

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.623 OF 2020

- 1 Jilani Khaja Sikalkar,
Age 24 yrs., Occ. Labour,
R/o Sikalkar Galli, Tipu Sultan Road,
Paranda, Tq. Paranda, Dist. Osmanabad.
- 2 Kalim Shahanoor Sikalkar,
Age 22 yrs., Occ. Labour,
R/o Sikalkar Galli, Tipu Sultan Road,
Paranda, Tq. Paranda, Dist. Osmanabad.

... Appellants

... **Versus** ...

The State of Maharashtra,
Through the In-charge of Police Station,
Nanalpeth, Tq. & Dist. Parbhani.

... Respondent

...

Mr. S.S. Kazi, Advocate for the appellants

Mr. B.V. Virdhe, APP for the respondent

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**CORAM : SMT. VIBHA KANKANWADI AND
RAJESH S. PATIL, JJ.**

RESERVED ON : 25th AUGUST, 2022.

PRONOUNCED ON : 30th SEPTEMBER, 2022

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by original accused persons challenging their conviction by learned Additional Sessions Judge, Parbhani in Sessions Trial No.35/2018, thereby they have been sentenced to suffer imprisonment for life and pay fine of Rs.1,000/- each, in default to suffer rigorous imprisonment for one month each, for the offence punishable under Section 364-A read with Section 34 of the Indian Penal Code, 1860.

2 The prosecution case in the nutshell is – original informant Usha is the mother of the victim boy. Her son was aged 12 at the time of incident i.e. 25.10.2017. Her husband is working in Veterinary Hospital at Pingli. The victim boy was taking education in 6th standard at Bal Vidya Mandir, Parbhani and the family of the informant was residing at Parbhani. After the Diwali vacations the victim boy and his friends used to play cricket in Idgah Maidan daily around 4.00 p.m. When the boy returned in the evening after playing cricket on 23.10.2017, he handed over Rs.20/- to the mother and then the mother asked as to from where he has fetched the amount. He told that a person who was watching their match at Idgah Maidan appreciated his play and he has given Rs.20/- as prize/gift. The person had also promised that he would give him the bat and ball. As usual on 24.10.2017 also the boy

went along with his two friends, played cricket and returned in the evening. On 25.10.2017 around 10.00 a.m. the boy told mother that the uncle who had given him gift of Rs.20/- would be giving bat and ball to him on that day and, therefore, he went outside the house. He did not return till 12.00 noon and, therefore, mother started searching for him. She went to the house of the friends of her son, but then those friends told her that her son had gone alone to Idgah Maidan and they had not accompanied the said boy. The informant and her relatives took search of the boy in an around Idgah Maidan. But they could not trace him out nor they could find any other person there. Therefore, she lodged First Information Report contending that her son has been kidnapped. The said First Information Report came to be registered vide Crime No.415/2017 under Section 363 of the Indian Penal Code.

3 It is the further prosecution story that on 26.10.2017 a phone call was received by the husband of the informant around 6.45 p.m. The boy talked to father and it was told that the mobile was of unknown persons and persons who took the boy along with them demanded ransom of Rs.20,00,000/- for the safe release of the son. They had then also threatened that they would kill the son if their demand is not fulfilled. Thereafter the father of the victim son contacted police and made some arrangements for

the money and as he was called to Hyderabad, he went along with police party to Hyderabad, but before that he was then called to Vikharabad. On their way they were called to Udgir from Vikharabad and accordingly, the father went along with police persons to Udgir. The ransom amount was settled by the caller to Rs.8,00,000/-. At Udgir, Dist. Latur the father was called at 2-3 places by the caller. The last place, where he was called, was the railway crossing. He was directed by the caller to keep the bag of the money on one platform i.e. ota near the railway crossing. After the bag was put, one person picked up that money bag and the police persons nabbed him. Information was taken from that person about the son of the informant and then it was found that the son was along with another man standing nearby. That man was also caught hold of by the police and the victim son was given in the custody of his father. Supplementary statements were recorded, panchnama was carried out even at that place, accused came to be arrested and after the investigation was completed charge sheet was filed for the offence punishable under Section 364-A read with Section 34 of the Indian Penal Code.

4 After the committal of the case charge came to be framed at Exh.8 against both the appellants under Section 364-A read with Section 34 of the Indian Penal Code. They pleaded not guilty and claimed to be tried.

The prosecution has examined 11 witnesses to bring home the guilt of the accused and after considering the evidence, statements of the accused persons under Section 313 of the Code of Criminal Procedure and hearing submissions on behalf of both sides the learned Additional Sessions Judge held both the accused persons guilty of committing offence punishable under Section 364-A read with Section 34 of the Indian Penal Code and sentenced as above. The said conviction is under challenge in this appeal.

5 Heard learned Advocate Mr. S.S. Kazi for the appellants and learned APP Mr. B.V. Virdhe for the respondent.

6 Learned Advocate for the appellants has submitted that as per the prosecution case the victim boy was aged 12 and he was kidnapped on 25.10.2017. If we consider the First Information Report, it restricts to Section 363 of the Indian Penal Code. Further prosecution story that the husband of the informant i.e. PW 2 Ansiram had not given the phone number of caller i.e. from which he had received the phone calls has been stated in his testimony. The call record of the phone of PW 2 Ansiram has not been collected. Under such circumstance, except the bare statement of PW 2 Ansiram that the callers had demanded amount of Rs.20,00,000/- and then it was settled to Rs.8,00,000/- there is no other evidence. At no point of time

the police who were allegedly accompanying PW 2 Ansiram had tried to record the phone calls/conversations. It is, therefore, hard to believe that those calls were given by the present appellants. PW 1 mother – informant lodged First Information Report after getting suspicion about kidnapping about son. In fact, her conduct is also surprising. Those persons, who were not known to her son and even the son had not given names of those persons who had appreciated his play, whether could allow the son to be gifted with bat or ball. She does not say that she had tried to persuade the boy that he should not take gifts from unknown persons. The story therefore, appears to be unbelievable. PW 3 is the victim boy who was allegedly kidnapped for ransom. He has stated that two unknown uncles met him on Idgah ground on 22.10.2017 and told him that he plays cricket well. He has described one uncle as fat, another as thin. The fat uncle told him that if he hits a six he would give him Rs.20/-. On that day he could not hit a six. But then again on the next day when he had gone to play cricket, those two uncles were on the ground. They promised that they would give him a bat and ball. His friends were with him at that time. The fat uncle gave Rs.10/- to one Vijay to bring water pouches, accordingly, the water pouches were brought. On 23.10.2017 the fat uncle gave him amount of Rs.20/- as the cricket ball went over the tin roof and the game was stopped. His friend Vijay and Sumit went near Government Hospital to bring a new ball and accordingly fetched it. On

24.10.2017 the fat uncle gave him Rs.20/- to bring a new ball as the ball with which they were playing broke. The boy tries to say that thereby some confidence was tried to be gained by the said two unknown uncles and then on 25.10.2017 PW 3 victim was called at Idgah Maidan by those uncles and according to him, he was taken in a car. He says that the ball was bought, then, the question is, why he would accompany further to the accused ? Though he says that he had shouted and tried to inform the public that he has been kidnapped, then, the question arises - how people would not have helped him ? He then says that he was taken in the said car to Parali Railway Station and then it was told that since there was no train at that time they would be going to Ghatnandur. Accordingly, they went to Ghatnandur and from there they went to Ahmedpur by said jeep. The said jeep driver has not been examined. He then says that they came to Latur Road Railway Station from Ahmedpur and by train they went to Parbhani. Then he was taken to Hyderabad. He then says that he was then taken to Zahirabad and then to Udgir by a four wheeler. At no point of time when they had taken through public transport he had ever tried to raise voice. This rather gives an indication that the boy might have left the house in anger and the accused persons have been falsely implicated. PW 4 Vijay and PW 5 Sumit are the friends of the boy. Though they say that they had seen two unknown persons, they have not identified any of the accused and they were not with

the victim boy on the day of incident. PW 6 is the panch witness to the spot i.e. Idgah Maidan, but it is to be noted that he is the maternal uncle of the boy. PW 7 Rameshwar is the panch for the seizure of the lodge record and he has also stated that he treats Ansiram as his maternal uncle and was knowing him since childhood. PW 8 Santosh Mudhalwadkar is the Manager of Petrol Pump and the CCTV footage of the said petrol pump was collected by police; yet, it is to be noted that the said electronic evidence has not been proved by certificate under Section 65-B of the Indian Evidence Act and examining the appropriate person. PW 8 Santosh has produced copy of the receipt of petrol pump, but interesting to be noted is that the receipt which he produced is original. How he could have possessed the original receipt, is a question and in his cross-examination he has admitted that on the say of police he has prepared the said receipt. That means, such evidence is created by the Investigating Officer. PW 9 Daulat Chopade is the driver of the car, who was allegedly engaged by the appellants from Parbhani and he had left them including the boy at Railway Station, Parali. In his cross-examination, he has clearly admitted that he did not suspect the accused that they would have kidnapped the boy and he had not made any inquiry with the boy as well as the accused. He could not see that the boy was frightened, crying in the vehicle. Further, PW 10 PSI Sachin Dronacharya is the Investigating Officer, but he has admitted that he has not conducted Identification Parade. He has

also not conducted any panchnama about the amount to be given as ransom. Exactly how much amount was in the bag, from where the amount was collected by PW 2 Ansiram is not brought on record. The investigation appears to be partial. PW 11 API Sunil Pungale had accompanied PW 2 Ansiram at various places and it is stated that he had nabbed the kidnappers. As aforesaid, he had not tried to record the call of the accused persons and further it is to be noted that Exh.77, which is a letter given by Police Inspector, Police Station, Nanalpeth to D.S.P, Parbhani seeking permission to send police party along with the father, mentions that on the phone call the accused had asked Ansiram to bring amount of Rs.1,00,000/-. Why API PW 11 Sunil Pungale had not carried out the panchnama at the said place and why those panchas at that place i.e. at railway crossing at Udgir have not been examined by the prosecution is best known to the prosecution itself. Therefore, it cannot be stated that ingredients of Section 364-A of the Indian Penal Code have been attracted in this case.

7 Alternatively, the learned Advocate appearing for the appellants submitted that even if we take the evidence as it is, it may give rise to offences under Section 363 and 384 of the Indian Penal Code. There are no criminal antecedents of the appellants. The appellants came to be arrested on 26.10.2017 and they have undergone around 04 years and 11 months in

jail. Therefore, the sentence may be reduced to already undergone by the appellants. While undergoing the sentence one of the accused suffered gangrene and, therefore, his one leg was required to be amputated and, therefore, he needs sympathy to be shown.

8 Learned Advocate appearing for the appellants relied on the decision in **Rafiq and another vs. State** decided by Hon'ble Delhi High Court reported in **(2008) 2 CCR 322 : (2008) 4 JCC 2961**, wherein it has been held

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“Mere demand of ransom amount for release of a kidnapped person, is not sufficient to attract application of Section 364-A of the Indian Penal Code unless it is also proved that the kidnapped person was threatened with death or hurt or that the conduct of the kidnappers was such which could raise a reasonable apprehension that he could be put to death or hurt if the ransom amount was not paid. When there is such total absence of evidence in regard to any threat to cause death or hurt to the kidnapped child and also for lack of evidence in regard to the appellants conducting themselves in a way that could give rise to a reasonable apprehension that the child would be put to death or hurt, the ransom demands implicate could not have brought the offence within the ambit of Section 364-A of the Indian Penal Code.”

8.1 Further reliance has been placed on **Shaik Ahmed vs. State of Telangana** decided by Hon'ble Supreme Court in Criminal Appeal No.533 of

2021 [Special Leave Petition (Criminal) No.308 of 2021] decided on 28.06.2021, wherein it has been held thus -

“Essential ingredients to convict an accused under Section 364-A of the Indian Penal Code are required to be proved by prosecution are as follows :

- (i) Kidnapping or abduction of any person or keeping a person in detention after such kidnapping or abduction; and
- (ii) 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;
- (iii) causes hurt or death to such person in order to compel the Government or any foreign State or any Governmental organization or any other person to do or abstain from doing any act or to pay a ransom.”

8.2 Further reliance has been placed on the decision by Division Bench of this Court in **Atul Anantrao Kate vs. State of Maharashtra, 2022 (2) Mh.L.J. (Cri.) 157**. In this case, the essential ingredients stated in **Shaikh Ahmed** (supra) were considered and it was stated that in absence of the proof in respect of sms or any other electronic evidence the prosecution has failed to prove essential ingredients of Section 364-A of the Indian Penal Code.

Relying upon these decisions the learned Advocate appearing for the appellants initially prayed for setting aside the conviction and alternatively to convert the conviction under Section 364-A of the Indian Penal Code to under Section 363 of the Indian Penal Code, and reduce the sentence to already undergone.

9 Per contra, the learned APP strongly opposed the appeal and submitted that the boy was found in possession of the accused and this has been supported by the testimony of PW 1, PW 2, PW 3, PW 11 and PW 9 – the driver of the car has also identified that the boy was in the custody of the appellants. It appears that by giving promise that they would give him bat and ball as gift the boy was taken by the accused along with them. For that purpose the appellants were going to Idgah Maidan for 2-3 days prior to 25.10.2017 and by giving the amount for purchasing ball they had tried to gain confidence in them. The confidence might have over powered the boy and, therefore, he would not have suspected that he is being kidnapped. But, then, he says that at one point of time he has tried to raise voice but since the glass of the window of the car was put his voice could not reach people. He thereafter was given threat to kill and, therefore, he was keeping quiet. The identity of the accused persons has been established. The phone calls were received by PW 2 – the father and the amount of Rs.20,00,000/- which was

earlier demanded was then settled to Rs.8,00,000/-. Under such circumstance, the ingredients of the offence punishable under Section 364-A of the Indian Penal Code have been proved beyond reasonable doubt. The conviction awarded to the appellants by the learned Additional Sessions Judge is perfectly correct and it does not require any kind of interference.

10 It is to be noted that first of all we are required to consider as to whether the evidence led by the prosecution in the nature of testimony of 11 witnesses is sufficient to prove the ingredients of Section 364-A of the Indian Penal Code beyond reasonable doubt. The ingredients or essential requirements to prove the said offence have been enumerated in **Shaikh Ahmed** (supra). From the said point of view the important testimony would be that of PW 2 Ansiram, PW 3 – the victim boy and PW 11 API Sunil Pungale. PW 1 informant had not received/talked to the kidnappers on phone and, therefore, whatever Ansiram had told to her has been stated by her. PW 3 victim, who was 12 years of age, appears to be very much fascinated for playing cricket. As per his testimony, the appellants were watching his play since 22.10.2017. By giving amount for various reasons, that is, for bringing of water pouches, balls they had tried to establish a confidence. According to him, the accused persons were impressing him that since he plays well they would give him bat and ball. The fascination to have

new bat and ball might have over powered him and he left the house by informing the mother that the fat uncle had called him to give bat and ball. No doubt, the persons were not known to him and he had not even tried to get their names from their earlier visits. Taking into consideration his age, we can imagine that he might be very much happy to get a new bat and ball by a person who is admiring his play. The mother, in fact, ought to have persuade him not to take such gifts from unknown persons. But, merely because it was not stated by her we cannot raise any kind of doubt about the story itself.

11 The testimony of PW 3 the victim would show that at the Idgah Maidan when he went around 9.00 a.m., the fat uncle told him that he would give bat and ball after withdrawing money from ATM and made him to sit in a car. The window was closed, even the diesel was filled in the car and then it is stated that said fat uncle asked him about his father's mobile number. Accordingly, he had given it. He does not say that immediately from the car itself said fat uncle had given call to PW 2 Ansiram. The cross-examination may give an impression that the boy was taken to the shop from where they used to purchase the ball on 25.10.2017 also, but minute perusal of the cross-examination would show that it was the usual place from where they used to purchase the ball and prior to 25.10.2017 it was not told by PW 3 victim that

an unknown person is giving money to him to buy the ball. It leaves no doubt about the fact that from Idgah Maidan itself without taking the boy to the shop he was taken in a car, and this stands corroborated by the testimony of PW 9 - driver of the car. From the testimony of PW 3 victim as well as PW 9 driver it can be considered that during the journey to the place where the car was taken and later on through the public transport or other mode of transport, wherever the victim was taken, he did not appear to be frightened nor he had tried to flee away or get rescue from the clutches of the accused persons. According to the prosecution, especially the testimony of PW 2 Ansiram he had received the phone call from the kidnapper at about 6.00 a.m. on 26.10.2017. He then says that after contacting the police and arranging the money, along with the police staff they went towards Hyderabad. Thereafter, in the journey they were called at Zahirabad and then to Udgir and ultimately on the same day at Udgir the boy was found on 26.20.2017. Except the bare statement of Ansiram that the caller had told him that if the amount is not fulfilled his son would be killed, there is nothing. Neither PW 10 PSI Dronacharya nor PW 11 API Sunil Pungale have stated that they had at any point of time tried to record the call of the caller. The Call Detail Record has also not been collected. When the vital piece of evidence in the form of electronic evidence could have been collected and it is not collected, we cannot say that there was threat to kill or in other words -

the victim was put to fear of death or hurt by the accused persons. Another fact to be noted is that PW 2 Ansiram has not stated that how he has not collected the amount and though he has stated that amount was settled at Rs.8,00,000/- how much is carried out in the jeep, is the question. Why no panchnama was executed by PW 10 PSI Dronacharya has not been explained by him. We will have to take into account letter Exh.77, which he had returned to District Superintendent of Police, in which it is stated that the accused had told on phone to Ansiram that amount of Rs.1,00,000/- should be brought. This discrepancy in the evidence ought to have been explained by the prosecution. Again coming to testimony of PW 3 - the victim, it is to be noted that according to him, the threat to kill was given when he was to board train at Latur Road Railway Station for Hyderabad. Till then he does not say that he felt that he has been kidnapped and any threat to kill was given to him. Another fact to be noted is that the boy has not stated that he had ever talked to the father on phone. Even PW 2 Ansiram also does not say that the kidnappers had allowed the boy to talk with father. But then, PW 1 – the informant says that the boy had called his father from the mobile of unknown person. We are considering this to see whether the ingredients of Section 364-A of the Indian Penal Code has been made out. Certainly there is evidence to show that the boy was found in possession of the accused persons. Therefore, definitely, the ingredients of Section 363 of the Indian

Penal Code have been proved. There was no question of false implication of the appellants because even the appellants have not come with a case that they were knowing Ansiram and his family prior to the incident and there was such reason to implicate them. Again, at the cost of repetition, it will have to be stated that PW 11 Sunil had not made any arrangements even to hear the conversation between the caller and PW 2 Ansiram. He does not say nor it is supported by PW 2 Ansiram that Ansiram was directed to keep his mobile on speaker mode and then they had heard what the caller was saying. PW 11 API Sunil has not stated that at any time PW 2 Ansiram disclosed it to him that the caller is giving threat to kill his son. After the boy was taken in custody at railway crossing of Udgir, no medical examination of the boy has been conducted. That means, whether any hurt was caused to him has also not been tried to be brought on record. PW 3 – the victim does not say that he was anyway assaulted by the appellants. Under such circumstance, though kidnapping has been proved, it cannot be said to be by giving threats to cause death or hurt to the victim nor there is evidence to show that the conduct of the appellants was such that would give rise or develop the intention that the victim was put under the fear of death or hurt. This basic ingredient of Section 364-A of the Indian Penal Code has not been proved by the prosecution.

12 The testimony of PW 4 and PW 5, who are the friends of PW 3, at the most would prove that the appellants were the persons who were watching their play and they had tried to give money to them, thereby gaining confidence. The testimony of PW 6 and PW 7, who are the panch witnesses, cannot be appreciated further as the connecting evidence is absent. Same is the case with PW 8 Manager. The CCTV footage has not been proved by requisite certificate under Section 65-B of the Indian Evidence Act and also for not examining the appropriate person who was controlling the CCTV system. The production of original receipt by this witness regarding the sale of diesel raises doubt about the intention about the Investigating Officer. PW 9 – driver of the car had not even suspected that the boy would have been kidnapped shows that the boy was not put in fear of death or hurt throughout his travelling from the car.

13 It is to be noted from the testimony of PW 2 Ansiram and PW 11 API Sunil Pungale that the bag containing money was kept at the railway crossing and after it was lifted by one of the accused, he was caught. Neither that bag nor the money therein was seized by API Pungale on the spot nor later on by PW 10 PSI Dronacharya. Under such circumstance, these facts do not give rise to ingredients of Section 384 of the Indian Penal Code also. As aforesaid, the prosecution was able to prove offence under Section 363 of the

Indian Penal Code only against the appellants. The learned Additional Sessions Judge failed to consider the ingredients of the offence and went wrong in convicting the appellants under Section 364-A of the Indian Penal Code. We, therefore, acquit the appellants of charge of offence punishable under Section 364-A of the Indian Penal Code. We hold that in view of the fact that the offence under Section 363 read with Section 34 of the Indian Penal Code has been proved. The appellants deserve to be convicted under that offence.

14 The appellants are now alternatively claiming that for offence under Section 363 of the Indian Penal Code the sentence be reduced to already undergone by them. One of the accused, who suffered gangrene and whose leg is required to be amputated, is also seeking sympathy. However, it is to be noted that the appellants are from Osmanabad District and they have committed offence in Parbhani. They were not even knowing the victim boy and his family. Such crimes do not require that sympathy should be shown to the accused persons. Since the evidence that was adduced by the prosecution was short of proving the ingredients of Section 364-A of the Indian Penal Code, the same will not give advantage to the appellants to claim leniency. When offence is committed against the unknown person/unknown family, then, the appropriate sentence that can be imposed under this Section would

be the maximum.

15 For the above said reasons, we pass following order.

ORDER

1 The Criminal Appeal is partly allowed.

2 Judgment and order of conviction in Sessions Trial No.35/2018 dated 31.07.2020 passed by learned Additional Sessions Judge, Parbhani directing the appellants to suffer imprisonment for life and pay fine of Rs.1,000/- each, in default to suffer Rigorous Imprisonment for one month each, stands quashed and set aside.

3 The appellant Nos.1) Jilani Khaja Sikalkar and 2) Kalim Shahanoor Sikalkar are hereby held guilty of committing offence punishable under Section 363 read with Section 34 of the Indian Penal Code, 1860 and they are sentenced to suffer Rigorous Imprisonment for seven years and pay fine of Rs.1,000/- (Rupees One Thousand only) each, in default to suffer Rigorous Imprisonment for one month each.

4 The appellants, who are in custody since 27.10.2017 till date, are entitled to get set off under Section 428 of the Code of Criminal

Procedure, 1973.

5 Fine amount paid, if any, to be adjusted towards the fine now imposed.

6 It is clarified that there is no change in respect of order about disposal of muddemal.

(Rajesh S. Patil, J.)

(Smt. Vibha Kankanwadi, J.)

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