

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

**CRIMINAL APPEAL NO.194 OF 2017**

Subhash s/o. Ramdas More,  
Age 22 years,  
Occ. Labour (presently in jail),  
r/o. Abdimandi, Daulatabad,  
Tq. and Dist. Aurangabad ..Appellant

Vs.

The State of Maharashtra,  
Through In-charge,  
Police Station, Daulatabad,  
Dist. Aurangabad ..Respondent

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Mr. A.S.Shejwal, Advocate for appellant  
Mrs.P.V.Diggikar, APP for respondent  
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**CORAM : R.G. AVACHAT, J.  
RESERVED ON : MARCH 02, 2020  
PRONOUNCED ON : MARCH 18, 2020**

**JUDGMENT :-**

The challenge in this appeal is to the judgment and order dated 22.07.2016 passed by learned Additional Sessions Judge, Aurangabad, in Special Case No.71 of 2015. By the impugned judgment and order, the appellant herein has been convicted for the offence punishable under Section 366-A of Indian Penal Code

("I.P.C.", for short) and offence punishable under Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,000/- on both counts. In default of payment of fine, he has further been directed to suffer simple imprisonment for one month with a further direction that the substantive sentences shall run concurrently.

2. The facts giving rise to the present appeal are as follows:-

3. Ashok (PW 1) is resident of village Divasi Pimpalgaon, Tq. Gangapur. Vaishali (*name changed*) (PW 2) is his minor daughter. On 22.03.2015, Ashok and his family members including Vaishali went to sleep. Ashok (PW 1) woke up by 2.00 midnight. He saw Vaishali was not in her bed. He, therefore, awaken his wife and took search for Vaishali. The appellant was his neighbour. He was married. Ashok

(PW 1) went to his house to find whether the appellant was there. The appellant was found missing from his house. For about two days, search was made for Vaishali. Ashok (PW 1) lodged the FIR (Exh.16) at Police Station, Daulatabad, Dist. Aurangabad, on 24.03.2015, alleging the appellant to have kidnapped Vaishali. Crime vide C.R. No.I-20 of 2015 came to be registered for the offences punishable under Section 363 and 366 of I.P.C.

4. During investigation, Vaishali was found on 02.05.2015. Her statement came to be recorded. She also underwent medical examination. On 07.06.2015, the appellant was found at Lasur Station. He came to be arrested. His clothes were seized under panchnama. Statements of the persons acquainted with the facts and circumstances of the case were recorded. On completion of investigation, the appellant was proceeded against by filing charge-sheet.

5. Learned Judicial Magistrate, First Class (J.M.F.C.) committed the case to the Court of Sessions for trial in accordance with law. The case came to be assigned to learned Additional Sessions Judge (Trial Court). The appellant was charged for the offences punishable under Sections 363, 366-A and 376(i) of I.P.C. and under Section 4 of POCSO Act. The appellant pleaded not guilty.

6. To bring home guilt of the appellant, the prosecution examined eight witnesses and tendered in evidence some documents in the nature of medical examination report, panchnamas, school record of Vaishali, etc. On appreciating the evidence in the case, the trial Court convicted the appellant, as stated above.

7. Heard Mr.Shejwal, learned Counsel for the appellant and Mrs.Diggikar, learned APP for the respondent.

8. Mr. Shejwal, learned Counsel for the appellant, would submit that there is no evidence to show that both the appellant and Vaishali were ever seen together. The certificate issued by Anganwadi in proof of age, is not a valid piece of evidence. Vaishali was not subjected to ossification test. There is inconsistency *inter se* the evidence of the Medical Officer, and Vaishali. There was time gap of 15 days. There was no evidence of forcible intercourse. According to learned Counsel, the trial Court ought not to have convicted the appellant. He, therefore, urged for allowing the appeal.

9. Learned APP would, on the other hand, submit that Vaishali was little over 12 years of age. She had no reason to falsely implicate the appellant. The appellant was on visiting terms with Vaishali. Both went missing same day. The appellant in spite of having been married, lured Vaishali and took her away. Learned APP took me through the prosecution

evidence, to ultimately submit that no interference with the impugned judgment and order is called for.

10. Ashok (PW 1) is father of Vaishali. It is in his evidence that he had four daughters and a son. Vaishali is his number 2 daughter. She was 12 years of age at the relevant time. Both Ashok (PW 1) and the appellant were working as labourers for a brick kiln of one Narode. They had acquaintance *inter-se*. The appellant is married. Both the appellant and his wife would visit his house for watching television programmes.

It is further in the evidence of Ashok (PW 1) that the incident took place in the year 2015. He did not remember the month. It was 22<sup>nd</sup> day of a month, he woke up by 02.00 in the dead of night. He noticed Vaishali was not in her bed. He, therefore, awoken his wife to take search for Vaishali. Ashok (PW 1) came to know that the appellant too, was missing from his house. He, therefore, lodged the FIR

(Exh.16) against the appellant, alleging him to have kidnapped his daughter.

11. In response to the questions put in cross-examination, Ashok (PW 1) testified that Vaishali was educated upto 7<sup>th</sup> standard. She took education in C.P.S. School, Daulatabad. She was found at Deogaon, Tq. Gangapur, after one and half months. She was alone. The FIR was lodged as he had suspected involvement of the appellant.

12. Examination of Vaishali (PW 2) was in question and answer form. It is in her evidence that the incident took place on 21.03.2015. She woke up by 2:00 in the midnight for answering nature's call. She came outside. The appellant was present there. He called her and asked to accompany him. It is further in her evidence that the appellant proposed to marry her. She refused his proposal. The appellant gagged her mouth and asked not to shout else, he will kill her. He brought her to Aurangabad Railway Station.

Then they went to Kopargaon. They stayed there for several days. The appellant had sexual intercourse with her by force. Thereafter, they went to Limbgaon, Tq. Sangamner and again came back to Kopargaon and stayed there for some days. The police recorded her statement on 02.05.2015. The Special Judicial Magistrate too recorded her statement (Exh.18).

It is further in her evidence that she was 7<sup>th</sup> standard student of Zilla Parishad, Primary School, Divasi Pimpalgaon. She, however, could not recollect her date of birth. During her cross-examination, it has come on record that the appellant is her next door neighbour. He would stay along with his wife and children. They would visit her house for watching television serials. She has, therefore, acquaintance with him for long. It has further come in her evidence that at Railway Station, Aurangabad, there were many persons. She did not shout for help due to the threats given by the appellant. The room in which she stayed with the appellant belonged to

the relatives of the appellant. She informed her mother that she was at Paithan. She told so, due to the fear of the appellant. She would work at a brick kiln at Kopargaon. She stayed there for fifteen days. The appellant had been to the village. She returned to her parents thereafter.

13. Vilas (PW 4) and Sunil (PW 5) are panch witnesses. The scene of offence panchnamas and their evidence are of no much importance. The same, therefore, are not adverted to.

14. Suvarna Borse (PW 6) was examined in proof of Vaishali's age. She was teacher in Zilla Parishad (Primary) school. She was in-charge Headmaster of the school. She tendered in evidence the school admission entry of Vaishali. The extract of school admission register is at Exh.33. The certificate thereof is at Exh.34. According to her, as per the school record, the date of birth of the appellant was 03.09.2002. It appears that learned Advocate

representing the appellant was absent before the trial Court. The trial Court appears to have called upon the appellant to cross-examine this witness. The appellant declined. It was not fair on the part of the trial Court. Be that as it may.

15. Balwin Kaur (PW 7) was Assistant Professor in Government Medical College and Hospital, Aurangabad. She examined Vaishali on 02.05.2015 to find that her hymen was ruptured of multiple size and no bleeding was seen. In her opinion, penetrative sexual intercourse had occurred. She issued certificate, Exh.38. Since Vaishali was minor, Balwin Kaur (PW 7) had obtained her mother's consent to examine her. During cross-examination, Balwin Kaur (PW 7) testified that sexual intercourse was occurred with Vaishali within one week from the date of her medical examination.

16. Dadarao (PW 8) investigated the crime. It is in his evidence that Vaishali was found alone at village Deogaon Rangari.

**AGE OF VAISHALI :-**

17. When a date of birth or age of a person is in question, the best evidence in that regard, would be that of his parents. It is in the evidence of Ashok (PW 1), father of Vaishali, that she was twelve years old. He being illiterate could not give Vaishali's date of birth. Close reading of Ashok's (PW 1) cross-examination, would indicate that his evidence about age of Vaishali, has not been taken exception to. He had no reason to underage his daughter.

18. Vaishali (victim) testified that at the relevant time, she was a 7<sup>th</sup> standard student of Zilla Parishad Primary School, Divasi Pimpalgaon. She did not recollect her date of birth. In usual course of things, a 7<sup>th</sup> standard student would normally be 12-13 years of age. Suvarna (PW 6), In-charge Headmaster of Zilla Parishad School, testified that Vaishali was student of her school. As per the school record, her

date of birth was 03.09.2002. The date of birth was noted in the school record on the basis of a certificate issued by Anganwadi. It is reiterated that Suvarna (PW 6) was not subjected to cross-examination. Her evidence went unchallenged. Even if her evidence is ignored, the testimony of father of Vaishali goes to show that she was 12 years of age. Not subjecting Vaishali to ossification test would, therefore, be of a little consequence.

**KIDNAPPING :-**

19. Kidnapping is of two kinds – kidnapping from India and kidnapping from lawful guardianship. Section 361 of the Indian Penal Code defines kidnapping from lawful guardianship to mean, whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such

guardian, is said to kidnap such minor or person from lawful guardianship.

20. While Section 362 of the Indian Penal Code defines abduction to mean, whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

21. In case of **S. Varadarajan Vs. State of Madras, AIR 1965 SC 942**, it has been observed :-

*"Taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. . . . . But when the girl (who though a minor had attained the age of discretion and is on the verge of attaining majority and is a senior college student) from the house of the relative of the father where she is kept, herself telephones the accused to meet her at a certain place, and goes there to meet him and finding him waiting with his car gets into that car of her own accord, and the accused takes her to various places and ultimately to the Sub-Registrar's Office where they get an agreement to marry registered,*

*and there is no suggestion that this was done by force or blandishment or anything like that on the part of the accused but it is clear from the evidence that the insistence of marriage came from her side, the accused by complying with her wishes can by no stretch of imagination be said to have "taken" her out of the keeping of her lawful guardianship, that is, the father. . . . . The fact of her accompanying the accused all along is quite consistent with her own desire to be the wife of the accused in which the desire of accompanying him wherever he went is of course implicit. Under these circumstances no inference can be drawn that the accused is guilty of taking away the girl out of the keeping of her father. She has willingly accompanied him and the law does not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. . . . . There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S. 361. Where the minor leaves her father's protection knowing and*

*having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."*

22. There is no direct evidence in proof of the appellant to have kidnapped Vaishali. The allegations in the FIR indicate that Vaishali's father had a strong suspicion of the appellant's involvement in the alleged offence. Undoubtedly, the appellant was Vaishali's neighbour. He would visit Vaishali's house for watching television programmes. Admittedly, there was acquaintance between the appellant and his family on one hand and Vaishali and her parents, on the other. From the fateful day onward, the appellant was not in the village.

23. The evidence of Ashok (PW 1) indicates that while he woke up in the dead of night, he saw that Vaishali was not in her bed. The same indicates that Vaishali had left the house without informing and behind the back of her parents. Leaving the house at the dead of night suggests something more. The evidence of Vaishali that she came out of the house to answer nature's call and then the appellant gagged her mouth and took her away, appears to be unconscionable. Admittedly, the appellant and Vaishali went to the railway station on foot. The same indicates her tacit consent to join the appellant. She traveled with the appellant by railway and other modes of transport. She stayed with him for about a month. True, there is no direct evidence indicting both of them to have ever seen together. There is, however, no reason to doubt the testimony of Vaishali and her father. They do not have reason to falsely implicate the appellant.

24. The fact, however, remains that so far as regards the offence of kidnapping/abduction is concerned, there is nothing to suggest the appellant to have induced/compelled Vaishali to join him. It is reiterated that Vaishali left her house at dead of night. Her case that the appellant gagged her mouth and took her to railway station on foot, appears to be unreasonable. The fact that Vaishali returned after one and half months of her leaving home, undoubtedly, indicates that it is she, who had joined the appellant on her own. The offence of kidnapping, therefore, does not get attracted.

**RAPE :-**

25. Vaishali has testified that the appellant had sexual intercourse with her. It might be a case of consensual intercourse. In view of Vaishali having been below 18 years of age, her consent is immaterial. It is reiterated that there is no reason to disbelieve the testimony of Vaishali. It is true that there is some inconsistency between the evidence

of Balwin Kaur (PW 7) and Vaishali. According to Balwin Kaur (PW 7), the Medical Officer, sexual intercourse with Vaishali had happened within a week next before her examination on 02.05.2015. Whereas, the evidence of Vaishali indicates that for about 15 days next before her medical examination, she was alone. Her evidence, undoubtedly, indicates that the appellant had returned to the village alone. The evidence suggests that Vaishali was left to fend herself. She had, therefore, no option but to return home alone. The inconsistencies between evidence of two witnesses, is bound to occur, since it depends upon how one's memory would serve him. Vaishali, who was little over 12 years of age, had no reason to falsely implicate the appellant. The medical examination report reinforces her case as the report indicates that there was penetrative intercourse. Whether it was seven or fifteen days before, was a question based on one's memory. There is, therefore, no reason to disbelieve the evidence of Vaishali on

this score. The trial Court has, thus, rightly convicted the appellant of the offence punishable under Section 4 of POCSO Act.

26. Since it was found that Vaishali had, on her own, joined the appellant or eloped, interference with the trial Court's judgment, convicting the appellant for offence under Section 366-A of I.P.C., is called for. The appeal, therefore, succeeds partly.

27. Hence, the following order :-

- (i) The appeal is partly allowed.
- (ii) The judgment and order dated 22.07.2016 convicting and sentencing the appellant for the offence punishable under Section 366-A of Indian Penal Code is set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 366-A of the Indian Penal Code.
- (iv) The judgment and order dated 22.07.2016 convicting and sentencing the appellant for the

offence punishable under Section 4 read with Section 3 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 is, thus, maintained.

(v) The amount of fine paid in connection with the offence punishable under Section 366-A of Indian Penal Code be refunded to the appellant.

**[R.G. AVACHAT, J.]**

kbp