



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

CRIMINAL APPEAL NO.118 OF 2024

Ritesh Badrinath Borde,
Age: 23 years, Occu.: Labour,
R/o. Bajartal, Fulambri,
Tq. Fulambri, Dist. Aurangabad

.. Appellant

Versus

1. The State of Maharashtra,

2. X. Y. Z.

.. Respondents

...
Advocate for Appellant: Ms. P. R. Jamdhade h/f. Mr. Pawan Salve
APP for Respondent/State: Mr. A. A. A. Khan
Respondent No.2-served
...

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 01.08.2024

Pronounced on : 09.08.2024

JUDGMENT:

1. Conviction for offence under Section 363 of the Indian Penal Code passed by the learned Special Judge (POCSO), Aurangabad dated 07.12.2023 in Special Case (POCSO) No.10/2021 is assailed in the instant appeal.

FACTS LEADING TO TRIAL

2. In nutshell, prosecution version is that appellant who resided in front of house of victim a minor, lured her on the promise of marriage

and took her to his house. On report of mother, crime was registered for offence under Sections 363, 366-A of the IPC and under the provisions of the POCSO Act. On conclusion of investigation accused / appellant was chargesheeted and made to face trial.

Learned trial judge, who appreciated and analysed the prosecution evidence reached to conclusion that offence of 366-A of IPC and provisions of POCSO Act are not getting established. However, charge of Section 363 of IPC being made out, conviction for the same has been recorded.

Aggrieved by the above Judgment of conviction instant appeal has been preferred on various grounds raised in the appeal.

SUBMISSIONS

On behalf of the Appellant:

3. Alleging false implication learned counsel for the appellant submitted, that, there is no cogent, reliable and trustworthy evidence. Learned counsel emphasizes that essential ingredients of attracting offence of kidnapping are not available in the evidence. That, the girl herself left and no role of taking away victim is established by prosecution in the trial court. That, in fact, victim in her cross admitted that there was love affair. The learned trial court has also acquitted the accused of charge under Section 366-A of IPC and under the provisions of

POCSO Act. According to learned counsel, there is improper appreciation of evidence by the learned trial court and findings reached are not supported by sound reasons.

On behalf of the State:

4. Per contra, learned APP for the State would submit that victim was minor. She was studying in 9th standard. That, in trial court there is no serious challenge to her age. She being minor and accused having taken her away from the lawful custody, offence is clearly attracted. Prosecution has proved the case beyond doubt and, thus, according to him, learned trial court has committed no error in recording the guilt and, hence, he prays to dismiss the appeal for want of merit.

EVIDENCE ON RECORD

5. It seems that prosecution has adduced evidence of in all 5 witnesses. Their role and status and the sum and substance of their evidence is as under :

PW-1 Victim gave her date of birth as 28.06.2005 and deposed that when she was studying in 9th standard accused who resided in front of her house took her to Brijwadi. His father told that she was not of marriageable age and to not to perform marriage. Her parents

lodged complaint, Police brought her to police station and she gave statement and returned home.

PW-2 Mother stated that her step daughter studying in 9th standard. On 07.06.2020, she left the house without intimating her. In spite of being searched, when she was not found, she lodged report Exhibit 33. According to her, when police brought her daughter, she allegedly told that giving promise of marriage accused kidnapped her.

PW-3 Staff and Anganwadi Sevika stated that as per register date of birth of victim is 28.06.2005.

PW-4 Father gave date of birth of victim as 24.04.2005 and he placed birth certificate on record. According to him, when he returned from work, daughter was not at home. She was searched and, thereafter, his wife lodged report and she was found in the house of accused.

PW-5 Police Official, who carried out Spot Panchanam, collected Pravesha Nirgam Register, handed over investigation to PSI Murade.

ANALYSIS

6. Case of prosecution is rested on evidence of above 5 witnesses. Admittedly, evidence of victim is crucial. Out of charge of

Sections 363, 366-A of IPC and provisions of POCSO Act, on trial, conviction is recorded for Section 363 of IPC, which deals with kidnapping of minor from lawful custody.

7. For the sake of brevity and comprehension Section 361 of IPC is reproduced as under:

“Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”

For establishing the charge, it is incumbent upon the prosecution to prove following essentials:

- (1) The offence is committed by “taking” or “enticing” a minor or person of unsound mind.
- (2) The person kidnapped must be;
 - (a) Under the age of 16, if male **or**
 - (b) Under the age of 18, if female **or**
 - (c) a person of unsound mind
- (3) The “taking” or “enticing” must be out of keeping the lawful guardian of such minor.
- (4) “Taking” and “enticing” must be without consent of guardian.

8. In the case of **State of Haryana Vs. Raja Ram MANU/SC/0262/1972; AIR 1973 SC 819**, the words “takes”, “entices”,

“keeping out of lawful guardian” are dealt and discussed and it has been held that the word “entices” means, inducement or allurements by giving rise to hope or desire.

9. In the light of above requirement, evidence in the case in hand is re-evaluated. From the evidence of victim, her father, PW-3, there is material showing that date of birth of victim is 24.04.2005. Occurrence has taken place on 07.06.2020. Therefore, obviously, going by such date, victim is shown to be minor. Now, it is to be seen, whether there is act of kidnapping as contemplated under law.

10. Again, on visiting victim's evidence, at Exhibit 31, it is emerging that according to her, accused resided in front of their house. She merely deposed that prior to 4 years, he took her by giving assurance of marriage to his house at Brijwadi. But, father of accused told that she is not of marriageable age. Her mother, PW-2, in her testimony, at Exhibit 32, stated that her daughter left the house without intimating her. So much is the only evidence.

In cross, she has answered that, they both came to brigwadi from Phulambri by bus and she did not tell anyone when she came with accused. She also answered that she had love affair with him.

11. It is pertinent to note that accused allegedly resided in front of complainant's house. Except testimony of victim recorded in July 2023 that he took her by assuring marriage, there is no material that he called her, they both met anywhere and, then, he took her. There is no evidence about persuading her of enticing or alluring her. She has admitted that she has love affair with him. Mother speaks that her daughter left the house. In the considered opinion of this court, in this case, though, victim is minor, she has admitted about her love with accused and, even, the requirements of "taking" or "enticing" are not cogently proved.

Facts in the case are similar to the one in the case of landmark Judgment of **S. Varadarajan Vs. State of Madras** reported in **AIR 1965 SC 942**. Here, role of accused regarding enticing her or alluring her is not getting cogently proved. As stated above, mother has stated that daughter left the house. Merely because victim is below 18 years of age, offence cannot be said to be complete. The observations in ***S. Varadarajan (supra)***, which is the landmark Judgment also needs to be considered.

Therefore, herewith above quality of evidence on record, essential ingredients for bringing home the charge of Section 363 of IPC are not cogently brought on record.

12. Learned trial court seems to have accepted prosecution version primarily on the ground that she is below 18 years of age. Evidence of very informant / mother that victim left the house has been lost sight of by the learned trial judge. Consequently, interference is called for. Appellant succeeds. Hence, following order.

ORDER

- I) Criminal Appeal No.118 of 2024 is allowed.
- II) The conviction awarded to appellant Ritesh Badrinath Borde in Special Case (POCSO) No.10 of 2021 by the learned Special Judge (POCSO), Aurangabad, on 07.12.2023 for the offence punishable under Section 363 of the Indian Penal Code, stands quashed and set aside.
- III) The appellant stands acquitted of the offence punishable under Section 363 of the Indian Penal Code.
- IV) The bail bonds of appellant stand cancelled.
- V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.

[ABHAY S. WAGHWASE, J.]