

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

[1] CRIMINAL APPEAL NO.1458 OF 2018

Rabiya Kalil Shaikh	 Appellant
Versus	
The State of Maharashtra	 Respondent

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WITH

[2] CRIMINAL APPEAL NO.520 OF 2018

The State of Maharashtra	 Appellant
Versus	
1. Rabiya Kalil Shaikh, &	
2. Rajendra Laxman Mudliyar.	 Respondents

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Mr. Sachin B. Chandan, Advocate (appointed) for the Appellant in Criminal Appeal No.1458/2018 and for Respondent Nos.1 & 2 in Criminal Appeal No.520/2018.

Smt. J.S. Lohokare, APP, for the Respondent-State in Criminal Appeal No.1458/2018 and for the appellant in Criminal Appeal No.520/2018.

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CORAM : SARANG V. KOTWAL, J.

DATE : 26th SEPTEMBER, 2022

ORAL JUDGMENT :

1. Both these appeals are decided by this common judgment and order because they arise out of the same judgment

and order passed by the trial court. The appellant in Criminal Appeal No.1458/2018 was the original accused No.1 in Sessions Case No.488/2016 on the file of Additional Sessions Judge, Greater Mumbai. There was one more accused who faced the trial; he was accused No.2 Rajendra Mudliyar. Both the accused were convicted for various offences.

2. The Criminal Appeal No.520/2018 is preferred by the State of Maharashtra for enhancement of the sentences of both the accused. In that appeal, both the accused are the respondent Nos. 1 and 2. For the sake of convenience, the respondents in Criminal Appeal No.520/2018 are referred to by their original status as 'accused Nos.1 & 2' in the trial and in Criminal Appeal No.1458/2018, the appellant is referred to as 'accused No.1'.

3. Both the accused were convicted and sentenced as under:

- i) The accused No.1 was convicted for the commission of offence punishable under Section 363 of IPC and sentenced to suffer RI for 3 years.
- ii) The accused No.1 is also convicted for the commission of

offence punishable under Section 370(1) of IPC and sentenced to suffer RI for 7 years and to pay fine of Rs.3,000/- and in default of payment of fine to undergo SI for one month.

- iii) The accused No.2 was convicted for commission of offence punishable under Section 370(1) of IPC and was sentenced to suffer RI 7 years and to pay fine of Rs.3,000/- and in default of payment of fine amount to undergo SI for 1 month.
- iv) The substantive sentences of accused No.1 were directed to run concurrently.
- v) Both of them were given set off under Section 428 of Cr.P.C.

4. I have heard Smt. J. S. Lohokare, learned APP for the State of Maharashtra and Shri Sachin Chandan learned counsel for both the accused in these appeals. Shri Chandan submitted, on instructions, that both the accused have already undergone their maximum sentence of seven years RI imposed on them.

5. The prosecution case is that the accused No.1 was the step-mother of the victim-PW-2 who was 8 years of age at the time

of incident. She was kidnapped on 7.2.2016 from Chita Camp, Trombay, Mumbai by the accused No.1 and she was kept in the house of accused No.2 and then in the house of PW-3 Ravindra Pawar. The victim's brother lodged the FIR vide C.R. No.41/2016 at Trombay police station about kidnapping. The investigation was carried out and the victim was rescued from the house of PW-3 Ravindra Pawar. The investigation was carried out and the charge-sheet was filed. The case was committed to the Court of Sessions.

6. During trial, the prosecution examined seven witnesses, including the victim, her brother, PW-3 from whose house the victim was rescued, two investigating officers and two Nodal Officers who had produced the Call Data Records.

7. PW-1 Vicky Naidu was brother of the victim. He has deposed that his father was Murgesh Naidu. He was residing with his father, brother and sister. His younger sister was about 8 years of age. His brother was 15 years of age. His younger sister was playing with her cousin outside the house at 3.00 p.m. on 7.2.2016. After sometime his sister was not seen anywhere.

Therefore, they searched for her. In the night, at about 9:00 p.m., PW-1 went to the police station and lodged his FIR. The FIR is produced on record at Exh.11. He further deposed that at around 10.00 p.m. spot panchnama was conducted. On the next day, dog-squad was brought to his house. On 10.03.2016, his sister was found in Kalyan.

In the cross-examination, he deposed that the accused No.1 was his step-mother and she was also residing in his house. It is his case that the accused No.1 had induced the victim to accompany her on the pretext that she would provide good education to her. Since accused No.1 was PW-1 and the victim's step-mother, they did not suspect her. He further deposed that after death of his real mother his father performed marriage with accused No.1 and that she was staying with them since about three to four years. Since then, she was taking care of PW-1, his brother and the victim as real sons and daughter. However, she was not searching for the victim after she went missing. Till 10.3.2016, accused No.1 was residing with PW-1 and his family.

The FIR was lodged on 7.2.2016 at about 9:30 p.m.

under Section 363 of IPC vide C.R. No.41/2016 at Trombay police station, Mumbai. The allegations were that since about 4 p.m. on that day, the victim had been missing. The first informant (PW-1) suspected that somebody had kidnapped her. The spot panchnama is produced on record at Exhibit-12.

8. PW No.2 is the victim herself. She has deposed that she was studying in 4th standard in a Municipality School. She was residing with her two brothers, her father and the accused No.1. She has further deposed that the accused No.1 told her that she would provide clothes to her and she took her to Kalyan to the house of one Renuka Didi. Renuka's father was in the house. PW-2 identified him as accused No.2. While going to Kalyan accused No.1 had told PW-2 not to tell anybody-else about their visit to Kalyan. She gave her clothes. Then PW-2 was taken to the house of accused No.2's friend. After that, the police came there and took her with them. She was taken to a doctor.

In the cross-examination, she admitted that the accused No.1 was residing in their house and she was looking after her. Accused No.1 was providing food and clothes to her.

9. PW-3 Ravindra Pawar was friend of the accused No.2

when both of them were residing in Kolsewadi, Kalyan in 'Datt Niwas' Building. After that, PW-3 shifted to another building but they were on visiting terms. On 9.3.2016, the accused No.2 approached PW-3 with the victim and told her that she was his relative. He was going out of State along with his family and requested to PW-3 to keep her in his house for a night. PW-3 allowed the victim to stay with his family in the night. On the next day, the police came to his house and took the victim girl with them.

In the cross-examination, he admitted that when the accused No.2 brought the victim to his house, the victim was quite happy.

10. PW-4 PSI Kirti Mane had recorded the FIR and had registered the offence. She had brought the dog-squad but it did not help. The dog-squad could not detect anything of importance.

11. PW-5 API Ashok Damale was the Investigating Officer. He carried out major part of the investigation and then had filed the charge sheet. He has deposed that he could trace the victim through different Call Data Records concerning the accused No.1

and others. He was suspecting the accused No.1, Rani Naidu, Laxmi Naidu and Rajamma Naidu. There were 21 suspected phone calls. Based on that CDR, the victim could be traced to the house of PW-3. According to his investigation, the accused No.1 had kidnapped the victim and had handed her over to the accused No.2 and subsequently they were planning to sell the victim. The accused No.1 was arrested on 11.3.2016.

12. PW-6 Baby John, PW-7 Vijay Shinde were the Nodal Officers who had produced the CDRs and other related documents. Their evidence is in respect of the phone calls which would show how the victim was traced.

13. Learned counsel for the accused submitted that neither ingredients of Section 363 nor those under Section 370 of IPC are made out. Accused No.1 was his step-mother and, therefore, it cannot be said that the victim was taken away from lawful guardianship. Section 363 mentions that whoever kidnaps any person from India or from lawful guardianship shall be punished with imprisonment of either description for a term which may extend to seven years and shall also liable to fine.

‘Kidnapping’ is defined under Section 359 and ‘kidnapping from lawful guardianship’ is defined under Section 361 of IPC. The main ingredient is that the kidnapping should have been from the lawful guardianship. According to learned counsel, accused No.1 was a lawful guardian as the explanation of Section 361 mentions that lawful guardian would include any person lawfully entrusted with the care and custody of such minor or other person.

14. He further submitted that there is absolutely nothing to show that the victim was kidnapped for the purpose of exploitation which the main ingredient of Section 370 of IPC. Therefore, according to him no offence is made out.

15. Learned APP opposed these submissions. She submitted that conduct of accused No.1 itself shows that she had kidnapped the victim for unlawful purpose. Though she was aware that her family was searching for the victim she did not inform about the victim. She submitted that just because she was described as a step-mother it cannot be held that she was entrusted with the custody of the victim. The marriage is not proved. Therefore, she cannot be described as a lawful guardian

of the victim. She further submitted that the victim was taken away from the family and kept with the stranger for a period of one month; that shows that her purpose of kidnapping was not lawful.

16. I have considered these submissions. As far as facts of this case are concerned, on most parts they are undisputed. It is undisputed that the victim was not found by PW-1 and his family from 7.2.2016. Ultimately she was taken back home on 9.3.2016 by the police. She was traced through CDRs. The victim's statement shows that she had accompanied accused No.1 because the accused No.1 had promised to give her clothes. She was then kept with the accused No.2 and then with PW-3. All this while, the accused No.1 did not tell the victim's family regarding the victim's whereabouts though she was fully aware about the same. This shows that the accused No.1 had intentionally taken her away. From the evidence on record in this particular case it cannot be held that the accused No.1 was the lawful guardian of the victim. Though she was taking care of the victim and her elder brothers, there is a vague evidence about her marriage with the

victim's father. Her conduct of not telling the family about the victim is quite suspicious. Even the father and brothers were kept in the dark by the accused No.1. Her conduct is suspicious. She did not tell the facts to the police. There is nothing to show that she was specifically entrusted with the victim's custody. The evidence does not show that she was the lawful guardian of the victim and, therefore, the offence under Section 363 of IPC is made out. However, none of the ingredients of the offence under Section 370 of IPC is made out. The victim was happily residing in the house of accused No.2 and then for a night in the house of PW-3. PW-3 admitted that the victim was happy. She was not harassed for any purpose. There is nothing to show that either of the accused had taken any steps in exploiting the victim in the manner that is required under Section 370 of IPC. To that extent the conviction and sentence under that particular Section needs to be set aside, by giving benefit of doubt to the accused.

17. Learned trial Judge has not given any reason as to how Section 370 of IPC is attracted in this case. Merely provisions of Section 370 of IPC were reproduced. The prosecution has failed to prove its case beyond reasonable doubt. This particular aspect

was not properly considered by the trial Court.

18. As far as the appeal for enhancement of sentence is concerned, based on the above discussion I am holding that the offence under Section 370 of IPC is not made out. At the highest, the prosecution has proved the case for offence punishable under Section 363 of IPC. The accused have already undergone seven years of actual imprisonment. Therefore, there is no point in enhancing the sentence under Section 363 of IPC because the maximum sentence which could be awarded under Section 363 of IPC is seven years. The accused No.2 has not preferred any appeal challenging his conviction and sentence under Section 370 of IPC. But on the same evidence the appeal of the accused No.1 regarding conviction and sentence under Section 370 of IPC is being allowed. Therefore, even the accused No.2 deserves this benefit, though he has not filed any appeal. I am supported in this view by the ratio of the judgment of a Division Bench of this Court (Bench at Nagpur) in the case of **Laxman Bapurao Ghaiwane Vs. State of Maharashtra** in Criminal Appeal No.206/2008 decided on 6.8.2012. Hence, the following order is passed:

:: O R D E R ::

- i. Criminal Appeal No.520/2018 is dismissed.
- ii. Criminal Appeal No.1458/2018 is partly allowed. The conviction and sentence recorded against the appellant Rabiya Kalil Shaikh in respect of commission of offence punishable under Section 370 of IPC is set aside. The conviction and sentence recorded against her for commission of offence punishable under Section 363 of IPC is maintained.
- iii. Though the accused No.2 Rajendra Laxman Mudliyar has not preferred any appeal challenging his conviction, as both the accused are similarly placed and since it is held that the offence under Section 370 of IPC is not made out, the conviction and sentence recorded against accused No.2 under Section 370(1) of IPC is also set aside.
- iv. Both the appeals are disposed of accordingly.

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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