

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.118 OF 2011

1. Rajesh Babu Walundra
Aged 31 years, Occu. : Nil.
2. Sou.Gouri Rajesh Walundra,
Aged 24 years, Occu. Service,
Both R/o.Servant Quarter of
Girls Remand Home, Mundhwa,
Pune.
Both presently at Yerawada
Central Prison, Pune. ... **Appellant**

V/s.

The State of Maharashtra ... **Respondent**

**WITH
CRIMINAL APPEAL NO.105 OF 2011**

Sagar Ashok Avhale
Aged 19 years, Occu.Service,
R/o.433, Somwar Peth, Pune. ... **Appellant**

V/s.

The State of Maharashtra ... **Respondent**

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Mr.Vikas Shivarkar, Advocate for the Appellant
Mr.V.B.Konde-Deshmukh, APP for the Respondent/State.

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CORAM : ABHAY M. THIPSAY J.

DATED : 14th JANUARY 2016.

ORAL JUDGMENT :

1. These two appeals can be conveniently disposed of by this common Order, as the appellants in both these appeals were convicted on one and the same trial held by the Additional Sessions Judge, Pune. The appellants in Criminal Appeal No.118 of 2011 are husband and wife and were the accused Nos.1 and 3 respectively in the trial Court. The appellant in Criminal Appeal No.105 of 2011 was the accused No.2 before the trial Court. All the appellants were prosecuted on the allegations of having committed offences punishable under Section 363 of the Indian Penal Code (In short, 'IPC') read with Section 34 of the IPC, Section 366A read with Section 34 of the IPC, Section 506 Part II of the IPC simplicitor or Section 506 Part II read with Section 34 of the IPC. Additionally, the appellant No.1-Rajesh (Criminal Appeal No.118 of 2011) was also charged of having committed an offence punishable under Section 376 of the IPC, or in the alternative of an offence punishable under Section 376 read with Section 511 of the IPC, and the offence punishable under Section 323 of the IPC. The Additional Sessions Judge, after holding a trial, acquitted the appellants of all the offences with which they were charged, except the offence punishable under Section 363 of the IPC read with Section 34 of the IPC.

2. Being aggrieved by the conviction and sentences imposed upon them, the appellants have approached this Court by these two appeals.

3. No appeal from the acquittal of the appellants in respect of the other charges has been filed by the State.

4. I have heard Mr. Mr. Vikas Shivarkar, the learned advocate for the Appellant. I have heard Mr. V.B. Konde-Deshmukh, the learned APP for the Respondent/State. With their assistance, I have gone through the entire record of the case. I have carefully gone through the evidence adduced during the trial and the impugned Judgment.

5. It would be convenient to refer to the appellants as 'the accused'; and whenever separate reference to any particular appellant would be needed, it would be convenient to refer to that appellant by the number given to him – as an accused – in the trial Court.

6. The prosecution case, as put forth before the trial Court may, in brief, be stated thus :

The prosecutrix (name not mentioned to prevent disclosure of identity) aged about 17 years had been kept in the Girls' Remand Home, Mundhwa at Pune. She was earlier kept in a Remand Home at Mumbai and Observation Home at Nana Peth, Pune, and was transferred from there. She came to be kept in the Welfare Home as she is a victim in a rape case, the trial of which is pending.

One Smt.Vijaya Deshmukh (PW6) was the Superintendent of the said Welfare Home. The accused No.3 Smt.Gouri was working in the said Welfare Home as one of the Caretakers. The accused No.1-Rajesh is the husband of accused No.3-Gouri. Gouri had been provided with residential accommodation in the campus of the Remand Home itself. The accused No.2 Sagar is a friend of the accused No.1 Rajesh. As the prosecutrix was a victim in a case of rape, for her safety and security two women police constables were provided. One of them was Smt.Priti Dhumal (PW4).

On 21/03/2008 at about 3.15 a.m., Woman Police Constable Smt.Dhumal noticed that the prosecutrix had run away from the Remand Home by breaking the tin sheet roof of the bathroom and without informing anyone. She reported the matter to the Superintendent Smt.Vijaya Deshmukh (PW6), who lodged a missing report (Ex.70) with the police. At about 6.00 a.m. it was learnt that the prosecutrix was with the accused Nos.1 and 2; and was at Shirur in the house of brother of accused No.1 Rajesh. They were apprehended by the Shirur Police Station and were handed over to Hadapsar Police Station.

Thereafter, the First Information Report (Exh.69) was registered and investigation continued. Upon completion of investigation, the accused persons were prosecuted on the allegations of their having committed the aforesaid offences.

7. During the trial, the prosecution examined totally 11 witnesses. The first witness Yuraj Patil is a junior caretaker in the said Remand Home. He has acted as a panch in respect of the spot panchanama. The second witness Atmaram Sonawane is also a panch in respect of the seizure of vehicle and some other articles, such as Mobile Telephone and sim cards that was effected in the course of investigation. The relevance of the seizure of vehicle is that the vehicle was used by the accused Nos.1 and 2 allegedly for carrying the prosecutrix to Shirur. The fourth witness, as aforesaid, is the Woman Police Constable Priti Dhumal, who had lodged a missing report immediately on noticing that the prosecutrix was not in the Remand Home. The fifth witness is the prosecutrix herself. The sixth witness, as aforesaid, is Smt.Vijaya Deshmukh. The seventh witness Ganesh Katke, the then API, is the Investigating Officer. The eighth witness is Dr.Ajay Tawre, who had examined the prosecutrix and carried out ossification test. The ninth witness Sandhya Makashir is the Headmistress of the school where the prosecutrix was studying while at Ahmednagar. She has been examined to prove the date of birth of the prosecutrix. The eleventh and last witness Pandharinath Gadge is the police officer attached to Shirur Police Station, who apprehended the accused No.1 and also the prosecutrix.

8. Before proceeding to discuss the prosecution evidence, certain undisputed facts may be noted. Thus, that the prosecutrix

had been kept in the said *Welfare Home*, is not in dispute. That, she was kept there because she is a victim in a rape case which is pending, is also not in dispute. That on 23rd February 2008, the prosecutrix went missing from the Welfare Home, is also not in dispute. That, she escaped therefrom by breaking upon the tin-sheets on the top of the bathroom, is also not in dispute.

9. The evidence of Yuvraj Patil, Junior Caretaker shows that on 23th March 2008 while he was sleeping, a servant by name Salvi woke him up and informed him, by giving the name of the prosecutrix, that she had escaped by breaking the tin-sheet roof above the bathroom. That, he along with Salvi and WPC Priti Dhumal (PW 4) searched for the prosecutrix. She could not be found. Then, WPC Dhumal lodged a missing report with the police (Exh.30). According to Yuvraj Patil, WPC Priti Dhumal also told him that the prosecutrix was accompanied by accused no.1 Rajesh and accused no.2 Sagar, and that, all of them were at Shirur Police Station. The accused no.3 Gauri – wife of accused no.1 – was believed to have assisted the prosecutrix in escaping

from the Welfare Home. Yuvraj Patil speaks of having seen that the tin-sheets of the bathroom were broken and that there was a ladder which was seized by the police. Apparently, this ladder was used for coming down after breaking the roof of the bathroom.

10. Uttam Salve (PW 3), an employee working in the same institution corroborates the version of Yuvraj Patil. According to him, he had locked the main door of the building from inside and latched the middle room from outside. He stated that in the night at about 3.00 a.m, WPC Priti Dhumal (PW 4) told him that one girl had run away, and that he should open the door. He then saw that the tin-sheet roof was broken, and that there was a ladder from outside. That, Priti Dhumal (PW 4) confirmed about running away of the prosecutrix and then reported the matter to Mundhwa Police Station. He also speaks of receiving information in the morning, at about 6.00 a.m., that the prosecutrix, accused no.1 and accused no.2 were found in the Shirur Police Station.

11. According to Priti Dhumal (PW 4) on 20th March 2009, she was on night guard duty for the protection of the prosecutrix.

That, there was another lady constable deputed for duty at the institution, but on that day, she was not present. That, at about 3.00 a.m, she heard some noise from the side of bathroom, and hence, went there with one Prasan Behre. She found that the tin-sheet roof of the bathroom was broken. She suspected something wrong and returned to the hall. She then found that the prosecutrix had run away. She also found a ladder. She then went to Mundhwa Police Station and lodged a missing report (Exhibit-30).

12. The fifth witness is the prosecutrix herself and her evidence is most significant. She stated about being a victim in a case of an offence punishable under Section 376 of the IPC, and about she being kept in the said Welfare Home for her protection. She then said about having come in contact with accused no.3 Gauri. According to her, the accused no.3 Gauri had brought a sim card to her and had told her that she would take her (prosecutrix) out from there. That, the accused no.3 had told her on 20th March 2009 about the plan to escape and had told that the accused n.1

Rajesh and Sagar would break the tin-sheet at about 2.30 a.m and would carry her. She also stated about the tin-sheet being broken and the accused nos.1 and 2 putting a ladder inside the bathroom, of making her climb up by the ladder and then making her jump down from the tin-sheet roof of the bathroom. Her evidence shows that she, the accused no.1 and accused no.2, all went to Shirur on the motorcycle of the accused no.2. She then said that the accused no.1 tried to rape her, and she raised shouts whereupon the accused no.1 pointed out a knife towards her. She also said that the accused no.1 gave cigarette burns to her on her right cheek. That, thereafter, the accused no.1 took her to his brother Dinesh at Shirur and Dinesh made a telephone call to the police whereupon police, came and took all the three in their custody.

13. Vijaya Deshmukh (PW 6) Superintendent of Welfare Home has also said about the prosecutrix escaping from the institution in the early morning of 21st March 2008. According to her, she learnt this from WPC Dhumal (PW 4). She states that she

suspected the accused no.3 and told the police accordingly, whereafter the police made inquiries with the accused no.3. That, after the prosecutrix and the accused nos.1 and 2 were found, she lodged a First Information Report (Exhibit-69). Prior to that, she had lodged a missing report (Exhibit-70).

14. The evidence of Ganesh (PW 7) API at Mundhwa Police Station who is the Investigating Officer shows that he arrested the accused nos.1 and 2 after registering the offence/offences. In his cross-examination, it was revealed that during the period between 2005-2008, about 300 – 350 girls had run away from the said 'Welfare Home'.

15. Dr.Taware (PW 8) and Dr.Pote are the Doctors who had examined the prosecutrix. According to Dr.Taware, on clinical and radiological examination, the age of the prosecutrix was opined by him to be more than 15 years, but less than 17 years. Dr.Girish Pote opined that the prosecutrix was habituated to penetrative sexual vaginal inter-course, and also opined that there was

evidence of recent forceful attempt of sexual inter-course.

16. Sandhya Makashir (PW 10) is the Head Mistress of the school where the prosecutrix was also studying, and she has been examined to prove the date of birth of the prosecutrix.

17. The eleventh and the last witness is Pandharinath Ghuge API, who was, at the material time, attached to Shirur Police Station and who had handed over the custody of the accused no.1, accused no.2 and the prosecutrix to the Hadapsar Police Station.

18. On going through the entire evidence, it is clear that the prosecutrix herself had run away from the Welfare Home.

19. The prosecutrix was staying in one big hall along with other girls, and it would not be possible for anybody to take her away forcibly from there without the same being noticed by no one. It is evident that the prosecutrix, as preplanned, went to the bathroom and escaped from the tin sheet roof of the bathroom after the same had been broken upon. The evidence shows that the building of the Welfare Home has been properly secured and

that, security employees used to be kept inside the Welfare Home after closing the entry door at about 8.00 to 9.00 p.m. One Choukidar would be present on the entrance gate. Inside the campus of the Welfare Home, Lady Police Constable and employees of the Welfare Home used to be remain present. The compartment where the girls used to stay, used to be locked from inside. Under these circumstances, it is impossible to hold that the prosecutrix could be taken by anyone by applying force.

20. The question is whether the prosecutrix was enticed by the accused persons – or anybody else, for that matter – *to run away from the Welfare Home*. This seems to be the prosecution case. However, if the evidence of the prosecutrix is carefully examined, it is apparent that though the accused persons apparently had assisted her in running away from the Welfare Home, there was no question of the accused persons *enticing* her to run away therefrom.

21. It is significant that the accused persons are not shown to be having any motive for enticing the prosecutrix to leave the Welfare Home. Kidnapping is done with some object and for some motive. When the prosecutrix was not caused any hurt, when she was not raped and when she was simply taken by the accused

No.1 to his brother's house at Shirur and when the brother himself telephoned to the police, it is evident that the theory of the accused persons having *enticed* the prosecutrix to run away from the Welfare Home is not correct. Though, the prosecutrix in her evidence said that the accused No.2-Gouri told her that she would take her (the prosecutrix) from there (the Welfare Home), it is obvious that the accused No.2-Gouri could not have abruptly said so, unless the prosecutrix had informed her of her desire to get out of the Welfare Home. That the prosecutrix herself wanted to run away, and that she could not be said to have been taken away or enticed by the accused persons out of the keeping of her lawful guardian, is further clear from the fact that after going out of the premises by breaking open the tin sheet roof, the prosecutrix and the accused Nos.1 and 3 went on a motorcycle, which was driven by the prosecutrix herself. The prosecutrix in the cross-examination admitted having said so, even before the Superintendent Deshmukh (PW6) and also the police, and the factual correctness of this statement was not disputed by her.

22. At this stage, it will not be out of place to mention the points for determination as formed by the the Additional Sessions Judge and his findings thereon.

Sr.No.	Points	Findings
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1]	Does prosecution prove that on 31/3/2008 accused either individually or in furtherance of their common intention kidnapped the prosecutrix from the lawful guardianship of complainant ?	In Affirmative.
2]	Does prosecution prove that accused induced the prosecutrix to be rescued from the Girls' Remand Home either personally or with common intention ?	In Negative.
3]	Does prosecution prove that accused no.1 Rajesh Walundra committed rape on the prosecutrix ?	In Negative.
4]	Does prosecution prove that accused No.1 Rajesh attempted to commit rape on the prosecutrix ?	In Negative.
5]	Does prosecution prove that accused No.1 Rajesh voluntarily caused hurt to the prosecutrix ?	In Negative.
6]	Does prosecution prove that accused either individually or in furtherance of their common intention threatened the prosecutrix with her life ?	In Negative.
7]	What order ?	As per final order.

23. It is evident that the prosecutrix is not treated as reliable witness by the Additional Sessions Judge and rightly so, in my opinion. The prosecutrix has been disbelieved with respect to her allegation regarding rape and causing hurt to her, of her being

threatened by the accused persons, etc., This appreciation of evidence of the prosecutrix, as done by the the Additional Sessions Judge, suffers from no infirmities. The negative findings recorded by the the Additional Sessions Judge on these aspects are proper and legal.

24. When such is the situation, that the prosecutrix was enticed by the accused No.3 Gouri and the other accused to run away from the Welfare Home, cannot be easily accepted. In my opinion, it has to be accepted that the prosecutrix wanted to run away from the Welfare Home.

25. It, however, cannot be overlooked that the prosecutrix herself and on her own, without the assistance of anyone, could not have run away. It is evident that the accused Nos.1 and 3 have assisted her in escaping from the Welfare Home. The act of breaking the tin sheet roof, getting ladder for climbing up, etc. could not have been done by the prosecutrix without the assistance of someone else from outside. Though the learned counsel for the accused persons submitted that this assistance could not to said to have been given by the accused persons, and that there were many other persons, who could have assisted her in escaping, I am not able to agree with this contention. It is because there is clear and satisfactory evidence – which, as a matter of fact, is not challenged – to the effect that the prosecutrix

was found in the company of accused Nos.1 and 3 in the house of the brother of the accused No.1 at Shirur. The accused Nos.1 and 3 reside in the same premises – accused No.3 being an employee of the Welfare Home – and from the evidence that the prosecutrix was assisted in escaping from the Welfare Home by the accused persons, is clearly indicated.

26. The question is whether the act of the accused persons in assisting the prosecutrix in running away from the Welfare Home would amount to an offence of 'kidnapping' as defined under Section 361 of the Indian Penal Code. The answer has to be in the negative. It is not necessary to enter into an elaborate discussion of all the finer aspects of the matter; and it is sufficient to say that the element of enticing being missing, the accused persons cannot be said to have been *kidnapped the prosecutrix from the 'lawful guardianship' of the Superintendent of the Welfare Home.*

27. Certainly, the act of assisting the prosecutrix in escaping from the Welfare Home was a wrongful act. However, there are no ingredients of an offence of kidnapping in the matter. But the facts of the case would attract the penal provisions of Section 225B of the Indian Penal Code (In short, 'the IPC'). The prosecutrix was lawfully detained in the Welfare Home and the provisions of Section 224 not being applicable to her case, (as she

was detained not in connection with any offence allegedly committed by her, but by reason of her being a victim of an offence) the case was squarely covered by penal provision of Section 225B of the IPC. By assisting the prosecutrix to run away, the accused persons have aided and abetted the commission of an offence punishable under Section 225 of the IPC. The accused persons were, therefore, liable to be prosecuted on the allegations of having committed an offence punishable under Section 225B of the IPC read with Section 109 of the IPC and/or Section 114 of the IPC. However, no such accusation against the accused persons was levelled in the charge-sheet, and the Court also did not frame any such charge against them.

28. I have considered whether the accused persons can now be held guilty of an offence punishable under Section 225B of the IPC read with Section 109 of the IPC and/or 114 of the IPC without there being a charge in respect of the said offence against them during the trial, by resorting to the provisions of Section 222 of the Code of Criminal Procedure. Section 222 of the Code provides that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it. The question that then arises is whether the offence punishable

under Section 225B of the IPC can be said to be a minor offence, when compared with the offence punishable under Section 363 of the IPC. Again the answer has to be in the negative. The offence of kidnapping defined in Section 361 of the IPC is punishable with imprisonment up to seven (7) years as provided in Section 363 of the IPC. For the offence punishable under Section 225B of the IPC, the maximum punishment that can be awarded is imprisonment for a period of six months, but that would not make it a lesser or minor offence. The test is not the gravity of the punishment. The test is that whether the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence. The ingredients of the offence punishable under Sections 363 of the IPC and 225B of the IPC are materially different. As such, though it appears that the accused persons had aided and abetted the commission of an offence punishable under Section 225B of the IPC by the prosecutrix, they cannot be convicted of the said offence when during the trial they were not charged of that offence.

29. This brings me to the last question whether the accused should now be ordered to be retried on the charge of having committed an offence punishable under Section 225B of the IPC read with Section 109 of the IPC and/or Section 114 of the IPC. This also needs to be answered in the negative. If the charge of an offence punishable under Section 225B of the IPC was to be

levelled, it ought to have been levelled against the prosecutrix. Further, there was reasonable basis for believing that there might be others, who had also aided and abetted the said offence, but since instead of that charge, the charge of kidnapping was levelled, no proper investigation in that direction was done. The ingredients of an offence punishable under Section 225B IPC being different from the offence punishable under Section 363 of the IPC, the investigation into that offence, if undertaken, would have been in a different direction. *It cannot be ignored that running of girls from the said Welfare Home was a regular affair and that about 300 to 350 girls had escaped from the said Welfare Home within a span of three years.* The persons from the said institution, therefore, would naturally be interested in showing the case to be of 'kidnapping' rather than of an inmate escaping from the Welfare Home, and thereby, avoiding investigation into certain crucial and relevant aspects. It would not be just and proper to have the appellants retried with respect to the offence of abetting an offence punishable under Section 225B of the IPC, when the principal offender is not charged, and when the possibility of there being other abettors also, is apparent. Moreover, the maximum punishment that has been provided for the offence punishable under Section 225B of the IPC is of imprisonment for a period of six months together with fine. The appellants have already remained in the custody for a period of more than six months. Under these circumstances, directing the accused persons to be

now tried on the charge of an offence punishable under Section 225B of the IPC read with Section 109 of the IPC and/or Section 114 of the IPC, would not be proper from the point of view of good conscience and justice.

30. Clearly, the appellants cannot be said to have committed an offence punishable under Section 363 of the IPC. The appreciation of evidence as done by the Additional Sessions Judge was not proper. The Additional Sessions Judge was also in error for not comprehending the distinction between the offence punishable under Section 363 of the IPC and Section 225B of the IPC and in not realising that the facts alleged and proved amounted not to an offence punishable under Section 363 of the IPC, but to an offence punishable under Section 225B of the IPC read with Section 109 of the IPC and/or Section 114 of the IPC.

31. The order of convicting the appellants of an offence punishable under Section 363 of the IPC and the sentences imposed upon them therefor, not being in accordance with law, are liable to be set aside.

32. The appeals are allowed.

The impugned Judgment and Order is set aside.

The appellants are acquitted.

Their bail bonds are discharged.

Fine, if paid, be refunded to them respectively.

(ABHAY M. THIPSAY J.)