



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.174/2023

Naim s/o Nijamuddin Khan Pathan,
aged 38 years, Occ. Musician,
r/o Sant Ravidas Ward, Tah. Tirora,
Dist. Gondia.

.....APPELLANT

...V E R S U S...

1. State of Maharashtra, through PSO
P.S. Tirora, Tah. Tirora, Dist. Gondia.
2. XYZ, in Crime No. 115/2020,
through Police Station, Tirora,
Dist. Gondai.

...RESPONDENTS

Mr. A. M. Sharma, Advocate for appellant.
Mr. A. R. Chutke, A.P.P. for respondent no.1.
Mrs. D. V. Sapkal, Advocate appointed for respondent no.2.

CORAM:- ANIL L. PANSARE, J.
DATED :- 10.10.2023

ORAL JUDGMENT

The appellant – original accused is aggrieved by judgment and order dated 31.01.2023, passed by the Court of Special Judge (Under POCSO Act) and Sessions Judge, Gondia in Special (Child Protection) Case No.115/2020, whereby the appellant has been convicted for the offences punishable under Sections 363 and 366 of the Indian Penal Code, 1860 (hereinafter

referred to as the 'IPC') and Section 7 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act'). The appellant shall be hereinafter referred to as the accused.

2. Briefly stated, the facts are as under:

The accused is/was a music teacher. Respondent no.2 – victim was taking music tuition from the accused during the period from 2017 to 2020. The allegation is that on or about 08.09.2020, the accused has kidnapped the victim, aged 14 years from her lawful guardianship with an intention to compel her to have sexual intercourse and further has repeatedly committed rape on the victim. The said allegation, in terms of the provisions of the POCSO Act, is an aggravated penetrative sexual assault on the minor victim.

3. The accused did not plead guilty to the charges framed. The prosecution has examined seven witnesses to bring home guilt of the accused. The Special Court disbelieved the theory of rape as also the aggravated penetrative sexual assault on minor, mainly on the ground that the evidence in this regard is full of omissions. The Special Judge, however has held the accused guilty for the offence of kidnapping under Section 363 of the IPC so also the offence of

kidnapping or abduction of a woman with intent to compel her to marry any person against her will or to be forced or seduced to illicit intercourse under Section 366 of the IPC. The Special Court has also found the accused guilty for the offence punishable under Section 7 read with Section 8 of the POCSO Act.

4. Since the prosecution has not challenged the impugned judgment, the appeal is being considered to test the conviction of accused for the offence under Sections 363 and 366 of the IPC and Sections 7 read with Section 8 of the POCSO Act.

5. Having heard both the sides and having gone through the impugned judgment and the material placed before me, following points arise for my determination.

Sr.No	Points	Answer
1	Has the prosecution proved that on or about 08.09.2020, the accused has kidnapped the victim from her lawful guardianship?	In the Affirmative
2.	Has the prosecution proved that on the aforesaid date, time and place, the accused has kidnapped the victim with an intention to compel her to have sexual intercourse?	In the Negative
3.	Has the prosecution proved that the accused has committed sexual assault as defined under Section 7 of the POCSO Act?	In the Negative.
4.	Whether interference is called for in the impugned judgment?	Yes

5.	What order?	As per final order.
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6. **As to point Nos. 1 to 3:**

These points being interlinked, are decided by common reasons. Before dealing with the rival contentions, I will refer to the evidence led before the trial Court, which the learned counsel before me have taken through.

7. PW1 is victim. She deposed that the accused is a music teacher and since 2017, she used to attend the music tuition conducted by the accused. She attended the tuition class for the period from 2017 to 2020. The tuition classes were closed in the year 2020 because of the lockdown. The witness and accused used to talk on mobile. The accused told her that if she accompanies him, he will change her life. The witness then states that the accused has committed sexual intercourse many times without her wishes. He used to threaten her by saying that he will defame her and her parents and further that he will kill her. She deposed that in the month of May-2018, the accused has committed sexual intercourse for the first time in the tuition class itself.

8. The victim then deposed that on 08.09.2020, the

accused sent the message on the mobile of her brother and called her. Thereafter, both had been to Nagpur. On the next day, they were at Tiroda when police traced them. In the meantime, the accused committed sexual intercourse against her wish.

9. This part of the evidence, however, is proved to be an omission except the fact that she used to attend the class. The defence put forth through the cross-examination is that the victim and the accused were involved in love affair and the victim was deeply in love with the accused. The witness admitted that she used to make persistent demands with the accused to elope. Thus, an attempt is made to establish that the victim herself has accompanied the accused, which in fact, appears to be a true status.

10. PW2 is mother of the victim. She deposed that the victim's date of birth is 22.10.2005. The birth certificate Exh.-21 was proved through her. The birth certificate has been issued by the Gram Panchayat and being a public document, was marked as Exh.-21. She then deposed that on 08.09.2020, her son received message from the accused. The contents were, "*Tere behen ko main leke ja raha hun, police ko complaint karna nahi, jo karna hai*

soch samaj ke karna.” This fact has been told by her husband. The victim was missing and, therefore, she and her husband approached police station and lodged the report. On 09.09.2020, a phone call was received from Police Station that the victim has been traced out. They went to police station where the victim and accused were present. The victim was handed over to her parents. She intimated the aforesaid story.

11. In the cross-examination it is brought on record that on 08.09.2020, the victim has taken some gold ornaments and cash of Rs.4500/- to 5,000/- from the house. Thus the defence that the victim herself accompanied the accused has been cemented by the aforesaid cross-examination. An attempt then is made to show that the victim has cooked up a false story against the accused on his refusal to have relationship. This defence is unbelievable for the reason that both were found together from 09.09.2020 at a dhaba, meaning thereby that both have willingly left their places.

12. PW3 is father. He deposed that on 08.09.2020, his son has shown a message received on his mobile. He then deposed that he and his wife went to the police station and lodged oral report Exh.-P-24. The printed FIR is at Exh.-P-25. According to

him, the victim told him that by giving allurements of marriage, the accused committed forcible sexual intercourse with her. This theory is, however, absent in the evidence of the victim and, therefore, cannot be believed.

13. PW4 is panch witness to the clothes seizure panchanama of the accused. He is also witness to the CCTV footage collected from three toll booths located on Tumsar road. The footage was seized in his presence. The witness deposed that in the said CCTV footage, the accused and the victim were seen riding on a motorcycle.

14. PW5 is Medical Practitioner. She deposed that history narrated by the victim was that the accused had committed sexual intercourse with her. No external injuries were found on the person of the victim. The witness opined that the sexual intercourse cannot be ruled out.

15. In the cross-examination, she states that she did not notice any evidence of penetrative sexual assault. She further admits that in absence of report of the Forensic Science Laboratory, she cannot opine about sexual intercourse. The witness was not re-examined and, therefore, the evidence in the cross-examination

remains intact, which means that the medical evidence is not supporting the theory of prosecution on the point of penetrative sexual assault.

16. Thus the only evidence of penetrative sexual assault is of PW1 - the victim, which is found to be full of omissions and, therefore, the learned Special Court has rightly acquitted the accused of the offence punishable under Section 376 of the IPC and Section 6 of the POCSO Act.

17. PW6 is Police Sub Inspector. She has recorded statement of victim in Crime No.312/2020. The omissions pointed out to the victim in the cross-examination have been proved through this witness. The following statements are shown to be omissions:

“I should come with him and he will change my lifestyle.”

“Many times accused committed sexual intercourse against her wish in his tuition class and threatened that if said fact told to anyone, he will defame her and her parents and kill her.”

“On 08.09.2020 accused sent message on the mobile phone of her brother and called her.”

They halted beneath a shed and under the said shed accused committed sexual intercourse with her against her wish.”

Thus, the evidence on the point of penetrative sexual assault is proved to be an omission. The Special Judge has considered this fact and acquitted the accused of the offence under Section 376 of the IPC and Section 6 of the POCSO Act.

18. PW7 is the investigating officer. He searched the whereabouts of the victim. On 09.09.2020, at about 09:00 p.m., he found the victim and accused at Fouji Dhaba on Tiroda road. Both were brought to police station. After necessary investigation, the victim was handed over to her parents and the accused was arrested.

19. This is how the prosecution has led the evidence to prove the guilt of the accused. As stated earlier, the conviction under Sections 363 and 366 of the IPC is now being tested in the effect. Learned counsel for the accused has correctly argued that in the entire cross-examination, PW1 victim has not deposed that she was kidnapped with an intention that she will be compelled to marry the accused or any person or with an intent that she may be forced to have illicit intercourse.

20. Learned Special Judge has disbelieved the victim of her evidence on the point of penetrative sexual assault/rape. In the circumstances, in absence of any cogent evidence, the Special Court has committed serious error by believing the victim to find nexus of the accused with the crime under Section 366 of the IPC. There is no iota of evidence as regards the forcible sexual intercourse or as regard the intent of the accused to compel the victim to marry himself or any other person.

21. Let me point out here that when the accused was heard on the point of sentence by the Special Judge, he has prayed for leniency on the count that his parents, wife and children are depending on him. That means, the accused is a married person. In such situation, in absence of any cogent evidence, the Special Judge ought not to have held the accused guilty for the offence under Section 366 of the IPC, which basically provides for kidnapping of a woman with intent to compel her to marry any person against her will. In the present case, the evidence clearly depicts that the victim has willingly eloped with the accused. The evidence further indicates that she was in deep love with the accused. In the circumstances, to say that she was unwilling to marry the accused, is something which is contrary to the evidence.

Section 366 of the IPC does not deal with the willingness of a minor girl to marry a person to contend that the consent of victim is immaterial.

22. In any case, the fact remains that there is absolutely no evidence to show that the accused has kidnapped the victim with an intent to compel her to marry him or any other person. In the circumstances, the conviction of accused under Section 366 of the IPC is unsustainable.

23. The next question that requires answer is whether there is evidence to prove that the accused has committed sexual assault upon the victim in terms of Section 7 of the POCSO Act, which reads thus:

7. Sexual assault

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

24. Counsel for the accused submits that none of the witnesses has deposed that the accused has committed any act as mentioned in the aforesaid section. This submission will have to be accepted, considering the evidence narrated hereinabove. As

stated earlier, except for the evidence of victim and the doctor, the testimony of other witness will be of no relevance to prove the ingredients of Section 7 of the POCSO Act. So far as, the evidence of the victim is concerned, her evidence is full of omissions and cannot be relied upon. The doctor's evidence show that there was no sexual assault upon the victim. That being so, the guilt of the accused under Section 7 of the POCSO Act recorded by the Special Judge will be unsustainable.

25. Learned A.P.P. as also the learned counsel for respondent no.2, have fairly admitted that there is no cogent evidence to prove the ingredients of Section 366 of the IPC as also Section 7 of the POCSO Act.

26. Now remains the conviction under Section 363 of the IPC. Learned counsel for the accused argued that the victim's version is not trustworthy and that, therefore, the same cannot be taken aid of to prove the guilt of the accused under Section 363 of the IPC. On this point, the learned A.P.P. as well as the learned counsel for the respondent no.2 have rightly argued that not only the victim but the other evidence led before the trial court is overwhelming on the point of ingredients of Section 363 of the IPC.

The evidence of victim indicates that she has willingly eloped with the accused. The defence taken by the accused is also of victim and the accused leaving their places at their sweet will. In addition, the message sent by the accused on the mobile of the brother of the victim has been seen by the father, PW 3. The message clearly depicts that accused has kidnapped the victim. Further they were found together on the motorcycle at three different locations of toll plaza. The story of kidnapping is lastly cemented by the evidence of investigating officer, who has deposed that on 09.09.2020, he has found the accused and victim together at Fouji Dhaba on Tiroda road. The victim being minor, her consent will be insignificant.

27. This is, thus, a clear case of accused enticing the minor girl out of the keeping of lawful guardianship without their consent. The relationship was such that the victim would be influenced by his conduct. The accused, who is married and has children had no business to entice the victim to leave her house for substantive period, indicating his intention of kidnapping. The learned Special Judge relied upon the evidence as narrated above to hold the accused guilty under Section 363 of the IPC. I do not find any perversity in the said finding. Rather the conviction is

consistent with the evidence and material placed before the trial Court.

28. In view of above, point no. 1 is answered in the affirmative, point no.2 is answered in the negative and point no.3 is answered in the negative.

29. **As to point Nos. 4 and 5:**

In view of the answers to point nos. 1 to 3 above, the Special Court has committed grave illegality in convicting the accused for the offence punishable under Section 366 of the IPC and Section 7 read with Section 8 of the POCSO Act. To that extent, the interference in the impugned judgment is necessary. Hence, I answer point no. 4 in affirmative and proceed to pass the following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) Judgment and order dated 31.01.2023, passed by the Court of Special Judge (Under POCSO Act) and Sessions Judge, Gondia in Special (Child Protection) Case No.115/2020, thereby convicting the appellant for the offence punishable under Section 363 of the Indian Penal Code, 1860 is maintained.

(iii) Appellant/Accused Naim s/o Nijamuddin Khan is acquitted for the offence punishable under Sections 366 of the Indian Penal Code, 1860 and Section 7 punishable under Section 8 of the Protection of Children From Sexual Offences Act, 2012.

(iv) The other part of the operative order dated 31.01.2023 passed by the Court of Special Judge (Under POCSO Act) and Sessions Judge, Gondia in Special (Child Protection) Case No.115/2020 shall remain as it is.

(v) Professional fees of Ms Sapkal, learned counsel for the respondent no.2 shall be paid as per rules.

(Anil L. Pansare, J.)

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The learned counsel for the appellant submits that the accused is in jail for more than three years and, therefore, he may be directed to be released.

The Superintendent, Central Prison, Nagpur shall verify the status and if the accused has undergone the period of imprisonment for the offence punishable under Section 363 of the Indian Penal Code, 1860, and if he is not required in any other crime, he shall be released forthwith.

(Anil L. Pansare, J.)

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