

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

**CRIMINAL APPEAL NO.1042 OF 2019 WITH
CRIMINAL APPLICATION NO.3370 OF 2022**

- 1) Mohammad s/o Sayeed Shibibi
Age 48 years, Occu. Unemployed,
R/o Sahayognagar, Nanded
- 2) Shahin Begum w/o Mohammad Shibibi
Age 42 years, Occu. Household,
R/o Sahayognagar, Nanded ... **APPELLANTS**

VERSUS

The State of Maharashtra
through Police Station,
Bhagyanagar, Nanded
Tal. & District Nanded
(Copy to be served on the
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad) ... **RESPONDENT**

.....
Mr. Aniket Wagal with Mr. Rajesh H. Mewara,
Advocates for appellants
Mr. A.M. Phule, A.P.P. for respondent – State
.....

**CORAM : R. G. AVACHAT, AND
R. M. JOSHI, JJ.**

Date of reserving judgment : 18th November, 2022

Date of pronouncing judgment : 30th November, 2022

JUDGMENT (PER R.G. AVACHAT, J.) :

The appellants, along with three others, were
prosecuted for commission of offences punishable under

Sections 363, 364-A, 387, 342 read with Section 34 and Section 120-B of the Indian Penal Code (I.P.C. for short). Learned Additional Sessions Judge, Nanded, by a judgment dated 3/10/2019, convicted the appellants for the offences punishable under Sections 342, 363, 364-A, 387 read with Section 34 of the Indian Penal Code and, therefore, sentenced to suffer imprisonment for life including imprisonment for certain terms and to pay a fine, with default stipulations. They have been acquitted of the offence punishable under Section 120-B of the I.P.C.

2. The facts of the prosecution case, in a nutshell are as follows :-

P.W.5 Dr. Sital Kyatamwar (victim) had cleared 9th Standard examination in 2005. She was the resident of Vasmat, District Hingoli. She would attend Vacation Classes for 10th Standard at Nanded. She would, therefore, shuttle between Vasmat and Nanded by bus. P.W.3 Prashant was her classmate. He too would attend those classes. Both used to come together to Nanded.

It was 7.00 in the morning of 25th April 2005,

both, the victim and P.W.3 Prashant came to Nanded. They boarded an autorickshaw at Raj Corner. On the way to Class premises, two more persons boarded the very autorickshaw. One of them shared the driver seat. While the rickshaw was passing by Railway Division, one of the two took the victim out of the autorickshaw. The second one also alighted. He pushed Prashant. Prashant related the incident to Head Mistress. Both, in turn, approached Bhagya Nagar Police Station, Nanded and Prashant lodged F.I.R. (Exh.174).

The duo (culprits) had their motorcycle parked at a roadside. They made the victim sit on the motorcycle. Both of them took the victim to Hyderabad. They travelled from Nanded to Hyderabad on the same motorcycle triple seat. The victim was kept in a room at Charminar. Then they took telephone number of father of the victim namely Dr. Maroti Katamwar (P.W.1). They talked with him and made a demand of Rs.15 Lakhs for her release. On negotiations, it was reduced to Rs.4,50,000/-. P.W.1 Dr. Maroti, accompanied by police officials of Bhagya Nagar Police Station went to Hyderabad since the caller had asked P.W.1 Dr. Maroti to pay him money at Hyderabad and get the victim back. Assistance of Hyderabad police was also taken. The caller had asked

P.W.1 Dr. Maroti to come to road – Chandrayan Gutta to Barkas Funeral Ground. Telephonic conversation was in progress between the caller and P.W.1 Dr. Maroti. On his directions, P.W.1 Dr. Maroti alighted at a particular place on the aforesaid road. Two motorcycle-borne persons came to him. P.W.1 Dr. Maroti gave them Aristocrat bag containing sum of Rs.4,50,000/-. The duo went away. They came back immediately and dropped the victim at the place whereat the money was received. As planned, the culprits were chased and overpowered. They were appellant No.1 and absconding accused No.2.

3. The further investigation followed. Others involved in the crime came to be arrested. Panchanamas of the relevant happenings were drawn. An autorickshaw came to be seized. On investigation, the charge sheet came to be filed in the Court of Judicial Magistrate, First Class, Nanded. The learned Judicial Magistrate, First Class, in turn, committed the case to the Court of Sessions for trial. The trial Court framed the charge. Prosecution examined 13 witnesses. On appreciation of the evidence in the case, the appellants were convicted and consequently sentenced as stated above.

4. Learned counsel appearing for the appellants would submit that, it was just illogical to accept the case of the prosecution that the accused kidnapped the victim and took her to Hyderabad on motorcycle. It was a distance of not less than 275 Kms. It is just unpalatable that they travelled unnoticed by anyone on the road. Many toll booths had to be passed. CCTV cameras have been installed at all toll booths. The victim did not raise cries. He would further submit that, there is no shred of evidence against the appellant No.2. Her crime is that, she happens to be wife of appellant No.1. No overt act has been attributed to her. The evidence indicates that, the duo who received ransom, had their faces covered. P.W.1 Dr. Maroti was not called upon to identify them in test identification parade. The evidence in the case came to be recorded little over 12 years after the incident. The learned counsel would submit that, close scrutiny of the evidence would indicate no ingredients of offence punishable under Section 364-A were made out. According to him, all the panchanamas were drawn at Bhagya Nagar Police Station, Nanded. They, therefore, urged for allowing the appeal.

5. Learned A.P.P. would, on the other hand, submit

that, the evidence of P.W.3 Prashant almost went unchallenged. Close scrutiny of the evidence of the relevant witnesses would indicate that the factum of kidnapping is undisputed. A force was used in kidnapping the victim. The appellants made phone call to the victim's father. Implied therein was apprehension of the victim being put to hurt, at least. According to the learned A.P.P., the appellant No.1 and the absconding accused No.2 were caught red-handed. The victim, her father and the police officer, who had actually participated in the rescue operation, identified the appellant before the Court. The learned A.P.P. ultimately urged for dismissal of the appeal.

6. The Division Bench of this Court, in case of **Philips Fadrick D'Souza & Ravindra @ Balu Pandurang Kambre Vs. The State of Maharashtra & anr. etc. : (2008) ALL MR (Cri) 2830**), observed in paragraph No.6 as under :-

“Section 364-A of the Indian Penal Code reads as follows :-

364-A. Kidnapping for ransom etc. - 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 imprisonment for life, and shall also be liable to fine.”

The essential ingredients of the offence - under Section 364A 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 inter-governmental 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.

The Penal Code classifies offences affecting the human body in Chapter XVI and those which relate to kidnapping and abduction are delineated in Section 359 to Section 369. Section 359 provides that kidnapping is of two kinds, namely, kidnapping from India and kidnapping from lawful guardianship. Section 360 relates to kidnapping from India, while Section 361 relates to kidnapping from lawful guardianship. Section 362 defines the offence of abduction. Section 363 provides a punishment of imprisonment upto seven years in respect of the offence of kidnapping. Section 363A deals with kidnapping or maiming a minor for the purpose of begging. Section 364 deals with kidnapping or abducting in order that a person may be murdered or may be so disposed of as to be put in danger of being murdered; the punishment provided being imprisonment for life or rigorous imprisonment upto ten years and fine. Section 364A is the provision which falls for interpretation in this case. Section 365 provides for kidnapping or abduction with intent to secretly and wrongfully confine a person. Section 366 deals with the offence of kidnapping, abduction or inducing a woman to compel her to marry any person against her will or in order that she may be forced or seduced to illicit intercourse. Section 367 deals with the offence of kidnapping or abduction in order to subject a person to grievous hurt or slavery. Section 369 covers the offence of kidnapping or abducting a child under ten years with intention of taking dishonestly any movable property from the

person of such child.

The offence under Section 364A is not made out only upon the commission of the unlawful act of kidnapping or abduction. The essential ingredients of the statutory provision, apart from the act of kidnapping, abduction or, as the case may be, keeping a person in detention thereafter, are a threat to cause hurt or a reasonable apprehension of such a consequence or causing death or hurt, in order to compel the payment of ransom or the doing or abstention from doing any act by the government, a foreign state, an inter governmental body or by any unlawful act is to demand person. The purpose of the ransom is to compel the doing or abstention from doing of a particular act. Kidnapping or the abduction by itself does not lead to an inference of the underlying purpose with which it was carried out. The purpose must exist at the time when the act of kidnapping or abduction takes place. Whether such a purpose existed at that time will have to be deduced from all the attendant circumstances. Events which take place prior to, at the time of and subsequent to the commission of the offence would weigh in the balance. In interpreting Section 364A the Court must be cognizant of the fact that the provision was introduced in order to deal with the serious menace posed by terrorism to the stability of civil society. Hence, while the underlying purpose, which is an ingredient of Section 364A, must demonstrably be found to exist as the foundation of the unlawful act, the Court would not be justified in abridging the parameters of the statutory provision with reference to requirements which have not been imposed by Parliament. Situations involving kidnapping or abduction for ransom are fluid. Demands which are raised by abductors may in the very nature of things evolve as the situation progresses. The law does not prescribe that the nature of the demand for ransom be precisely spelt out when the kidnapping or abduction is carried out. So long as the unlawful act of

kidnapping or abduction is carried out for the purpose of making a demand for ransom, the requirement of the section would be met. Moreover, as the Supreme Court noted, it may well happen that after the demand is made known to the victim, but before it is communicated to a third person, the accused may be arrested. That again would not detract from the circumstance that when act of kidnapping or abduction was carried out with the object and purpose of demanding ransom. A statutory provision like Section 364A must undoubtedly, like penal legislation, be construed strictly. But while construing a provision such as Section 364A the Court must be careful not to interpret it in a manner which would denude it of its legislative efficacy.”

7. Let us turn to the evidence in the case. Although the prosecution has examined 13 witnesses, for deciding the appeal, relevant evidence would be that of the victim, her father Dr. Maroti (P.W.1), her friend Prashant (P.W.3) and the police officer involved in the rescue operation.

P.W.3 Prashant gave evidence consistent with the F.I.R. (Exh.174) lodged by him. Only two questions were put to him during his cross-examination. One was in the nature of suggestion that he lodged the F.I.R. against unknown person. Another one was, to obtain his admission, about 7 to 8 persons were accompanied them (in autorickshaw) when the incident took place. As such, the evidence of P.W.3

Prashant that – he along with the victim came from Vasmat to Nanded on 25/4/2005 by 7.30 in the morning, they boarded an autorickshaw, on the way two persons got in the very autorickshaw, one of them shared driver seat, near Railway Board Division, one of those two removed the victim from the autorickshaw, he got himself rescued, those two went to a motorcycle parked in the nearby, the duo then took the victim with them, he immediately reported the matter to his teacher, he then went to the police station and lodged the F.I.R. (Exh.174), went unchallenged.

8. True, P.W.3 Prashant failed to identify the culprits before the Court. His rest of the evidence, however, stands. On the same lines is the evidence of the victim. She reiterated in her evidence that, on the fateful day, she came to Nanded in a bus for attending Vacation Classes. Prashant – her classmate was with her. They boarded an autorickshaw at Raj Corner. On the way to Vacation Class premises, two more persons boarded the very autorickshaw. One of them shared the driver seat. While the rickshaw was passing by Railway Division, one of the two took the victim out of the autorickshaw. The second one also alighted. He pushed Prashant.

It is further in her evidence that, she raised cries. The persons made her sit on the motorcycle. They took her to Hyderabad on motorcycle. She was kept in a room at Charminar. There was one another lady (appellant No.2) with her. The accused then took phone number of her father. The conversation took place between her father and the accused. She was made to talk to her father. She was informed by the father that they were making demand of money for her release.

9. P.W.1 Dr. Maroti, father of the victim was a Medical Superintendent at Government Hospital, Vasmat. It is in his evidence that, on 17th April, he had received a call on his landline phone. It was 9.00 p.m. The caller was unknown. He enquired about his name. P.W.1 Dr. Maroti gave him his name and asked what the matter was. The Caller I.D. was, therefore, applied to the landline phone. P.W.1 Dr. Maroti claimed to have lodged report with police on the following day.

10. It is further in his evidence that, on 25th April, his daughter (victim) had left the house for Vacation Classes.

After a while, he received a phone call of Class Teacher of the victim. He was informed that, the victim was kidnapped by two unknown persons on a motorcycle. He along with his wife Savita (P.W.4) came to Bhagya Nagar Police Station, Nanded. Dy. S.P. Abdul Razzak met them there. Prashant (P.W.3) lodged the F.I.R. The evidence of P.W.1 Dr. Maroti further disclose that, during intervening night of 25th and 26th April, he received a phone call on his landline. The caller was a male person. He told P.W.1 Dr. Maroti that his daughter (victim) was with him and for her release, he would be required to pay him money. The caller told P.W.1 Dr. Maroti to think over and respond. That person again made a phone call on cell phone of P.W.1 Dr. Maroti. The caller made a demand of Rs.15 Lakhs. On the directions of the police officer, P.W.1 Dr. Maroti negotiated with the caller and agreed to pay a sum of Rs.4,50,000/-. His evidence would further suggest that, it was a phone call from Hyderabad. The caller asked him not to report to the police. The caller had asked P.W.1 Dr. Maroti to come to Hyderabad, pay him money and get back his daughter. His evidence further suggests that, police officers of Bhagya Nagar Police Station, Nanded accompanied him to Hyderabad. There were three vehicles. One vehicle was proceeding ahead of his vehicle, another one was following.

The police persons were in civil dress. He again received a phone call. The caller asked him to come to the road – Chandrayan Gutta to Barkas Funeral Ground. The caller insisted to pay him money first. P.W.1 Dr. Maroti agreed, on the instructions of the police officer. It is further in his evidence that, as per the directions of the caller, he alighted from the vehicle and took a walk. He had a suitcase of Aristocrat make with him. The sum of Rs.4,50,000/- was kept therein. Two persons came on a black-colour motorcycle in a short while. They took the briefcase, informing P.W.1 Dr. Maroti that his daughter would be released. The duo left. After 10 minutes, the victim came there. He took her in the vehicle. Those two came from back side of P.W.1 Dr. Maroti's vehicle and overtook his car. P.W.1 Dr. Maroti, in turn, informed the same to Abdul Razzak, Dy. S.P. The police officials overpowered the duo after a while. A panchanama was drawn. The culprits gave their names. One stated his name as Shibibi (appellant No.1).

11. During cross-examination of P.W.1 Dr. Maroti, it has come on record that, the duo had covered their faces with clothes. P.W.1 Dr. Maroti, however, categorically stated that, it was so when they were given the bag. While the victim was

brought by them, that time their faces were not covered. P.W.1 Dr. Maroti had identified the appellant No.1 before the Court as one of those two culprits.

12. The victim's evidence reinforces the evidence of P.W.1 Dr. Maroti. It is in her evidence that, after the accused received the money, they came back. They took her on a motorcycle and left at a place wherefrom she could see car of her father. Immediately thereafter the police chased the duo and successfully overpowered. It is further in her evidence that, the appellant No.1 himself had given his name as Shibibi. The appellant No.2 is the wife of appellant No.1. During the cross-examination, the victim stated to have had not raised cries on way to Hyderabad. Police gave her the names of appellants and the co-accused. Although she claimed to have identified the appellant No.1 in test identification parade, there is no evidence in that regard.

13. P.W.11 Mohd. Giasuddin was one of the officers involved in the rescue operation. It is in his evidence that, he had accompanied Dy. S.P. Abdul Razzak and others to Hyderabad. It was 27th April 2005. A trap was laid. The appellant No.1 and absconding accused No.2 came after a

while. The appellant No.1 was given bag containing sum of Rs.4,50,000/-. He released the victim and took to his heels. The police staff caught him with a motorcycle and the bag containing money. A cell phone, knife and diary was found with him. A seizure panchanama was drawn vide Exh.64.

14. It is true that, there is no evidence to indicate that the seizure panchanama was drawn on the spot. There is also no material to indicate the test identification parade to have been held for identification of the appellant. The fact, however, remains that, the appellant No.1 was overpowered within minutes of receipt of ransom and release of the victim. He did not, however, offer any evidence to suggest that no incident as has been alleged by the prosecution did take place and he was arrested from somewhere else.

15. It is reiterated that, there is overwhelming evidence to indicate the victim to have been kidnapped by two persons. She was taken to Hyderabad on a motorcycle and kept in a room. The appellant No.2 was with the victim in the very room. She is none other than wife of appellant No.1. The question is, whether, based on the evidence on record the offence punishable under Section 364-A is made out. The

definition of Section 364-A has already been adverted to with enumeration of ingredients thereof hereinabove. In our view, what has been proved by the prosecution is – the appellant No.1 along with his associate, kidnapped the victim from Nanded. He took her to Hyderabad. She was kept in a room for 48 hours. The same amounts her detention. He made a call to the father of the victim and made a demand of money for the victim's release. The same makes out a case of demand of ransom. In our view, one of the ingredients of the offence punishable under Section 364-A is missing. It is not the case of the victim or her father that the caller (appellant No.1) had ever given them a threat of causing her death or hurt. There is also nothing to suggest the conduct of the appellant was such as to give rise to a reasonable apprehension that such person (victim) or her father might have been put to death or hurt. The fact that the caller had asked not to report to the police would in no way give rise to a reasonable apprehension of any offence against human body of the victim or her father. No investigation was made in relation to a phone call received by Dr. Maroti (P.W.1) on 17th of April. There is also no evidence to indicate a link between the said call, if any, and the incident in question. In our view, the ingredients of offence punishable under Section 365 of the

I.P.C. are proved against the appellant No.1.

16. No overt act has been attributed to appellant No.2. There is evidence only to suggest that she was with the victim in the room in which the victim was kept. The victim was candid enough to state to have been served with food during her stay there. The appellant No.2 being the wife of appellant No.1, was expected to be in the shadow of her husband. Even if it is assumed that she knew that her husband was involved in criminal activity, her mere silence and not reporting to the police in no way make her liable for any offence. It is reiterated that, for invoking her criminal liability with the aid of Section 34 of the I.P.C., neither an act or omission made punishable under the I.P.C. or any of the statutes is shown. In the face of evidence on record, the trial Court ought not to have convicted the appellant No.2. It also not to have convicted the appellant No.1 for the offence punishable under Section 364-A of the I.P.C. Since the offence punishable under Section 365 is made out against appellant No.1 and the same being punishable with imprisonment for a term which may extend to seven years and fine, we propose to sentence the appellant No.1 to maximum term of imprisonment provided under Section 365

of the I.P.C.

17. For the aforesaid reasons, the appeal partly succeeds. Hence the order :-

ORDER

(i) The Criminal Appeal is partly allowed.

(ii) The impugned order dated 3/10/2019, passed by learned Additional Sessions Judge, Nanded in Sessions Case No.107/2005, convicting and sentencing the appellant No.2 for the offences punishable under Sections 342, 363, 364-A, 387 read with Section 34 of the Indian Penal Code is set aside. She stands acquitted of the offences punishable under Sections 342, 363, 364-A, 387 read with Section 34 of the Indian Penal Code. She be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to her.

(iii) Conviction and consequential sentence of the appellant No.1 for the offence punishable under Section 364-A read with Section 34 of the Indian Penal Code imposed by learned Additional Sessions Judge, Nanded in Sessions Case No.107/2005, by impugned order dated 3/10/2019 is hereby

set aside. He stands acquitted of the offence punishable under Section 364-A read with Section 34 of the Indian Penal Code. He is, however, convicted for the offence punishable under Section 365 of the Indian Penal Code and, therefore, sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5000/- (Rupees five thousand), in default to suffer simple imprisonment for six months.

(iv) Rest of the terms of the impugned order of conviction and sentence to stand unaltered.

(v) Consequently, Criminal Application No.3370/2022 is disposed of.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

fmp/-