

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 518 OF 2012
WITH
INTERIM APPLICATION NO. 1003 OF 2022
WITH
INTERIM APPLICATION NO. 1280 OF 2020

1. Sandeep Omprakash Singh

Age : 24 years, Occupation : Student
R/o. Keshav Prasad Singh Chawl,
Chawl No.2, Room No.2,
Mount Mary, Keshwari Mandir Road,
Bandra (W), Mumbai.

2. Ajay Keshav Singh

Age : 28 years, Occupation : Service
R/o. Keshav Prasad Singh Chawl,
Chawl No.2, Room No.2,
Mount Mary, Keshwari Mandir Road,
Bandra (W), Mumbai.

At present both are in Kolhapur
Central Prison.

.. Appellants
(Orig. Accused Nos.2 & 3)

Versus

The State of Maharashtra

At the instance of Khar Police Station,
C.R. No. 77 of 2010.

.. Respondent

WITH
CRIMINAL APPEAL NO. 218 OF 2017

Pravin Chabinath Singh

age : 36 years, Occ: Business,
Residing at Riddhi Siddhi Chawl
Sri Ram Nagar, Nalasupara (E),
Dist. Thane.

.. Appellant

Versus

The State of Maharashtra

(at the instance of Khar Police Station
vide C.R.No. 77/2010)

.. Respondent

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- Ms. Devyani Kulkarni, Appointed Advocate a/w. Ms. Apeksha Vora, Advocates for the Appellant in Appeal No. 518 of 2012.
 - Mr. Kartik Garg, Appointed Advocate a/w. Mr. Nitin Sejpal a/w. Ms. Sakshi Jha and Ms. Akshata Desai, Advocates for the Appellant in Appeal No. 218 of 2017.
 - Mr. Veerdhaval Deshmukh, Appointed Advocate for the victim.
 - Ms. P.P. Shinde, APP for the Respondent - State.
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**CORAM : SMT. SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.**

DATE : APRIL 28, 2022.

JUDGMENT (PER : MILIND N. JADHAV, J.)

1. Criminal Appeal No. 518 of 2012 has been filed by the Appellants - original accused Nos. 2 and 3 to challenge the judgment and order dated 31.03.2012 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 796 of 2010 convicting the Appellants i.e. Sandeep Omprakash Singh (accused No. 2) and Ajay Keshav Singh (accused No. 3) for the offences punishable under sections 363 and 364(A) r/w 34 of the Indian Penal Code ("**IPC**" for short). Under section 363 IPC, both the accused are sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs. 2000/- each and in default to suffer rigorous imprisonment for four months. Under section 364(A) IPC, both the accused are sentenced to suffer life imprisonment and to pay fine of Rs. 2000/- each and in default to suffer rigorous imprisonment for four months. The learned Sessions Judge further directed that the above sentences of

imprisonment shall run concurrently.

2. Criminal Appeal No. 218 of 2017 has been filed by the Appellant - original accused No. 1 to challenge the judgment and order dated 29/30.11.2016 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 796 of 2010 convicting the Appellant Pravin Chabinath Singh (accused No. 1) for the offences punishable under section 364(A) r/w 34 IPC and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default to suffer rigorous imprisonment for six months.

3. Since the accused No. 1 was absconding, the trial of accused Nos. 2 and 3 progressed and judgment and order dated 31.03.2012 was passed. The judgment and order convicting accused No. 1 was passed subsequently on 29/30.11.2016 after he was apprehended.

4. Both the appeals are taken up for hearing and final disposal and disposed of by this common judgment.

5. Before we advert to the submissions made by the learned counsel appearing for the parties, it will be apposite to refer to such of the relevant facts which are necessary to decide the present appeal.

5.1. The incident took place on 10.02.2010. Complainant, Anthony Mendes, is the step-father of Ashutosh, 11 years old, at that time studying in VIth standard in St. Teresa's High School, Bandra

(West). As usual Ashutosh left from his house in Hill View Co-operative Society, 16th Road, Khar, Mumbai at 7.00 a.m. for his school. After coming out of his building, he hired a rickshaw to reach his school; when the rickshaw proceeded at some distance, one person boarded the rickshaw and pointed a gun towards Ashutosh and tried to suffocate him. The rickshaw veered towards Road No. 15 and from there towards Mount Mary Area. Ashutosh was taken to one room by the rickshaw driver and the person who boarded the rickshaw. There was a third person present in the said room. All three gave some tablets to Ashutosh because of which he suffered from giddiness. The three persons are accused Nos. 1, 2 and 3 in the First Information Report (FIR). Appeal No. 218 of 2017 has been filed by accused No. 1 i.e. the driver of the rickshaw. The trial of accused Nos. 2 and 3 was conducted separately; accused Nos. 2 and 3 filed Appeal No. 518 of 2012.

5.2. Complainant married Deepali, mother of Ashutosh. Ashutosh is the son of Deepali from her first marriage. Complainant returned from Goa on the morning of 10.02.2010. When Ashutosh did not return from school at his usual time of 02.00 p.m., complainant went to his school and inquired from the clerk present there and learnt that on that day Ashutosh did not attend school and had been marked absent. Complainant returned home and along with

his wife i.e. Deepali, inquired with his friends who confirmed that Ashutosh did not attend school on that day. At this time complainant received a phone call for confirming his name and the phone call got disconnected. Both parents thereafter decided to lodge a missing complaint report and went to Khar police station. The missing complaint report was lodged. At around 8.00 p.m., Deepali received a phone call on her mobile phone and the caller once again asked whether she was Anthony and then disconnected the phone. At around 9.30 p.m. on the same day, Deepali received one more phone call and on inquiry was informed that her son was in the custody of the caller and that he had kidnapped him; when Deepali asked him what he wanted, the caller informed her that he shall let her know later. The caller also informed her that she should not disclose this fact to any person(s) and particularly to the police.

5.3. On the following day i.e 11.02.2010 at around 03.30 p.m. Deepali received a phone call demanding ransom of Rs. 17 lakhs to release Ashutosh and thereafter on that date she repeatedly received phone calls from the caller seeking ransom. She pleaded with the caller that at that time she only had Rs. 8 lakhs with her and was not in a position to meet the demand of Rs. 17 lakhs. Thereafter on 12.02.2010 Deepali once again received phone calls from the caller who threatened to harm Ashutosh if she approached the police.

5.4. While the aforesaid was happening simultaneously the State CID, Bandra, Unit-IX carried out parallel investigation and recorded statements of various witnesses. On 15.02.2010 CID, Bandra, Unit-IX received information that one of the accused was coming to meet his associates near the telephone exchange at Bandra (W), Mumbai; hence a trap was laid and the accused was nabbed. The accused confessed of his involvement and took the police to the room where Ashutosh was confined. This accused was accused No. 1 i.e. Pravin Singh, the driver of the rickshaw. Spot panchanama was done and several articles were recovered from the room, Ashutosh was found and handed over to his parents. The three accused were arrested from the room and after due investigation charge-sheet came to be filed. During the pendency of the trial, accused Nos. 1 absconded. As accused Nos. 2 and 3 were arrested by the police, their trial proceeded first. Charges were framed against the accused in both the trials and explained to them which were denied by stating that a false case was lodged against them. In order to bring home the guilt of the accused, prosecution examined in all a total of seven witnesses before the Trial court in the case of accused Nos. 2 and 3 and eight witnesses in the case of accused No. 1. The star witness is Ashutosh, the child himself, and Deepali, mother of Ashutosh who were examined in both trials. The remaining witnesses are pancha witnesses and the Investigating Officers (I.Os.). In both the trials, the accused Nos. 1 to 3 were found

guilty of committing the offence punishable under section 364(A) read with 34 of IPC and were convicted to suffer rigorous imprisonment for life and to pay fine as per the two impugned judgments dated 31.03.2022 and 29 / 30.11.2016 passed by the Ld. Trial court.

6. This court appointed Advocates Ms. Devyani Kulkarni and Mr. Kartik Garg to represent the accused in the Criminal Appeals.

7. Both learned Advocates for the Appellants have submitted as under:-

- i. that Deepali Anthony Mendes PW-2, mother of Ashutosh has deposed that Ashutosh was studying in 6th standard and his school timing was from 7.10 a.m. to at 1.05 p.m.;
- ii. that on the date of the incident Ashutosh left his house and did not return back from school;
- iii. that at around 3:00 p.m. Anthony received a phone call on his mobile phone No.9930313095 and after asking his name, the caller disconnected the call;
- iv. that at about 8.40 p.m., after the missing complaint was lodged, Deepali received a phone call on her mobile phone which was followed by a third phone call at about 9.15 p.m. when she was informed that Ashutosh

was kidnapped;

- v. that thereafter till 03.00 p.m. on the following day i.e. 11.02.2010 phone call was received at 3.30 p.m. asking for ransom call and the amount was negotiated with the caller;
- vi. that on 15.02.2010 Ashutosh was rescued by the CID, Unit-IX after arresting the accused and returned back to her; this date however is stated differently in the 2nd trial in respect of accused Nos. 2 and 3;
- vii. that Ashutosh has been examined and he has stated the entire sequence of events as per the prosecution's case and has also stated that he was provided with little food during confinement and that on one day when he was in confinement there were 7 persons present in the room who identified themselves as police officers and handed him over to his parents.

8. Prosecution has examined Mr. Ashok Appa Sawant as PW-5, Police Inspector of CID, Bandra, Unit-IX in the trial of accused Nos. 2 and 3. It is seen that CID, Bandra, Unit-IX carried out parallel investigation in the present crime despite the crime being registered with Khar police station. Mr. Sawant, in his evidence has stated that he received information from Khar police station through his unit that

an 11 year old boy had been kidnapped by unknown persons; he has not stated who gave him this information and when the said information was received by him. He has stated that on 15.02.2010 upon receiving secret information (from an informant) that accused No. 1 who was involved in the present crime was coming to meet his associates at Bandra (West). Thus the CID Unit- IX laid out a trap and nabbed the accused No. 1, and that is what ultimately led them to Ashutosh. He has however stated a completely different version of the act of rescuing Ashutosh after accused No. 1 was nabbed; that accused No. 1 took the police through Hill Road, Ramdas Nayak Marg, Dr. Peter Dias Road, Khadeshwari Temple Road, Ganesh Chowk, Sea Side building and finally to Mount Mary area; that after reaching Sea Side building they started walking towards the transit camp near Cosmo colony and thereafter entered in one room where Ashutosh was kept confined. He has stated that when the said room was opened by the accused Nos. 2 and 3, who were inside, they saw Ashutosh sleeping with both his hands tied with a white colour wire. He has stated that Ashutosh had declared the names of the three accused to the woman Police Inspector, Mrs. Jahagirdar as the persons who had kidnapped him. He has stated that on search being conducted, one toy revolver was recovered from the pocket of the trouser of accused No. 2 apart from four white metal finger rings, one kada and a mobile handset. He has stated that he discovered two packets of Tricha Company on

the bed where Ashutosh was found sleeping, one packet containing 15 tablets and another containing 8 tablets. He stated that he had seized all the said articles but the above mentioned tablets have not been placed on record.

9. It is seen that apart from the above three witnesses whose evidence has been considered by the Trial court for convicting the accused, the evidence of the rest of the witnesses is not directly relevant. After perusing the evidence of the witnesses, the question which now arises for deliberation is whether the prosecution has proved its case beyond reasonable doubt or otherwise. The prosecution has also relied upon the evidence of PW-8 in the trial of accused No. 1 for convicting the accused.

10. It is seen that one of the most important piece of evidence with respect to the aspect of kidnapping of Ashutosh is in itself contradictory. According to the prosecution Ashutosh was kidnapped on 10.02.2010 and was found by the officers of CID, Bandra, Unit-IX on 15.02.2010, which means that Ashutosh was under the confinement of the kidnappers for a period of five days. This is in material contradiction to the evidence of PW-1. PW-1 in her examination-in-chief has deposed that Ashutosh was out of her house for three days. She has stated that "it is correct statement in my previous evidence that Ashutosh was out of house for three days i.e.

on 10.02.2010, 11.02.2010 and 12.02.2010". This is a material discrepancy in the case of the prosecution which highlights the duration of confinement of Ashutosh with the kidnappers. That apart, the evidence of PW-8 i.e. the father of Ashutosh in the trial of accused No. 1 is also self contradictory. PW-8 in his deposition at three places confirms that Ashutosh was away from their house for 72 hours. He also states that those 72 hours were "embedded" in his memory. Hence if this is the case narrated by both the parents of Ashutosh, then it cannot be true for the prosecution to allege that Ashutosh was kidnapped for a period of five days. It is pertinent to note that the trial court has not considered the above piece of material evidence and has not dealt with the same at all. In fact, PW-8, father of Ashutosh, has categorically deposed that both PW-1 and PW-8 went to the CBI, Unit IX, Office on 12.10.2010 or 13.10.2020 to receive their son.

11. Further in this entire gamut of proceedings and investigation, one thing stands out with respect to the investigation that was conducted, i.e., admittedly there are no station diary entries in respect of the crime and the investigation produced by the prosecution with respect to the length of the investigation in the present case. The only case of the prosecution to indict the accused for kidnapping is based upon the telephone records, however it is pertinent to note that the prosecution has failed to examine the

officers of the telecom company in order to verify the telephone records; further the nexus between the telephone calls made from a particular sim card to the PW-1 and PW-8 have also not been established and placed on record. One of the most important pieces of the material evidence in the present case is the object / vehicle used by the kidnappers / accused which needs to be looked at by this court. It is alleged that Ashutosh was kidnapped by the accused in an auto rickshaw. To begin with, the statement of Ashutosh himself is that he sat / boarded the auto rickshaw in the first instance. It is alleged that accused No. 1 was the driver of the rickshaw, accused No. 2 boarded the rickshaw midway and accused No. 3 was awaiting in the alleged room. If this is the story relied upon by the prosecution then the prosecution has utterly failed to establish the identity of the auto rickshaw, it has failed to identify the owner of the auto rickshaw so as to the establish the nexus between the auto rickshaw / owner of the auto rickshaw and the accused No. 1 who is alleged to have driven the auto rickshaw. The entire evidence of the prosecution despite two parallel investigations, has not been able to place any material on record with respect to the alleged auto rickshaw used in the crime.

12. There is another piece of material evidence placed on evidence which needs consideration. Ashutosh was confined in a room in the transit camp with admittedly no toilet facilities. The

transit camp has a common toilet facility. The alleged room was so small that there was no toilet facility or cooking facility inside the said room. The case of the prosecution is that Ashutosh was confined in the said room for five days and during that entire period it is impossible to believe that in the transit camp area, which is a crowded place, no one saw Ashutosh or his alleged kidnappers at all. That apart if it is alleged by the prosecution that Ashutosh was confined to a particular room in the transit camp, then it was incumbent upon the prosecution to establish the identity of the owner of the said room or the occupant of the said room and bring material evidence on record to indict the present accused. There is not an iota of evidence referred to and relied upon by the prosecution to establish the identity of the alleged owner / occupant of the said room or of them having any nexus with the present accused.

13. PW-7, the Investigation Officer in the trial of accused Nos. 2 and 3 has categorically deposed that the mobile phone which was seized from the accused was different than the mobile phone from which the PW-1 and PW-8 had received the ransom calls. Further, admittedly when Ashutosh was kidnapped there were no eye witnesses to the said incident when the crime took place. It is equally pertinent to note that during the cross-examination of Deepali i.e., the mother of Ashutosh in the trial of accused Nos. 2 and 3 she has

admitted firstly that Ashutosh came back on 10.02.2010, thereafter she has stated that Ashutosh came back on 12.02.2010 at about 10.00 p.m. In contrast to this in the trial pertaining to accused No. 1 she has maintained that Ashutosh had come back after three days. In contrast to him it is the case of the prosecution that Ashutosh was kidnapped for a total number of five days. It is pertinent to note that if Ashutosh was confined to any room in the transit camp as alleged, it is not understood as to why the prosecution could not find any evidence to confirm the confinement of Ashutosh in the alleged room in the transit camp. The Investigating Officer has stated that they found Ashutosh lying with his hands and legs tied with a white wire. If this has been true then it is assumed that Ashutosh was confined in that manner for five days; then in that case it was incumbent upon the prosecution to conduct a medical examination which was never done. Further recovery of a toy plastic revolver from the trouser back pocket of the accused No. 1 cannot show the intention or motive to harm or kill Ashutosh. In this entire sequence of events, one aspect needs to be highlighted and that is that Anthony Mendes (PW-8 in the trial of accused No. 1) is not the real father of Ashutosh. The real father of Ashutosh is Hemant Rathod; though he was interrogated by the police authorities, during both the trials he was not produced before the trial court. Admittedly a divorce had taken place between PW-1 i.e. Deepali and Hemant Rathod. The aforementioned evidence leaves no

doubt that the prosecution has not been able to prove its case beyond reasonable doubt.

14. For obtaining a conviction for commission of an offence under Section 364A, it is necessary to prove that not only such kidnapping or abatement has taken place, but thereafter the accused had threatened to cause death or hurt to such person or by their conduct give 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 organisation or any other person to do or abstain from doing any act or to pay a ransom. Thus, unless all conditions as enumerated in Section 364A are fulfilled, no conviction can be recorded.

15. The important ingredient of Section 364A is the abduction or kidnapping, as the case may be. Thereafter, a threat to the kidnapped/abducted that if the demand for ransom is not met then the victim is likely to be put to death and in the event of death is caused, then the offence under Section 364A is complete. There are three stages in this section, one is the kidnapping or abduction, second is threat of death coupled with the demand of money and lastly when the demand is not met, then causing death. If the three ingredients are available, that will constitute the offence under Section 364A of the IPC. Any of the three

ingredients can take place at one place or at different places. If all the three ingredients are available that will constitute the offence under Section 364A IPC.

16. In view of the statutory provision of 364A and the law laid down by the Supreme Court, it is held that the essential ingredients to convict an accused under 364A which 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) cause 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.

16.1. Thus, after establishing the first condition, one more condition has to be fulfilled since after first condition, word used is “and”. Thus, in addition to the first condition either condition (ii) or (iii) has to be proved, failing which conviction under Section 364A cannot be sustained.

17. In the present case from the evidence on record regarding kidnapping, it cannot be proved beyond reasonable doubt that the assailants had kidnapped Ashutosh for ransom and that the demand of ransom has been proved beyond doubt. The offence of kidnapping is not established and proved beyond reasonable doubt. It is seen from the evidence that none of the neighbours residing in the alleged transit camp have seen the accused / Appellants or Ashutosh when it is an admitted fact that the transit camp is a congested place with several persons residing therein. That apart Ashutosh has stated in his deposition that he was never allowed to go out of the said room. Apart from the inconsistencies of the number of days that Ashutosh was confined in the said room, it is significant to note that the said room did not have a bathroom and toilet inside for the use of its occupants. Hence if Ashutosh had to use the toilet, it would have been incumbent upon him to go outside the said room and in that event, there was always a probability of him being spotted by some persons / neighbours in the transit camp. It cannot be comprehended that during the entire period of confinement, Ashutosh who was then 11 years old, remained confined in the said room without using the toilet facility. These contradictions do not prove the case of the prosecution beyond reasonable doubt. These are obvious lacunae in the evidence of the prosecution. The ingredients of the provisions of section 364A IPC have thus not been proved in the facts and

circumstances of the case. Hence, it cannot be said that the prosecution has proved the guilt of the accused persons beyond reasonable doubt. The fact that the name of the owner / occupant of the transit accommodation room has not been unearthed by the prosecution; the fact that the owner of the rickshaw in which Ashutosh was allegedly kidnapped at 7.00 a.m. in the morning has not been found and unearthed, the fact that the alleged room in the transit camp admeasures 8 feet x 10 feet and had one window from where it could have easily been possible for Ashutosh to shout and attract the attention of the neighbours having not been investigated, clearly show the contradictions and omissions in the evidence of the prosecution. Hence the prosecution has failed to prove its case beyond reasonable doubt.

18. In view of the above discussion and finding we pass the following order:-

- (i) Both the appeals are allowed;
- (ii) The conviction of the Appellants for the offences punishable under Sections 363 and 364A read with 34 of Indian Penal Code passed by Ad-hoc Judge, City Civil Court and Additional Sessions Judge, Greater Bombay vide judgments and orders dated 31st March, 2012 and 29th / 30th November, 2016 both passed separately in

Sessions Case No. 796 of 2010 are hereby quashed and set aside;

(iii) The accused/Appellants stand acquitted of all the charges levelled against them;

(iv) The Appellants be released forthwith, if not required in any other offence;

(v) Fine amount if paid, be refunded to the accused/Appellants as per rules.

19. The Appeals as well as Application(s), if any, stand disposed of accordingly.

20. This Court had requested Advocate Ms. Devyani Kulkarni to espouse the cause of the Appellant in Criminal Appeal No. 518 of 2012, Advocate Mr. Kartik Garg to espouse the cause of the Appellant in Criminal Appeal No. 218 of 2017 and Advocate Mr. Veerdhaval Deshmukh to espouse the cause of the victim, they have assisted the Court in appreciating the evidence on record. Their professional fees are quantified as per rule to be paid to them by High Court Legal Aid Services Committee, Mumbai.

[MILIND N. JADHAV, J.]

[SMT. SADHANA S. JADHAV, J.]