



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

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**CRIMINAL APPEAL NO. 633/2023**

Mayur s/o Dilip Giri (in Jail)  
Aged about 30 years, occu; Labour  
R/o Sirso, Tq. Murtizapur, Dist. Akola.

**..APPELLANT**

**v e r s u s**

1) State of Maharashtra  
Through Police Station Office  
PS Civil Line, Tq.Dist. Akola.

2) X Y Z Crime No. 343/2014  
PS Civil Line Tq. Dist. Akola.

**..RESPONDENTS**

.....  
Mr. A.S. Londhe, Advocate for the appellant  
Ms. H.S.Dhande, APP for Respondent no.1-State  
Ms. Radha Mishra, Advocate (appointed) for Respondent No.2  
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CORAM: ANIL L.PANSARE, J.  
Date of Reserving : 27.10.2023  
Date of Pronouncement: 31.10.2023

**JUDGMENT :**

Mr.A.S.Londhe, the learned counsel for the appellant submits that he is not pressing for orders on Criminal Application (APPA) No.1025/2023 and, as such, the Application is disposed of as not pressed.

2. Heard Mr.A.S.Londhe, the learned counsel for the appellant;

Ms.H.S.Dhande, learned APP for the respondent no.1-State and Ms. Radha Mishra, the learned counsel (appointed) for the Respondent no.2-victim, at length, and perused the records.

3. The appellant/accused is aggrieved by the judgment and order dated 21.07.2023 passed by the learned Additional Sessions Judge, Akola ( in short, ‘ the trial Judge’ ) in (Special Child Protection) Case No.29/2015, convicting him for the offences punishable under Sections 363 and 354A(1)(i) of the Indian Penal Code (in short “IPC”) and thereby sentenced him to suffer rigorous imprisonment for three years and two years respectively and to pay a fine of Rs.3,000/- and Rs. 2,000/- respectively and, in default, to suffer simple imprisonment for six months and three months respectively. The appellant, however, has been acquitted of the offences punishable under sections, 7,8,10, and 12 of the Protection of Children from Sexual Offences Act (in short ‘POCSO Act’). The prosecution has not assailed the judgment and therefore the challenge is restricted to the conviction of the appellant for the aforesaid IPC offences. The appellant will be hereinafter referred to as ‘the accused’.

4. Briefly stated, the facts of the case are that the informant is the father of the victim who resides at Borgaon-Manju, District: Akola and ekes out his living by working as a labour. The mother of the informant resides at Krishinagar, Akola. Her husband (father of the informant) has expired. On 24.09.2014, the informant, his daughter and his son had been to Akola to attend the death anniversary of informant’s father. After performing the rites and rituals, the informant along with his children intended to go back home at Borgaon-Manju. Accordingly,

on 24.09.2014, they came near Radhakrishna Talkies Bus stop situated on Amravati-Akola Highway and were waiting for the bus. At that time, one person, by name, Khanya Thukekar, who was acquainted with informant came there and both were talking to each other. After some time, the accused came there on a motorcycle. The accused was going to Murtizapur. Accordingly, Khanya Thukekar proposed the informant to seek lift. Initially, the informant was reluctant but later on agreed. The informant, Khanya and accused then consumed liquor at nearby Ruchi Wine Bar. Thereafter, the accused along with informant and his children proceeded to Borgaon-Manju on motorocyle. The victim was sitting at the front, on the petrol tank of the motorcycle. The accused was riding the motorcycle. The informant and his son were the pillion riders. During the journey when they reached Near Shivani Petrol pump, the accused halted his motorcycle near the Petrol pump saying that petrol tank has emptied. He gave Rs. 30/- to the informant and asked him to get petrol in a plastic bottle. The informant then proceeded to the petrol pump across the road. The accused then asked informant's son to instruct the informant to get the petrol of Rs. 20/-only, instead of Rs. 30/-. Accordingly the son of the informant proceeded towards the petrol pump. The accused then took away the victim-girl with him on the motorcycle. The accused molested the victim by moving his hands on her legs, stomach and also by fondling her breasts. The victim resisted the lecherous act and shouted loudly. Thereafter, the accused stopped a ST Bus by palping his hand and made the victim board the bus which was going towards Murtizapur. The accused instructed the Conductor of the bus to alight the victim at Boragaon-Manju bus stand. He then left the spot.

5. The victim, accordingly, boarded the bus. The conductor smelt something fishy and made contact with Borgaon-Manju Police. He handed over the victim to the police at Borgaon-Manju. Her mother was also called, so also the father and brother of the victim. They were so called because the father in the meantime, had lodged a report of the incident with the Akola Police Station. The police brought the victim to Akola Police Station. The victim narrated the incident to the police. She was subjected to medical examination. Initially, the FIR was lodged for the offence punishable u/s. 363 of the IPC vide Crime No.343/2014. During investigation, the offences punishable under section 354A(1)(i) of IPC and Sections 7, 8, 10 and 12 of the POCSO Act were added. The investigation culminated into filing the charge sheet. The charge came to be framed. The accused pleaded not guilty. The prosecution, therefore, examined a total of eleven witnesses to bring home the guilt of the accused. The defence of the accused is of total denial and false implication.

6. Having heard both sides and having gone through the impugned judgment and the material placed before me, the following points arise for my consideration. I have recorded my findings thereon for the reasons to follow :-

| Sr.No | Points                                                                                                                                                                                                                       | Findings          |
|-------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|
| i)    | Has the prosecution proved that on 24.09.2014 in the transit journey from Radhakrishna Talkies Bus stop to Borgaon-Manju, the accused has removed the victim from the lawful guardian i.e. father and, thus, kidnapped her ? | <b>Not proved</b> |
| ii)   | Has the prosecution proved that on 24.09.2014, the accused has sexually harassed the victim by making physical contact?                                                                                                      | <b>Proved</b>     |

|      |                                                              |                           |
|------|--------------------------------------------------------------|---------------------------|
|      |                                                              |                           |
| iii) | Whether interference is called for in the impugned judgment? | <b>Yes</b>                |
| iv)  | What order ?                                                 | <b>As per final order</b> |

### REASONS

7. **As to Point Nos. (i) & (ii):** These two points being interlinked, are decided by common reasoning :-

The prosecution was under obligation to prove that the accused has kidnapped the victim in terms of Sections 359 and 361 of the IPC. Section 359 provides that kidnapping is of two kinds: kidnapping from India and kidnapping from lawful guardianship. The case of the prosecution is that the victim being minor, she has been kidnapped from lawful guardianship. Section 361 of the IPC defines 'kidnapping' from lawful guardianship so as to mean, whoever takes or entices any minor female under 18-years of age without the consent of the lawful guardian, is said to kidnap such minor from lawful guardianship.

8. The evidence as regards kidnapping finds place in the deposition of PW1-victim PW2-Vinayak, brother of the victim and PW 4-Vijay, the father of the victim. All the witnesses have deposed in tune with the prosecution version. They have deposed that on 23.09.2014 they all attended the death anniversary of informant's father. On the next day i.e. 24.09.2014, they were waiting at the bus stand to proceed for Borgaon-Manju where Khanya Thukekar met them. After some time, the accused came there on motorcycle. The trio viz., the father of victim,

Khanya Thukekar and accused consumed liquor at the nearby Bar. The victim sat at the front i.e. petrol tank of the motorcycle. The accused was riding the motorcycle, whereas the father and brother were pillion riders. The accused stopped the motorcycle near Shivani petrol pump, on the pretext that the petrol tank emptied. He gave an empty bottle and Rs. 30/- to the father of the victim to bring the petrol. He went to the petrol pump followed by the brother of the victim since the brother was instructed to inform the father, to purchase the petrol worth Rs. 20/- only and not Rs. 30/-. Before the father and brother could arrive, the accused took away the victim on motorcycle.

9. This is the consistent testimony of three witnesses named above and despite cross-examination, it is not shaken a bit. An attempt was made to show that there occurred a dispute between the father and the accused on the ground that the father demanded Rs.1 lakh and threatened the accused of false implication. This suggestion has been given without developing any background as to why would father suddenly demand Rs.1 lakh and threaten the accused of false implication. On the contrary, the victim during her evidence, has volunteered that the mother of the victim came to their house with a proposal to compromise the matter by taking an amount of Rs. 2 lakhs. The evidence, thus, on the point of accused taking away victim on motorcycle is believable.

10. The issue, however, is about proof of the age of the victim. The learned trial Judge has, after assessing the evidence, noted that the Investigating Officer has collected *bona fide* certificate of the victim from Zilla Parishad Primary School, Borgaon-Manju where she was

studying in III standard. Her date of birth is mentioned as 17.10.2005. The learned trial Court noted that this document could have been taken aid of had the prosecution examined the concerned school authority or the teacher to prove the school record. The trial Court has further noted that the I.O. failed to collect birth certificate of the victim from the statutory authority i.e. Gram Panchayat or Municipal Corporation. Accordingly, the learned Judge has held that the prosecution failed to prove the age of the victim and thus acquitted the accused under the provisions of the POCSO Act.

11. Despite rendering the aforesaid finding, the learned trial Judge has convicted the accused for the offence punishable u/s 363 of the IPC, which provides punishment for kidnapping. I have noted the ingredients of kidnapping from lawful guardian, for which the age of the victim has to be below 18-years else the conviction u/s 361 read with Sec. 363 of the IPC will not be sustainable. The learned trial Judge has given a strange reasoning on this point, in as much as he has placed reliance upon the *bona fide* certificate issued by the school authority, to hold that the victim was a minor. According to him, different parameters will apply while assessing the evidence for the stringent provisions of POCSO Act, *vis-a-vis*, the provisions of Section 361 of the IPC. The learned trial Court has noted that for kidnapping the conviction can be based on probable evidence but not where the offence alleged is under the provisions of the POCSO Act.

12. I do not find any logic behind applying such different parameters. The law is well-settled that in criminal trial, considering the punishment of imprisonment which affects the personal liberty of a

person, the prosecution is duty-bound to prove the charge beyond reasonable doubt. In these circumstances, if there occurred doubt as regards proof of age of the victim, the doubt cannot be diluted for assessing evidence for the offences punishable under the provisions of the IPC. The Courts will have to maintain same standard of proof, be it an offence under the POCSO Act or IPC. The reason assigned by the learned trial Court, therefore, is contrary to the settled principles of law and, therefore, is not acceptable. The offence of kidnapping, therefore, cannot be said to be proved.

**13.** Carrying forward the evidence on the proof of commission of offence u/s. 354A(1)(i) of the IPC, the only evidence on this point is that of the victim. She, after having testified about her kidnapping, stated that once the accused took her away, he moved his hands on her breasts, abdomen, legs and inserted hand into her pant. She raised shouts, the accused informed her that he is a Doctor and is in habit of touching any organ of the body. The accused then made victim to board the bus and informed the Bus conductor that she should be alighted at Borgaon-Manju. He gave Rs. 10/- to the Conductor and asked him to get Rs. 4/- from the victim's father. The victim then deposed that one policeman had been to the Bus Stop. He brought the victim to the Police Station where she narrated the incident to her mother. The father also came there and they all went to Police Station, Akola and lodged the report.

**14.** This evidence has been also not shaken in the cross-examination. The accused has put up a case that there was no petrol in the motorcycle but later on put up another case that the accused alone

went on motorcycle. He has also made an attempt to get the record existence of CCTV camera at the Petrol pump. The accused, however, during investigation or trial, has never made an attempt to get the evidence collected in support of his defence of riding alone on the motorcycle. Nothing material could be elicited in his cross-examination. Thus, the evidence of PW 1, 2 and 4 on the point of accused taking away the victim on motorcycle is trustworthy. Further, the evidence of victim on the point of sexual harassment by the physical contact is also believable.

**15.** The prosecution has then examined the mother of the victim as PW3-Rukhma. She has deposed that the date of birth of the victim is 17.10.2005 and at the time of incident she was nine-years old. She is not witness to the crime and, therefore, her testimony is not of much relevance.

**16.** PW5 is Khanya Thukekar, who deposed that on 24.09.2014 at about 6.p.m., he was present at the Ruchi Wine Bar. He was short of money to purchase the liquor and therefore was waiting for some acquaintance. The accused came there. Both have purchased liquor and consumed it at an Egg's stall. PW4-informant and his children came there who intended to go to Borgaon-Manju. The accused was also going towards Borgaon-Manju and offered lift to them. PW5 has then deposed that in his presence the accused took informant and his children on a motorcycle towards Borgaon-Manju. In the cross-examination, he admitted that he was not knowing the accused earlier and had seen him for the first time on the day of the incident.

17. This witness being a chance witness, unless his presence at the spot is established with cogent material, it will be risky to place reliance upon his testimony. Nonetheless, even if his evidence is not taken into consideration, the evidence of the PW 1,2 and 4, is sufficient to hold the accused guilty of the offence punishable u/s 354A (1)(i) of the IPC.

18. PW6-Sunil is the Panch witness to spot of the incident. The spot of the incident is shown as Wine shop and Egg stall, situated on Akola- Murtizapur road. This witness has also acted as a Panch to seizure of cloth *panchanama* of the victim as also of the accused. However, his evidence is not of much reliance.

19. PW7-Dr.Priya Meshram, is a the Medical officer who has examined the victim. According to her, no injury was found on the person of the victim. There is no reason to expect bodily injury in as much it is nobody's case that while committing the offence, the victim suffered any injury.

20. PW8-Dr.Swati Jarande is the Medical officer who has examined the accused.

21. PW9-Dr. Manisha Borekar, is the Medical officer attached to Primary Health Centre, Akola. She has brought original document of information of birth of the victim given by the District Women Hospital, Akola. She had brought the letter indicating the date of birth of the victim, which was verified from the original and it has been marked as Exh.101. The said witness has also identified birth certificate produced

by the victim (Exh.64). She has deposed that the birth certificate (Exh.64) has been generated online from the official website of the concerned Department and the contents therein were correct and were as per the original birth record. She has then deposed that the date of birth of the victim is 17.10.2005.

**22.** Despite such evidence, the learned trial Court has not placed reliance on the birth certificate (Exh.64) but went on to comment upon the school record brought by the investigating agency which resulted in acquittal of the accused for the offences punishable under the POCSO Act. The prosecution has not challenged the verdict and, therefore, the law does not permit this Court to revisit the finding of acquittal. Nothing more is required to be said here, except that despite there being evidence of victim being minor, the lapses committed before the Court below have affected the prosecution case.

**23.** PW10-Madhuri Gaikwad, is the Investigating officer. She has deposed about the manner in which the investigation in this case has been conducted. She referred the victim for medical examination. She has also referred the accused to medical examination. She has drawn spot *panchnamas* and other *panchnamas*. Test identification parade was conducted. She has filed charge-sheet after collecting the evidence. In the cross-examination, she has admitted that registration certificate of the vehicle is not in the name of the accused. She admitted that she has not secured the CCTV footage from the nearby vicinity nor the petrol pump. She had also admitted that she did not get birth certificate of the victim from statutory authority. However, the ID proof and school birth record of the victim was seized during investigation. No material could

be brought on record to disbelieve the investigation.

24. PW11-Mahendra Atram is the Naib Tahsildar who has conducted the test identification parade. There is, however, hardly any dispute about identification of the accused, particularly when he had spent considerable time with the witnesses. In the circumstances, the witnesses had ample opportunity to recognize the accused in the court. They all have accordingly identified him.

25. Putting all the things together, the evidence of PW1, 2 and 4 if read together, the ingredients of Section 354A(1) (i) of the IPC have been duly established. The prosecution has proved beyond reasonable doubt that the accused has made physical contact with the victim. However, since the age of the victim has not been established it cannot be said that the prosecution has proved the ingredients of Section 363 of the IPC. To that extent, the finding recorded by the learned trial Court will have to be set aside. Accordingly, I answer the Point No.(i) in the negative and Point No.(ii) in the affirmative.

**As regards Point Nos. (iii) and (iv):**

26. Having answered the first two points in the manner stated hereinabove, the learned trial Court's finding on the point of guilt of the accused u/s 363 of the IPC being unsustainable, will have to be interfered with. Accordingly, the Point No.(iii) is answered in the affirmative. Resultantly, the following order:-

**ORDER**

- i) Criminal Appeal No. 633/of 2023 is **partly** allowed.
- ii) The impugned judgment and order dated 21.07.2023 passed by

the learned Additional Sessions Judge, Nagpur in Spl. (Child Protection) Case No. 29/2015, as regards conviction and sentence for the offence punishable u/s 363 of the IPC, is hereby set aside.

iii) The impugned judgment and order dated 21.07.2023 passed by the learned Additional Sessions Judge, Nagpur in Spl. (Child Protection) Case No. 29/2015 as regards conviction and sentence for the offence punishable u/s 354A(1)(i) of the IPC, is hereby maintained.

iv) Rest of the judgment and order stands as it is.

v) It is reported that the accused is in jail for almost two years and eight months. If the statement is found to be correct, the appellant/accused- Mayur Dilip Giri is entitled for getting the benefit of Section 428 of the Code. Of Criminal Procedure, 1973, in terms of operating Clause (4) of the judgment and order. The Superintendent of Jail, Akola shall examine the period already undergone by the accused in the jail and if satisfied that he has undergone more than two years of imprisonment, the accused-Mayur Dilip Giri shall be set at liberty forthwith if is not required in any other case.

vi) Professional fees of Ms.Radha Mishra, learned Advocate (appointed) for the victim, be quantified and paid as per the Rules.

(ANIL L. PANSARE, J.)