, threat was alleged to be given by the accused to father of the child. P. W. 1 Anand Shah has also not stated that from the conversation on the said phone calls any reasonable apprehension was created in his mind that accused may cause death or hurt to the child if ransom was not paid.

20. Most vital evidence on this aspect was that of the child Karnit. However, his evidence is also conspicuously silent about either accused No.1 or accused No.3 extending him any threat of death or causing actual hurt or creating reasonable apprehension in his mind that accused may cause hurt to him.

21. The evidence of P.W.17 Shailesh Ghole, in whose vehicle child was taken from Nallasopara to Nashik also, nowhere reveals that during said journey he had at any time noticed that child was threatened or any hurt was caused to the child. On the contrary his evidence proves that accused No.1 asked the child whether he wants cold-drink. His evidence also proves that child was calling accused No.1 as "Sameer Uncle" and he sat with

Sameer Uncle on the front seat.

22. The evidence of P.W.19 Ramshankar Bind in whose house at village Sujaula-Uttar Pradesh, child was kept also nowhere reveals that at any time child was threatened or there was any apprehension of danger to the life of child at the hands of accused No.3. The evidence of parents of child also nowhere proves that after child was rescued and was given in their custody, child has communicated to them that he was at any time tortured or threatened or hurt.

23. Thus, there is no iota of evidence on record to prove that either of the accused Nos 1 & 3 had threatened the child or by their conduct, they created reasonable apprehension in the mind of child or his parents that he may be put to death or hurt. Even the complaint which was lodged after the demand was made for ransom does not mention that any threat was given or there was apprehension in the mind of parents that child would be put to death or hurt.

24. We are, therefore, of the view that prosecution in this case has not made out essential ingredients of the offence punishable under Section 364-A of the Indian penal Code. The prosecution case, therefore, falls under Section 365 of the IPC. The maximum punishment provided for the offence punishable under Section 365 of IPC is imprisonment which may extend upto 7 years and fine. In this case, both the accused Nos 1 & 3 are in jail since the date of their arrest on 20th April, 2011. Therefore, they have already undergone imprisonment for almost four years and three months.

25. In our considered opinion, having regard to the nature of the offences proved against the Accused, submission of learned counsel for the appellants that punishment already undergone by the Accused be considered as sufficient for the offence punishable under Section 365 of IPC, deserved to be accepted as under.

- I. Both the Criminal Appeal Nos. 1139 of 2013 and 184 of 2014 are allowed partly.

II. The conviction of the appellants in both these appeals for offence punishable under Section 364-A r/w. 34 IPC is quashed and set aside and instead they are convicted for offence punishable under Section 365 read with 34 of IPC and sentenced to suffer the imprisonment which they have already undergone, maintaining the sentence of fine amount and default sentence, as imposed by the trial Court.

III. The conviction of Appellants for offence punishable under Section 344 read with Section 34 of IPC is also maintained with a direction that the substantive sentences for both the offences are to run concurrently.

IV. On payment of fine amount, if not paid already, Appellants, who are in Jail, be released forthwith, if not required in any other offence.

V. We quantify the fees to be paid to Mrs. Sonia Miskin, Appointed Advocate for the Appellant in Criminal Appeal No.184 of 2014, by the Legal Services Authority @ Rs.5,000/-.

[DR.SHALINI PHANSALKAR-JOSHI, J.]

[SMT. V.K.TAHILRAMANI, J.]