

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NOS.52 OF 2018 & 23 OF 2019
CRIMINAL APPEAL NO.52 OF 2018

Uday @ Rupesh Falkar,
S/o Sudan Falkar,
32 years of age, Indian, Married,
R/o Moti Dongar, Margao,
Taluka Salcete,
South Goa District, Goa
(Presently in custody at Central Jail
Colvale, Taluka Bardez Goa.)

... Appellant

Versus

1. State of Goa,
Through the Public Prosecutor
High Court of Bombay at Goa
Althino, Panaji Goa.

2. Police Inspector,
Margao Police Station,
Margao, Salcete Goa.

... Respondents

Mr. Pavithran A. V. and Mr. Ravi Anand, Advocates for the Appellant.

Mr. P. Faldessai, Additional Public Prosecutor for the Respondent -State.

WITH
CRIMINAL APPEAL NO. 23 OF 2019

Mr. Victor @ Duledonio@
Dulshidanio Fernandes
s/o Antonio Fernandes,
32 years of age,

R/o House No.8, Davorlim,
Salcete, Goa and
Presently at Fr. Miranda Road,
H.No.1648,
Margao Goa,
Presently in Judicial Custody
at Central Jail, Colvale,
Bardez Goa.
Through next friend
Mr. Deepak Kattimani
40 years of age,
R/o H.No.77,
Kharbhand Pedda,
Margao.

.... Appellant

Versus

1. State
Through PP
Hon'ble High Court of Bombay
at Panaji Goa.
2. Police Inspector,
Margao Town Police Station.

.... Respondents

Mr. Sidhesh Shet, Advocate for the Appellant.

Mr. P. Faldessai, Additional Public Prosecutor for the Respondent -State.

**Coram:- M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.**

**Reserved on : 30th January, 2020
Pronounced on: 7th February, 2020**

JUDGMENT (Per M. S. Sonak, J)

Heard Mr. Pavithran, learned counsel for the Appellant in Criminal Appeal No.52 of 2018 and Mr. S. Shet, learned counsel for the Appellant in Criminal Appeal No.23 of 2019.

2. Mr. P. Faldessai, learned Addl. Public Prosecutor for the Respondent/State in both the appeals.

3. Both these appeals are directed against the judgment and order dated 30th January, 2017 in Special Case No.54/2011 made by the Children's Court in the State of Goa (Trial Court). By the impugned judgment and order the Appellants in both these appeals were convicted for offences punishable under Sections 120B and 364A of the Indian Penal Code (IPC) read with Section 8(2) of the Goa Children's Act, 2003 and sentenced to imprisonment for life and pay fine of Rs.1,00,000/- each or in default to undergo simple imprisonment of one year.

4. In Special Case No.54/2011 before the Trial Court, the Appellant in Criminal Appeal No.52 of 2018 was styled as Accused No.1 (A1) and the Appellant in Criminal Appeal No.23 of 2019 was styled as Accused No.2(A2).

5. Though, two separate charges were framed against the Appellants, the gist of the charge is that on 19th September, 2011 at 13.15 hours, the Appellants entered into a conspiracy to kidnap a special child who is a minor (name is withheld) in terms of provisions contained in Section 8(2) of the Goa Children's Act, 2003, in order to demand a ransom of Rs.20,00,000/- and thereby the Appellants were alleged to have committed offence punishable under Section 120B of IPC read with Section 8(2) of the Goa Children's Act, 2003. The charge further alleges that on the same date and time the Appellants kidnapped the minor for ransom and threatened to cause his death if they were not paid a ransom of Rs.20,00,000/- and thereby the Appellants were alleged to have committed offence punishable under Section 364A of IPC read with Section 8 of the Goa Children's Act, 2003.

6. Upon the Appellants pleading that they are not guilty, the trial commenced in which the prosecution examined almost 33 witnesses. Thereafter, the statements of the Appellants under Section 313 of Criminal Procedure Code came to be recorded. Since, no evidence was led on behalf of the Appellants, the learned Trial Judge heard the arguments and made the impugned judgment and order dated 30th January, 2017 convicting and sentencing the Appellants as aforesaid. Hence, the present appeals.

7. At the outset, the learned counsel for the parties agree that

both these appeals can be disposed of by a common judgment and order, since both the appeals impugn the very same impugned judgment and order in Special Case No.54/2011. Even according to us, it will be appropriate that both these appeals are disposed of by a common judgment and order.

8. Mr. Pavithran submits that in the present case, there is absolutely no material on record to suggest that A1 and A2 have committed any child abuse as defined under Section 2(m) of the Goa Children's Act, 2003. He submits that in the absence of any such material there was serious error in framing a charge under Section 8(2) of the Goa Children's Act, 2003 and trying the A1 and A2 under harsh provisions of the Goa Children's Act, 2003. He therefore, submits that entire trial is without jurisdiction and for these reasons itself the impugned judgment and order warrants interference.

9. Mr. Pavithran, learned counsel for A1 submits that there are several lacunae in the prosecution case and the prosecution has failed to prove the charges beyond reasonable doubt. He submits that two most vital and material witnesses i.e. shopkeeper who is alleged to have informed the driver (PW3) that he has seen the A1 taking the minor child alongwith him in his Maruti Omni van and PSI Vast, who is alleged to have informed the IO that the mobile phone for demand of ransom was allegedly made

belongs to Bombi and Associates, were not even examined by the prosecution. Mr. Pavithran submits that non examination of such material witnesses calls for drawal of adverse inference against the prosecution. In any case, he submits that such non examination renders the entire prosecution case quite suspicious.

10. Mr. Pavithran submits that in the present case, there are contradictory versions put forth by various prosecution witnesses. In particular, he points out that there is absolutely no evidence on the aspect of rescue. He points out that though it is the case of the prosecution that some bullets were fired at the car in which A1 and A2 were allegedly kidnapping the minor child, there is no evidence of ballistic expert placed by the prosecution on record. He submits that the theory of rescue put forward by the prosecution has not at all been proved and in any case, the theory was too fantastic to be true.

11. Mr. Pavithran without prejudice submits that in the present case, the Trial Court has accepted the evidence of minor child (PW2) in its entirety by holding that the minor child was a competent witness. Mr. Pavithran submits that the minor child has deposed that he was alongwith A1 and A2 from the time at which he was allegedly kidnapped till the time he was rescued by the police. He submits that this minor child has at no stage deposed that A1 and A2 either hurt or threatened to hurt, much less

to kill him. Rather, the minor child has deposed that he was offered a banana and Thums Up by A1, whom, he knew. On this basis, Mr. Pavithran, without prejudice to his contention that the prosecution has totally failed to prove the charges against the A1 and A2 submits, that the essential ingredients of the offence under Section 364A of IPC have not at all been made out and therefore, the conviction under Section 364A of IPC warrants interference.

12. Mr. Pavithran further without prejudice submits that it is not even the case of the prosecution that A1 and A2 hurt the minor child or misbehaved with him. He submits that taking into consideration the conduct of A1 and A2, they may be released from incarceration, having suffered imprisonment right from the year 2011.

13. Mr. Pavithran relied upon certain decisions which will be considered in the course of this judgment and order.

14. For all the aforesaid reasons, Mr. Pavithran submits that the impugned judgment and order deserves to be set aside.

15. Mr. Shet, learned counsel for the Appellant in Criminal Appeal No.23 of 2019 whilst adopting the submissions made by Mr. Pravithran adds that there is absolutely no evidence about role of A2 in the entire

episode. Without prejudice, he submits that at the highest the role ascribed to A2 was that of the driver of the Maruti Omni van. He submits that there is absolutely no evidence to establish the charge of conspiracy under Section 120B of IPC. He therefore submits that the conviction against the A2 warrants interference.

16. Mr. Shet relied upon certain decisions which will be considered in the course of this judgment and order.

17. For all the aforesaid reasons, Mr. Shet submits that the impugned judgment and order be set aside.

18. Mr. Pavithran and Mr. Shet submitted without prejudice that the fine of Rs.1,00,000/- each imposed upon A1 and A2 is also highly excessive. They submit that the provisions of Section 8(2) of the Goa Children's Act, 2003 do not mandate imposition of fine of Rs.1,00,000/- in each case. They submit that discretion is vested in the Trial Court and in the facts of the present case, such discretion has not at all been exercised though, the same, should have been exercised. On this ground they submit that the fine of Rs.1,00,000/- each imposed upon A1 and A2 warrants interference.

19. Mr. Faldessai, learned Addl. Public Prosecutor defends the

impugned judgment and order on the basis of reasoning recorded therein. He submits that in this case, the Appellants have indeed committed offence punishable under Section 8(2) of the Goa Children's Act, 2003. He submits that in this case the threats were indeed given by the Appellants and therefore, the ingredients of Section 364A of IPC have been made out. In alternate he submits that giving of threats to cause death or hurt cannot be regarded as essential ingredient of Section 364A of IPC and it is sufficient if there is kidnapping for ransom in order to sustain the conviction under Section 364A of IPC. Mr. Faldessai relied upon certain decisions which will be considered in the course of this judgment and order.

20. The rival contentions now fall for our determination.

21. The first contention of the Appellants relates to framing of charge under Section 8(2) of the Goa Children's Act, 2003. Section 8(2) of the Goa Children's Act, 2003 reads as follows :-

“8. Child Abuse [and trafficking]. —

(1)

(2) Whosoever commits any [child abuse or sexual assault] as defined under this Act, shall be punished with imprisonment of either description for a term that may extend to three years and shall also be liable to fine of Rs. 1,00,000/-. Whoever commits any Grave Sexual Assault shall be punished with imprisonment of either description for a term that shall not be

less than [ten years] but which may extend to [life imprisonment] and shall also be liable to a fine of Rs. 2,00,000. Whoever commits incest shall be [punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and also a fine which may extend to Rs.2,00,000/-][Statement of the child victim shall be treated on par with the statement of a child rape victim] under Section 375 of the IPC, as laid down by the Supreme Court of India.”

22. The expression “*child abuse*” has been defined in Section 2(m) of the Goa Children's Act, 2003 and the same reads as follows :-

“Child abuse” refers to the maltreatment, whether habitual or not, of the child which includes any of the following:—
(i) psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;
(ii) any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being;
(iii) unreasonable deprivation of his basic needs for survival such as food and shelter; or failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death;”

23. In this case, the charge against the A1 and A2 is that they kidnapped the minor child at about 13.15 p.m., on 19th September, 2011 from the gate outside his school and in his presence made phone calls to his father and uncle demanding for ransom of Rs.20,00,000/-. The minor boy

was alleged to have been taken by the A1 and A2 in Maruti Omni Van and was with them until his rescue at about 18.30 by the police.

24. According to us, the aforesaid charge if proved would certainly amount to child abuse as defined under Section 2(m) of the Goa Children's Act, 2003. In this case, if the charge is proved, then it is apparent that the minor child was maltreated by A1 and A2. This is more so since there is evidence on record that the minor child was a special child having learning disabilities.

25. Besides, the expression "*child abuse*" does not include merely physical abuse but also psychological abuse as well as emotional maltreatment. A child of 11 years, being kidnapped from the lawful guardianship in such a manner for ransom of Rs.20,00,000/- for his release is certainly a traumatic experience for the child and would constitute psychological and emotional maltreatment. Besides, acts of the Appellants, if proved, would certainly amount to deeds which debase, degrade or demean the intrinsic worth and dignity of the minor child as a human being. If the charge is proved against the A1 and A2 then it is apparent, A1 and A2 treated the minor child, who, was a special child, as if he were an object, which they could trade for a ransom of Rs.20,00,000/-. According to us, this certainly debases, degrades and demeans the intrinsic worth and dignity of the child as a human being. For all these reasons, we

see no merit in the contention that there was any error in framing charge under Section 8(2) of the Goa Children's Act, 2003.

26. In the present case, it cannot be said that the prosecution has failed to prove the charges against A1 and A2 beyond reasonable doubt. Based upon some minor discrepancies in the testimonies of some of the witnesses here and there or on the basis that the shopkeeper or PSI Vast were not examined as prosecution witnesses, we cannot say that the prosecution has either suppressed any evidence or has otherwise failed to prove the charge against the A1 and A2 beyond reasonable doubt. It is necessary to record that in the present case, the minor child has deposed as PW2 and the learned Trial Judge has quite correctly relied upon his evidence, which, even according to us, inspires a lot of confidence. According to us, the evidence of minor child (PW2) is in fact sufficient to sustain the conviction against the A1 and A2 though, we must add that the prosecution has placed on record the substantial evidence, apart from the testimony of minor child (PW2) in order to establish the charges against the A1 and A2 beyond the reasonable doubt.

27. PW2 who is the minor victim child was admittedly about 11 years old as on 19th September, 2011, on which date, he was kidnapped as he left his school after conclusion of classes. The Trial Court posed several relevant questions to PW2 in order to determine whether he was

competent to depose at the trial. From the answers given by PW2, the Trial Court was satisfied that PW2 was competent to depose at the trial. We have also perused the questions and answers posed to PW2 and from the same, we too endorse the findings of Trial Court as regards the competency of PW2 to depose at the trial.

28. Besides, in this case, the prosecution has examined Dr. Shilpa Waikar (PW33) and Associate Professor at the Institute of Psychiatry and Human Behaviour who had examined the minor child (PW2), since, he was reported to be a special child. PW33 has deposed that PW2 was a slow learner having border line intelligence with learning disability of writing and reading difficulty. She has deposed that PW2 had IQ 80 when in fact normal IQ is above 90. In the cross examination, PW33 has explained that a person with IQ 80 takes time to learn and in this case, the special child had writing and reading disabilities.

29. According to us, from the deposition of PW2 which we have evaluated in some detail as well as the depositions of his teacher Amita Bhat (PW15), the Principal of the School which he was attending (PW16), Maid (PW17) who had handed over the custody of the minor child to the driver Ramesh Gaonkar (PW3) and the evidence of Psychiatric (PW33), we are satisfied that PW2 was quite competent to depose at the trial and there is really no good reason not to believe the clear and cogent testimony

of PW2, in the present case.

30. PW2 has deposed that on 19th September, 2011, after the school hours, his driver Ramesh Gaonkar (PW3) came to pick him up from the school. He has deposed that while he was sitting in the car (Winger), A1 came near the car and told Ramesh Gaonkar (PW3) that his car was not in a proper condition. Accordingly, Ramesh went to Sumo vehicle of A1 and tried to start the same. PW2 has then deposed that he knew Ramesh since Ramesh was working for his family earlier. He then deposed that while he was sitting in the car (Winger) A1 came to him and told him that Ramesh (PW3) had taken Sumo to the garage and it is A1 who would now drop him home. Believing A1, he sat in the Omni Car on the rear seat which was black in colour. He has deposed that A1 then drove Omni car till Costa hospital where, another person took the driver's seat and A1 came and sat with him on the rear seat.

31. PW2 has at a later stage, identified the other person who took the driver's seat at Costa hospital, as being A2. PW2 has then deposed that A1 asked him to give phone number and he gave his uncle's cell number as 09822103939. PW2 has then deposed that A1 then dialed the said number and spoke to his uncle Madhukar alias Mantha. PW2 has deposed that he was taken in the vehicle towards Ponda and that he knew the route to Ponda since he used to go to the temple alongwith his parents.

32. PW2 has deposed that the car was stopped near Honda showroom because of heavy rain. He has deposed that on the way of Ponda, A1 was dialing many numbers and A1 and A2 were speaking to someone in Hindi. PW2 has deposed that he heard the driver telling the person at the other end to give Rs.20,00,000/- to release the boy. He has deposed that A1 and A2 were using only one mobile phone to make calls.

33. PW2 has also deposed that on the way to Ponda, A1 gave him one banana and Thums Up and thereafter PW2 had to sleep. He has deposed that when he woke up, he found that they were near the Goa Dairy. He has deposed that he saw his driver Ramesh (PW3) coming towards the car with a bag and as Remesh reached near the car, the driver of the Omni took the car a little ahead and stopped the car by the side of the road. PW2 has then deposed that the driver of the Omni car took the car a little ahead and drove away upto the highway on which point PW2 saw a grey colour Wagon-R which tried to stop the Omni but the driver refused to stop the vehicle. PW2 has then deposed that the police fired shots at the tyre and in the air and towards the rear glass and the driver was then forced to stop the Omni car. He has deposed that one of the policemen pulled him out from the car and brought him to the police station, after which he was referred to Hospicio Hospital for medical examination and then sent to his family. He has deposed that the police also pulled the driver out of the car.

34. PW2 has given a graphic description of the clothes which were worn by A1 and A2. He has then deposed of identifying A2 before the Judge in Margao Court. Even in the Court he has identified the A1 and A2. PW2 deposed that he only heard the sound of fired shot but did not see whether the shot was actually fired at the tyre. He has also deposed that he was not sure whether he had seen the police firing the gun shot in the air but he deposed that he heard the sound of gun shot. He has also deposed that he has seen the police firing the gun shot on the rear glass of the car at which point of time he had laid down on the floor of the car.

35. PW2, in the course of his cross examination gave a graphic description of the route on which he was taken. At one stage, he voluntarily stated that while they were on the way to Ponda the accused had stopped the vehicle by the side of the road, both of them had got down and walked little away from the car and he had seen them talking on the cell phone. He has deposed that the accused had walked to a distance approximately about 4 to 5 metres away from the Omni car but he cannot state for how long they had spoken on cell phone. He has deposed that he was in the car when the accused were talking on the cell phone.

36. According to us, as noted earlier the testimony of PW2 inspires confidence and is sufficient to bring home the charges against the Appellants. The contention that PW2 has not spoken about any threats to

kill or to hurt him do not really assist the case of the Appellants. The threats, in the present case, were given to PW1, father of the minor child and to PW25 the uncle of the minor child. PW1 and PW25 have clearly deposed about such threats.

37. Mr. Pavithran's contention that since the PW2 was throughout with A1 and A2 and since PW2, has not spoken about any threats whatsoever, but rather PW2 has spoken about being given banana and Thums Up, his testimony must be preferred over the testimony of PW1 and PW25 deserves no acceptance. This is because PW2 has clearly deposed that after having a banana and Thums Up, he went to sleep. Besides and most importantly PW2 has deposed in the course of cross examination by voluntarily stating that at one point of time, A1 and A2 went out of the car and were speaking with some one on the cell phone. The Nodal Officer (PW28) examined on behalf of the prosecution has produced the call detail records, which also establish various calls were made from the cell phone which was in possession of A2 to PW1 and PW25 father and uncle of the minor child. Therefore, the fact that PW2 may not have deposed to the threats which were given by A1 and A2 to the father and uncle of the minor child, does not detract substantially from the case of the prosecution. PW1, father and PW25 uncle have clearly deposed to the threats and demand for ransom. Even PW2 has deposed on the aspect of demand of ransom. Accordingly, we are unable to accept Mr.

Pavithran's contention that in the present case, the prosecution has failed to establish that there were any threats to hurt or to kill issued by A1 and A2.

38. Mr. Pavithran relying upon the decision of Delhi High Court in *Jamil Ahmed Vs State (NCT) of Delhi*¹ submitted that one of the essential ingredients of Section 364A of IPC is that the threats to hurt or to kill should be given to the victim who was being kidnapped or abducted. Though, certain portions of the judgment of Delhi High Court suggest this, with greatest respect we are unable to agree that one of the essential ingredients of Section 364A of IPC is that the threats to cause death or to hurt should be given only to the victim in order that the offence under Section 364A of IPC is said to have been committed.

39. Section 364A of the IPC provides that whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or [any foreign State or international inter-governmental organization or any other person] to do or abstain from doing any act or to pay a ransom, shall be punishable with death or

¹ CDJ 2013 DHC 772

imprisonment for life, and shall also be liable to fine.

40. Section 364A of IPC, on plain reading does not require that the threats to cause death or hurt must be given only to such kidnapped person or victim, in order to bring home the charge under Section 364A of IPC. According to us, it is sufficient if the threats to cause death or hurt the kidnapped person are given to say the parents or guardian of such kidnapped person or victim as has happened in the present case. The evidence on record clearly bears out that A1 and A2 issued threats to the father (PW1) and the uncle (PW25) of the minor child that they would kill the minor child, in case their demand for ransom of Rs.20,00,000/- was not fulfilled. Such threats to the father and to the uncle of the minor child, in our opinion, are sufficient to bring home the charge of Section 364A of IPC, no doubt, subject further to fulfillment of the other ingredients as provided in Section 364A of IPC. Therefore, we do not agree with the contention of Mr. Pavithran that in the absence of any evidence that the minor child was threatened with death or hurt, the offence under Section 364A of IPC is not made out, merely on the basis of alleged threats issued to the father (PW1) and uncle (PW25) of the minor child.

41. Similarly, we do not also agree with the contention of Mr. Faldessai, learned Additional Public Prosecutor that the issuance of threats

to cause death or hurt of kidnapped person or the victim is not at all an essential ingredient of the offence under Section 364A of IPC. According to us, the decisions in *Shridhar Yeshwant Bhosale Vs State of Maharashtra*², *Vijay Ranglal Chorasaya Vs State of Gujarat*³, *Sudeb Manmohan Pal Vs State of Maharashtra*⁴, *Vinod Kumar Vs State of Haryana*⁵, *Surajsinh alias Sonu Surajsinh Collectorsinh alias Sevaram Rajput Vs State of Gujarat*⁶, and *Birbal Choudhary alias Mukhiya Jee Vs State of Bihar*⁷ do not support any such proposition as urged by Mr. Faldessai.

42. In some of the cases, it is true that there is no discussion on the issue of threats to cause death or hurt to the kidnapped person or victim. However, that is because there is evidence on record on the aspect of issuance of threats and the contention was that there was no demand for ransom. In some of the cases, the guns were used to kidnap and such conduct, obviously gave rise to a reasonable apprehension that the kidnapped person may be put to death or hurt and therefore, there was no contention, similar to that which is now raised by Mr. Faldessai, raised or decided in some of these decisions. Accordingly, all such decisions are quite distinguishable and according to us do not support the proposition put

² 2007 ALL MR (Cri) 1113

³ (2014) 12 SCC 400

⁴ 2015 DGLS (Bom.) 412

⁵ (2015) 3 SCC 138

⁶ (2017) 13 SCC 128

⁷ (2018) 12 SCC 440

forth by Mr. Faldessai that giving of threats to cause death or hurt to the kidnapped person or evidence of conduct which gave rise to reasonable apprehension that the kidnapped person may be put to death or hurt is not at all an essential ingredient of the offence in Section 364A of IPC. Such contention, according to us is contrary to the plain and complete reading of the provisions in Section 364A of IPC.

43. The decision of the two Judge Bench of the Hon'ble Apex Court in ***Malleshi Vs State of Karnataka***⁸, in which there is a reference to only three ingredients (1) that the accused kidnapped or abducted the person; and (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom, has been explained by three Judge Bench of the Apex Court in ***Vikram Singh alias Vicky and another Vs Union of India and others***⁹.

44. In *Vikram Singh (supra)*, three Judge Bench of the Hon'ble Apex Court has explained that Section 364A of IPC has three distinct components viz. (i) the person concerned kidnaps or abducts or keeps the victim in detention after kidnapping or abduction; (ii) threatens to cause death or hurt or causes apprehension of death or hurt or actually hurts or causes death; and (iii) the kidnapping, abduction or detention and the threats of death or hurt, apprehension for such death or hurt or actual

⁸ 2004(8) SCC 95

⁹ (2015) 9 SCC 502

death or hurt is caused to coerce the person concerned or someone else to do something or to forbear from doing something or to pay ransom.

45. From the aforesaid, it is quite clear that the component that the accused person “*threatened to cause death or hurt or cause apprehension of death or hurt or actually hurt or cause death*” is one of the essential ingredients of offence under Section 364A of IPC. Besides, in ***Philips Fadrick D'Souza and others Vs The State of Maharashtra and others***¹⁰, the Division Bench of this Court has analysed the provisions of Section 364A of IPC in some detail by reference to its legislative history as well as the essential ingredients provided therein. The Division Bench speaking through (Dr. D. Y. Chandrachud, J, as His Lordship then was) has held that the essential ingredients of offence under Section 364A of IPC must be deduced. The provision is attracted where a person:

(a)(i) *kidnaps or abducts any person; or*
 (ii) *keeps a person in detention after such kidnapping or abduction; and*

(b)(i) ***threatens to cause death or hurt to such person; or***
 (ii) ***by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt; or***
 (iii) *causes hurt or death to such person; and*

(c) *In order to compel the Government or any foreign State or international intergovernmental organization or any other person to do or abstain from doing any act or to pay a*

ransom. The ingredients of Section 364A, therefore, are broadly distributed into three heads:

The first head consists of kidnapping, abduction or holding the person kidnapped or abducted in detention: The second head consists of the issuance of a threat or then giving rise to a reasonable apprehension of causing death or hurt or actually causing death or hurt. The third head is that the purpose of the unlawful act is to compel the Government or a foreign state or international organization or any person to pay a ransom or to do or abstain from doing something. The marginal note to Section 364A is titled, "kidnapping for ransom etc.". The offence under Section 364A consists of an aggravated form of kidnapping or abduction. The offence is punishable with death or with imprisonment for life and with fine.

(Emphasis supplied)

46. Thereafter yet another Division Bench decision of this Court in ***Majhar Nashir Shaikh and others Vs The State of Maharashtra***¹¹ has held that the plain reading of Section 364A of IPC indicates that to establish an offence under this Section, the prosecution has to establish the following essential ingredients :-

- (1) That the accused kidnapped or abducted a person;*
- (2) kept him in detention after such kidnapping or abduction;*
- (3) The kidnapping or abduction was for ransom;*
- (4) The accused threatened to cause death or hurt to a kidnapped or abducted person, or***
- (5) The conduct of the accused was sufficient to raise a***

¹¹ 2016(3) BomCR (Cri) 45

reasonable apprehension in the mind of the kidnapped or abducted person that death or hurt may be caused to such person.

(Emphasis supplied)

47. Accordingly, we hold that the provisions of Section 364A of IPC as they presently stand, require the prosecution to establish beyond reasonable doubt that the accused persons after kidnapping or abducting any person or keeping any person in detention after such kidnapping or abduction have either threatened to cause death or hurt to such person or by their conduct gave rise to a reasonable apprehension that such person may be put to death or hurt or actually cause hurt or death to such person, in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom. To this extent, therefore, we do not agree with the contention raised by Mr. Faldessai, learned Additional Public Prosecutor.

48. However, we also do not agree with the contention of Mr. Pavithran, learned counsel for the A1 that Section 364A of IPC requires the prosecution to prove beyond reasonable doubt that the threats to cause death or hurt to such person have to be given to the kidnapped person or the victim alone and any evidence of such threats being given to the parents or guardian of such kidnapped person or the victim is not

sufficient to attract the provisions in Section 364A of IPC.

49. In any case, we are also satisfied that the conduct of the Appellants in the present case was such as gave rise to a reasonable apprehension that the minor child may be put to death or hurt, in case, their demand for ransom of Rs.20,00,000/- is not fulfilled by the father (PW1) or the uncle (PW25) of the minor child. The evidence, which has not at all been shaken regards the haste with which the father (PW1) and the uncle (PW25) of the minor child rushed and managed to withdraw an amount of Rs.20,00,000/- from their bank accounts and the manner in which they rushed to the school and the police after kidnapping and demands for ransom, very well establish that the conduct of the Appellants in the present case did give rise to a reasonable apprehension that the minor child may be put to death or hurt, in case, the demanded ransom of Rs.20,00,000/- was not paid.

50. For these reasons also we are satisfied that the essential ingredients of Section 364A of IPC were fully satisfied in this matter. In fact, evidence on record overwhelming establishes that the minor child was kidnapped and detained after such kidnapping. There is overwhelming evidence which establishes that the Appellants threatened to cause death or hurt to the minor child in case, their demands for ransom of Rs.20,00,000/- was not met with by the minor child's father PW1 and the

uncle PW25. In any case, there is evidence on record which establishes beyond reasonable doubt that the conduct of the two Appellants gave reasonable apprehension that the minor child may be put to death or hurt, in case the minor child's father PW1 and the uncle PW25 do not meet the demand of ransom of Rs.20,00,000/-. The prosecution has also succeeded in establishing that the Appellants did all this in order to compel the father and the uncle of the minor child to pay a ransom of Rs.20,00,000/- or to refrain from making any complaint to the police about kidnapping. Clearly therefore, the prosecution has proved beyond reasonable doubt all the ingredients of offence under Section 364A of IPC.

51. Apart from the evidence of the minor child (PW2), we have evidence of Ramesh Gaonkar (PW3), which according to us is also quite clinching.

52. PW3 has deposed that he was working as a driver with Mrs. Vidyadhar Mallya since the year 1984 and that there was yet another driver by Rameshwar Borkar who was also working for the same family. He has deposed that on 19th September, 2011, he went to pick up a minor child at around 13.15 hours in a Winger vehicle bearing registration No.GA08-U-4245 at child's school. He then collected the minor child, seated him in the vehicle and then sat in a driver's seat. At that time A1, who was earlier working for the same family came near the car and requested him to give a

push to his Sumo vehicle which was not starting. Thereupon PW3 told the minor child to remain seated in the car and left to attend A1 in pushing the Sumo which was on the same road which proceeds towards J. J. Hospital. PW3 has deposed that one person was sitting on the driver seat and he alongwith A1 began to push the Sumo but it failed to start. At this point, A1 and the driver, whom, PW3 has latter identified as A2 went away stating that they will bring one more person to push the vehicle but requested PW3 to wait until then.

53. PW3 has then deposed that he tried to crank the engine by the key but there was no response. He noticed that no lights from the dashboard were operating even after igniting the key. He checked the wires at the dashboard but did not detect any fault. He then got down from the vehicle and opened the bonnet and checked the battery terminals and found that they were loose. Thereafter, he closed the bonnet and returned to his Winger vehicle but noticed that the minor child was not in the vehicle.

54. PW3 has then deposed that he started searching the minor child by calling out to him loudly. At that time, one shopkeeper told him that the minor child sat in another vehicle and went. PW3 then returned to Mallya's home at around 13.45 hours. Thereafter, he alongwith the family members returned to the spot outside the gate of the school in order

to search the minor child. Again, the shopkeeper, told PW3 and others that the persons who had asked PW3 to push the Sumo had taken the minor child alongwith them in a Maruti Van. The shop owner also described the clothes of the said persons were wearing.

55. PW3 has then deposed to the calls which he received from a cell phone bearing No. 9225879515, which is latter on traced as belonging to '*Bombi and Sons*'. Further evidence reveals that '*Bombi and Sons*' had allotted this cell phone to A2, who was their employee. PW3 has also deposed as to how he took ransom amount with him, with some police officers who were following him in 2-3 private vehicles in order to deliver the ransom amount to A1 and A2. PW3 has also, deposed to what transpired soon after the police rescued the minor child. PW3 has also deposed that he actually saw the minor child in Maruti Omni Van driven by A2, with A1 in it. According to us, no serious dent has been made to the testimony of PW3 though, some suggestions were put to PW3 as if to suggest that even he was a part of kidnapping. According to us, the Trial Court has quite extenso analysed the testimony of PW3 and indicated the cogent reason for its acceptance. There is really no case made out to take any different view in the matter.

56. No doubt, it would be better if the prosecution had examined the shopkeeper who is alleged to have told PW3 and the other family

members of the minor child that he actually saw the minor child going in the Maruti car who had requested PW3 to push the Sumo. However, such non examination can hardly be said to be fatal to the case of the prosecution in the wake of clear and cogent testimony of both PW2 i.e. the minor child as well as PW3 the driver Ramesh Gaonkar.

57. Therefore, we are unable to agree with the contention of the learned counsel for the Appellants that failure to examine the shopkeeper cast some doubt upon the case of the prosecution or that the benefit of reasonable doubt is due to the Appellants, on account of such non examination.

58. Besides, we find that the prosecution in this case has also examined Joseph Silva (PW9), who has deposed that he had gone for haircut in '*Sai Hair Cutting Salon*' opposite Gate No.4, at Fatorda Stadium, in the vicinity of which, kidnapping of the minor child took place. He has deposed that he actually saw A1 and A2 whom he latter on identified the persons taking the minor child with them in their Maruti Omni. There is no reason not to believe the deposition of PW9 and examination of this witness by the prosecution is perhaps a satisfactory answer for non examining the shopkeeper.

59. It is true that there is no satisfactory evidence of ballistic expert

on the issue of firing of gun shots at the time of rescue. However, it is not as if there is no evidence whatsoever on record on the aspect of rescue. In any case, looking to the clear and cogent evidence of PW2, PW3, PW9 and corroboration which is to be found in the evidence of several other witnesses like RTO Inspector, PW21 or Ravi Pardesi, Nodal Officer of the cell phone company (PW29), we are satisfied that the prosecution in the present case has established the offence against the Appellants beyond reasonable doubt.

60. In this case, the prosecution, has established that the cell phone from which the demands for ransom were made belong to '*Bombi and Sons*', whose proprietor Nitin Naik was examined as PW11. The prosecution has also examined Deepak Rawool (PW13), the driver for '*Bombi and Sons*' for last 15 years, who has also deposed to A2 being the employee of '*Bombi and Sons*' and who was given the said cell phone alongwith SIM card. The testimony of Ravi Pardesi (PW29), who has produced the call detail records (CDR), also corroborates various calls made between the cell phone of A2 and PW1 and PW25. The prosecution has also examined Sachin Shinde (PW30) in relation to call detail records of cell phone of PW1 and PW25, which again corroborates the case of the prosecution. In the wake of all this evidence, we do not think that failure to examine PSI Vast makes any dent to the case of the prosecution as contended by the learned counsel for the Appellants.

61. In this case, the prosecution also examined Savio D'Mello (PW23), the owner of Bar styled as '*Little Corner*' who has deposed that A1 and A2 had taken drink in his Bar upto about noon on 19th September, 2011 i.e. the date of kidnapping. There is overwhelming evidence that A1 and A2 acting in concert with each other. There is evidence that the A1 and A2 were involved in together tricking PW3 into pushing the Sumo vehicle so as to find an opportunity to take away the minor child from Winger car. There is evidence that A2 made calls to PW1 and PW25 in the context of demand for ransom and further, was the driver of Maruti Omni in which kidnapping took place. This is certainly not a case where A2 can be said to have been involved only as a driver of the Maruti Van and having no nexus with the conspiracy or kidnapping. In the matter of conspiracy direct evidence is rare to come by. According to us, there is overwhelming evidence in the present case of the circumstance from which the inference of conspiracy can be legitimately drawn.

62. The fact that ultimately no harm befell on the minor victim child is really not a mitigating circumstance in the present case. In any case, Section 364A of IPC provides for death penalty or imprisonment for life, in addition to fine. Therefore, the imprisonment for life, is virtually minimum punishment that can be imposed once the offence under Section 364A of IPC is made out.

63. Since, we have already held that there were good grounds to frame the charges against the Appellants under the provisions of the Goa Children's Act, 2003, it is obvious that the Children's Court constituted under the said Act, has quite correctly assumed jurisdiction in the matter. This Act, in Section 32(1)(l) provides that whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused shall lie on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be. Looking to the evidence on record in the present case, it is obvious that the minor child was in the custody of the Appellants at the time of their arrest or at the time of rescue or removal of the child consequent upon his rescue by the police. Ordinarily therefore, the provisions in Section 32(1)(l) of the Goa Children's Act, 2003 would be attracted in a matter of this nature. However, we make it clear that we have based our judgment and order on the basis that the burden was entirely upon the prosecution in the present case to prove the charges framed against the Appellants beyond the reasonable doubt. It is only because the prosecution, in the present case, has succeeded in proving the charges against the Appellants beyond reasonable doubt, that we have sustained the conviction recorded against the Appellants.

64. As regards the contention that the fine imposed upon the

Appellants for an amount of Rs.1,00,000/- each is excessive or that the same warrants reduction because ultimately no harm befell upon the minor child, we see no merit in the same. This is because Section 8(2) of the Goa Children's Act, 2003 as noted above, provides that whosoever commits any child abuse shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine of Rs.1,00,000/-. Same Section, however, when it comes to incest provides for punishment with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and *'also a fine which may extend to Rs.2,00,000/-'*.

65. The aforesaid means when it comes to the offence of child abuse or sexual assault the fine amount has to be Rs.1,00,000/-. However, when it comes to the offence of incest, the fine amount may extend to Rs.2,00,000/-. In the latter case of incest therefore, there is some discretion in the matter of imposition of fine upto the extent of Rs.2,00,000/-. The contention of the learned counsel for the Appellants regards reduction of fine amount, therefore cannot be accepted.

66. The learned Single Judge of this Court in ***Maloji Patil Vs State of Goa***¹² in the very context of the provisions of Section 8(2) of the Goa Children's Act, 2003 has held that this statutory provision specifically

¹² 2009 CriLJ 903

provides for a fixed amount of Rs.1,00,000/- payable as fine meaning thereby that there is no discretion left to the Children's Court to impose fine of less than Rs.1,00,000/-.

67. In the record transmitted before us, we find that at several places, there is a reference to the name of the minor child, who was the victim of offences perpetrated by the Appellants. This is to be avoided at all costs. In fact, Section 32 of the Goa Children's Act, 2003 which deals with procedure before the Children's Court specifically provides that the Children's Court shall abide by the principle of right to privacy and confidentiality of the minor child. Further, Section 32(1)(i) provides that the child's rights to privacy and confidentiality shall be protected by all means and through all stages of the proceedings. Further, Section 32(2)(g) also provides that in all dealings with children, the Children's Court shall ensure that the identity of the child victim is protected. Therefore, we direct that the name of the minor child in the records shall be masked, no doubt, by maintaining the records regards the identity of the minor child in sealed cover. The registry is therefore directed to transmit the records to the Children's Court so that the Children's Court does the needful in the matter at the earliest. The Children's Court to however retain such records. The Children's Court to do the needful in the matter at the earliest.

68. For all the aforesaid reasons, we see no good ground to accept these appeals and to interfere with the impugned judgment and order and the convictions recorded therein. We therefore dismiss these appeals, leaving the Appellants to bear their own costs.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.

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