

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 717 OF 2015

Bapu @ Suraj @ Pandurang S/o Rama
Lokhande, Age Major, Occu.: Nil.,
Convict No. 16787, confined in
Yervada Central Prison, Pune.

.. Appellant
(Original Accused)

Versus

The State of Maharashtra
Through P.S.I. Jamkhed Police Station,
District Ahmednagar

.. Respondent
(Original complainant)

...

Mr. S.A. Dhengle, Advocate for appellant - Appointed
Mr. S. P. Sonpawale, APP for respondent- State.

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CORAM : K.K. SONAWANE, J.

RESERVED ON : 2nd FEBRUARY, 2018.

DELIVERED ON : 3rd MAY, 2018.

JUDGMENT :-

1. This is an appeal preferred by the appellant-original accused under section 374(2) of the Criminal Procedure Code (for short "Cr.P.C.") against the impugned judgment and order of conviction for the offence punishable under sections 363, 366 and 376 of the Indian Penal Code (for short "IPC") and resultant sentence imposed by the learned Additional Sessions Judge-4, Ahmednagar in Sessions Case No. 379 of of 2012 dated 22-01-2014.

2. Factual matrix of the matter in nutshell is that-

The victim – prosecutrix – a 14 years old minor girl, was the daughter of first informant -Sunita W/o Sonaji Sathe, resident of village

Javalke Satwai, Ta. Jamkhed, District Ahmednagar. The first informant Sunita was residing with her husband Sonaji, father-in-law Anna Sathe and minor daughter i.e. prosecutrix. They were eking livelihood by doing agricultural labour work. A parental home of the complainant - Sunita was at Kandhar. Her brother Hanumant Ramchandra Awaghade was doing business of hotel by name "Shivkrupa Hotel" in Kandhar town. During the school holidays the victim - prosecutrix used to visit to the house of maternal uncle Hanumant Awaghade at Kandhar. The accused Bapu Ramchandra Lokhande was employed as waiter in the hotel of maternal uncle - Hanumant. According to prosecution, in the month of May, 2012, victim - prosecutrix had been to the house of maternal uncle-Hanumant Awghade for enjoying the summer vacation. She stayed at the house of maternal uncle for some days and meanwhile she came in contact with the accused. Thereafter, victim -prosecutrix returned to the parental home at Javalke Satwai.

. It has been alleged that on 30-07-2012, in the noon hours, the victim - prosecutrix was alone at home. The accused visited to the house of victim - prosecutrix at village Javalke Satwai. Accused started cajoling the prosecutrix saying that he has an ten acres agricultural land and a house of three/four rooms for residence. He wanted to perform marriage with her. He asked prosecutrix to elope with him to get married. But, meantime, the mother and grandfather of victim- prosecutrix returned to home. They saw accused chitchatting with the victim - prosecutrix. The mother suspected about the foul play, and therefore, she attempted to catch hold the accused, but her efforts found unavailing. The appellant-accused Bapu forced the victim

prosecutrix to accompany with him. Accordingly, accused taken away and kidnapped the victim - prosecutrix from the custody of her parents. The information about kidnapping of victim - prosecutrix was given to the relatives. They made endeavour to search the prosecutrix but did not evoke result. Eventually, mother Sunita approached to the Jamked Police Station and filed the complaint about kidnapping of her minor daughter – victim - prosecutrix by the accused.

3. Pursuant to FIR, offence bearing crime No. 105 of 2012 came to be registered under sections 363, 366 of IPC and set the penal law in motion. Police had taken massive search for the accused and victim – prosecutrix. At last, Police succeeded to trace out the accused and prosecutrix from the rental premises located in Bhimnagar area, Daund District Pune. The Investigating Officer recorded statements of witnesses acquainted with facts of the case. The victim - prosecutrix and accused-Bapu were referred to medical examination. The prosecutrix blamed the accused for physical relations with her under the pretext to perform marriage. Accordingly, Investigating Officer added section 376 of the IPC against the accused. After completion of procedural formalities the Investigating Officer preferred charge-sheet against the accused before the court of Judicial Magistrate, First Class, Jamkhed.

4. The offences levelled against the accused were triable by the Court of Sessions, therefore, the learned Magistrate wisely transmitted the proceeding to the concerned Sessions Court for trial of the accused within purview of law. The Additional Sessions Judge, framed the

charge against the accused. He pleaded not guilty and claimed for trial. In order to bring home guilt of the accused, prosecution examined in all 13 witnesses in this case. Learned Sessions Judge recorded statement of the accused prescribed under section 313(1)(b) of Cr.P.C. After due consideration of entire oral and circumstantial evidence on record, the trial Court arrived at the conclusion that appellant/accused Bapu is guilty for the offence punishable under sections 363, 366 and 376 of IPC and imposed the resultant sentence of rigorous imprisonment for three years and to pay a fine of Rs. 2000/- and in default to suffer rigorous imprisonment for six months for each of the offence punishable under sections 363 and 366 of IPC. The accused was further directed to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 5000/- in default to suffer rigorous imprisonment for one year for the offence punishable under section 376 of IPC.

5. The appellant-accused by invoking remedy under section 374 (2) of Cr.P.C. preferred the present appeal agitating the validity, propriety and legality of the impugned judgment and order of conviction as well as resultant sentence imposed by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No. 379 of 2012.

6. The learned counsel for the appellant-accused vehemently submitted that the learned trial Court failed to appreciate oral and circumstantial evidence on record in its proper perspective and committed error for adverse inference against the accused, in regard to charges pitted against him. Learned counsel submits that the prosecutrix had an age of understanding at the time of commission of

crime. She voluntarily remained in company of the accused. She was consenting party for the entire affairs. There was no force or threats on the part of appellant/accused. According to learned counsel, there are material discrepancies in the evidence of prosecution witnesses. There is no concrete evidence in regard to age of the prosecutrix. The evidence of P.W. 5-Shri Sadashiv Nagargoje does not support the prosecution case. His evidence is not admissible to prove the School Leaving Certificate issued by the authority. Therefore, it cannot be held that prosecutrix -victim was the minor girl of 14 years old at the time of incident. Learned counsel for appellant explained the circumstances on record in detail. He further submits that the accused was 23 years old youngster at the time of incident. In view of the nature of subject-matter, he urged to exonerate the accused from charges pitted against him.

7. Learned APP appearing for respondent-state raised objection to the contentions propounded on behalf of appellant/accused and submits that the evidence on record squarely proved the circumstances that the victim was a minor girl below the age of 18 years at the time of commission of crime. She was kidnapped by the accused from her lawful guardianship. Thereafter, the accused took minor victim - prosecutrix to Daund District Pune. Both stayed in the rental premises of landlady P.W.13-Indubai Salve. It has been alleged that during aforesaid period accused maintained physical relations with minor victim - prosecutrix under the pretext of getting married. According to learned APP, the findings of learned trial Court does not warrant any interference.

8. The provisions of section 363 of the IPC contemplates punishment for the offence of kidnapping to any person from India or from lawful guardianship, which is more particularly defined in section 361 of the IPC. Hence, it is imperative to read section 363 with section 361 of the IPC, which is reproduced as under:

“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 or 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”.

9. It is evident from the aforesaid provision of section 361 of IPC that, in order to prove charges under section 361 of IPC, it is essential for the prosecution to establish that female should be under the age of 18 years and is taken away, out of the keeping of lawful guardianship without their consent. In the instant case, the evidence of P.W.1- victim - prosecutrix is available on record. She categorically stated that the accused taken her away, out of keeping of her lawful guardianship to Daund, District Pune and kept her in rental premises owed by the P.W.13- Indubai Salve. P.W- Sunita Sathe, mother and P.W. 3 Anna

Sathe, grandfather of the victim - prosecutrix received an opportunity to watch the spectacle, when the accused attempted to take away the minor victim -prosecutrix forcibly from their lawful custody. P.W.4- Hanumant Awghade, maternal uncle of the victim - prosecutrix, deposed about the efforts made to trace out the whereabouts of prosecutrix and eventually received the clue that accused was residing in Bhimnagar locality at Daund with victim - prosecutrix. P.W. 4- Hanumant Awghade accompanied with the police personnel of Jamkhed Police Station visited to the Bhimnagar locality and picked up the accused for further investigation. The police also recovered the victim - prosecutrix from the custody of accused for further process. P.W.13 - Indubai Salve, landlady, stated about the stay of accused with victim - prosecutrix in her premises on rent basis located in Bhimnagar area, Daund, District Pune. The evidence of all these prosecution witness categorically established that the victim - prosecutrix was taken away by the accused from lawful custody of her parents and that too without their consent. Therefore, there is no impediment to draw inference that prosecution has succeed to prove that the accused kidnapped the victim - prosecutrix from her lawful guardianship without their consent.

10. As referred above, in order to bring home guilt of the accused within ambit of section 361 of the IPC, it was incumbent for the prosecution to prove that the victim - prosecutrix was below the age of 18 years at the time of commission of crime. The prosecution primarily relied upon the oral version of victim - prosecutrix herself as well as her mother and grandfather. P.W.4 - maternal uncle - Hanumant Awghade stated that victim - prosecutrix was 14 years old at the time

of commission of crime and taking education in 9th standard in the school. Admittedly, version of victim – prosecutrix and her mother as well as grandfather reflects that victim – prosecutrix was school going girl taking education in 9th standard at the time of alleged incident. The prosecution witnesses categorically stated that when victim – prosecutrix was admitted in the school, at that time she was 6 years old and since beginning she passed the examination on each and every year and get promoted to higher standard in the school. According to prosecution, at the time of incident she was 14 years old.

11. In addition to oral evidence of mother and relatives of the prosecutrix, prosecution adduced evidence of P.W.5-Sadashiv Nagargoje, Assistant Teacher of the School. He produced School Leaving Certificate of victim prosecutrix (Exhibit-23) on record to show the date of birth of prosecutrix was 30-04-1998. It is the rule of law that School Leaving Certificate issued by the School authority duly signed by Headmaster is admissible in evidence as prescribed under section 35 of the Evidence Act to prove the date of birth of victim-prosecutrix. No doubt, such date of births are recorded in the school register by the authority in discharge of their public duty, and therefore, there is no impediment to appreciate the evidence of School Leaving Certificate to ascertain the date of birth of victim – prosecutrix, which is the pivotal issue for consideration in this matter. Albeit, the entry in school register would not be conclusive proof, but it has evidential value subject to corroboration from other sort of oral evidence.

12. In the matter in hand, the mother P.W. 2 Sunita, grandfather P.W. 3 Anna, and maternal uncle P.W. 4 Hanumant - of the victim prosecutrix, all categorically stated that the prosecutrix was the school going minor girl of 14 years old at the time of alleged incident. The School Leaving Certificate (Exhibit-23) demonstrate that victim - prosecutrix was 14 years and 03 months old at the time of alleged incident of kidnapping. These circumstances are suggestive of factual aspect that the victim - prosecutrix was a minor girl of 14 years and 03 months old at the time of occurrence of the incident. Therefore, when the victim - prosecutrix was below the age of 18 years at the relevant time, the issue of her consent became totally irrelevant and not considerable at all.

13. In view of oral testimonies of the prosecutrix herself, her mother P.W.2 Sunita, first informant, grandfather P.W. 3 Anna and maternal uncle P.W.4 Hanumat, it is evident that appellant-accused kidnapped the minor victim – prosecutrix from the lawful custody of her parents without their consent. The version of prosecution witnesses strengthen by the School Leaving Certificate, which would indicate that the date of birth of victim - prosecutrix was 30-04-1998. Obviously, the victim – prosecutrix was a minor girl below the age of 18 years at the time of alleged incident. In such circumstances, adverse inference drawn by the learned trial Court against accused for commission of offence under section 361 read with section 363 of the IPC does appear to be just, proper and reasonable one.

14. The victim – prosecutrix in her deposition before the learned trial

Court blamed the appellant-accused in explicit manner that, initially, the appellant-accused attempted to cajole her by saying that he has an agricultural land and a house of three/four rooms for residence. He expressed desire to perform marriage with her. The appellant-accused allured the victim – prosecutrix to accompany with him to get married. These factual scenario candidly proved that the appellant-accused was guilty of the offence punishable under section 366 of the IPC.

15. Now, turning to allegation of sexual assault under section 376 of the IPC, it would essential to take into consideration that the prosecution has already proved the circumstances that appellant-accused kidnapped the victim – prosecutrix with intention or knowledge that she may be forced or seduced to illicit intercourse. Therefore, the appellant-accused was held guilty for the offence punishable under sections 363 and 366 of the IPC. In addition, victim – prosecutrix cast allegations that since date of incident occurred on 30-07-2012, appellant-accused under guise to perform marriage maintained physical relations with her. It is not in dispute that the victim – prosecutrix came to be recovered from the custody of appellant-accused on 15-09-2012 by the relatives with the help of Police of Jamkhed Police Station. The alleged incident of abduction of victim-prosecutrix by accused occurred on 30-07-2012. It does appear that victim – prosecutrix was in the custody of accused for about one and half month of the incident. The prosecutrix blamed the appellant-accused for physical relations during her stay with him for about one and half months in the rented premises of P.W. 13 Indubai Salve at Daund, District Pune. The appellant-accused ventured to maintain

physical relations with minor victim – prosecutrix under the pretext to get married. These circumstances establish that the appellant-accused committed illegal act to ravish the victim – prosecutrix which is punishable under section 376 of IPC.

16. The prosecution also examined P.W.10 Dr. Kharade to buttress the circumstance of sexual assault with minor victim – prosecutrix. P.W. 10-Dr. Kharade clinically examined both victim - prosecutrix and accused on 16-09-2012 as referred by police of Jamkhed Police Station. He issued the certificates to that effect at (Exhibits-45 and 46) on record. P.W.10-Dr. Kharade opined that the victim- prosecutrix was capable to have physical relation and she was found habituated to sexual intercourse. The medical evidence adduced on record fortify the version of victim - prosecutrix that accused maintained physical relations with her when she was accompanied with him in the rental premises belonging to P.W.13 Indubai located in Daund town District Pune. The prosecution also proved that the victim - prosecutrix was 14 years and 03 months old minor girl at the time of alleged offence. Therefore, as she was found below stipulated age of 16 years as contemplated under clause Sixthly of section 375 of the IPC, the issue of her consent for sexual relations loses its significance for appreciation in this case.

17. The overall circumstances discussed above, if cumulatively considered, leads to only conclusion that appellant-accused kidnapped the minor – victim – prosecutrix below the age of 16 years, from the lawful custody of her parents and that too without their consent. The

appellant-accused taken away the minor-victim-prosecutrix with intention or knowledge that she may be forced or seduced to illicit intercourse. Eventually, the prosecution succeeded to prove that accused committed rape on victim – prosecutrix, a minor girl under the pretext to get married. Therefore, he is guilty for the offence punishable under section 376 of the IPC. It would be reiterated that the attending circumstance on record are sufficient to draw adverse inference against accused for the charges under sections 363, 366 and 376 of the IPC against accused. The learned trial Court has correctly dealt with the oral and circumstantial evidence on record in its proper perspective and held the accused guilty for the charges pitted against him. Therefore, circumstance does not permit to cause any interference in the findings of conviction expressed by learned trial Court in this case.

18. At this juncture, learned counsel for appellant-accused vehemently submits that the appellant/accused was 23 years old youngster at the time of offence. He has committed crime in a hit of passion. There was love affairs in between victim – prosecutrix and the accused. The victim - prosecutrix herself on her own accord accompanied with the accused to get married. In view of these circumstances, he urged to reduce the substantive sentence imposed on the accused for the charges pitted against him.

19. After giving anxious consideration to the submissions of learned counsel for the appellant-accused, in the light of circumstances discussed above, I find substance in his contention to reduce the

substantive sentence inflicted on the accused-appellant. Admittedly, the accused-appellant was 24 years old at the time of commission of crime. The circumstances also adumbrate that victim – prosecutrix voluntarily accompanied with the appellant without any demur or resistance. She was in the company of accused for about one and half months. She did not made any endeavour to disassociate with appellant-accused nor she attempted to communicate her whereabouts to her kith and kin. She did not ventilate any grievance against accused to the landlady P.W. 13 Indubai nor any other denizens of the locality. In contrast, P.W.13- Indubai deposed that the victim – prosecutrix and appellant-accused were residing as husband and wife in her rented premises located in Daund town, District Pune. All these circumstances are essential to be considered as mitigating factors to reduce substantive sentence of appellant-accused in this case. The learned trial Court imposed the sentence of rigorous imprisonment of three years and and fine each for the offence punishable under sections 363 and 366 of the IPC and rigorous imprisonment for seven years for commission of offence under section 376 of the IPC. The appellant/accused since arrest on 16-09-2012 is in jail initially being under trial prisoner and later on being convict. It reveals that appellant-accused lodged in jail since near-about five years and six month to serve out punishment. In view of his age and mitigating factors referred above, the period of his custodial sentence should be reduced to period already undergone as that would meet the ends of justice.

20. In sequel, appeal is allowed in part. The appellant-accused shall be set at liberty forthwith, if his detention is not required in connection

with any other crime. The registry to send the copy of this judgment immediately to concerned jail authority for further process. The fees of advocate appearing for appellant-accused be quantified at Rs.5000/- (Rs. Five Thousand Only) and same be paid by the Sub Committee, Legal Services Authority, High Court, Aurangabad. Accordingly, appeal stands disposed of in above terms.

Sd/-

[K. K. SONAWANE]
JUDGE

MTK.
