



Judgment

176 apeal1.14

1

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

CRIMINAL APPEAL NO.1 OF 2014

Ravindra s/o Trymbak Irale,
aged about 26 years, occupation : agriculturist,
r/o Antri Koli, tahsil Chikhali,
district Buldana. **Appellant.**

:: V E R S U S ::

State of Maharashtra,
through PSO Chikhali,
district Buldana. **Respondent.**

=====
Shri D.C.Chahande, Counsel for the Appellant.
Shri S.S.Hulke, Additional Public Prosecutor for the State.
=====

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 29/01/2024
PRONOUNCED ON : 08/02/2024

JUDGMENT

1. By this appeal, the appellant (the accused) has challenged judgment and order of conviction and sentence dated 14.12.2013 passed by learned Additional Sessions Judge, Buldana (learned Judge of the trial court) in Sessions Trial No.112/2012 whereby the accused is convicted for offence punishable under Section 363 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and to pay fine Rs.10,000/-, in default, to suffer

.....2/-

2

rigorous imprisonment for one year. He is also convicted for offence punishable under Section 366 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and to pay fine Rs.15,000/-, in default, to suffer rigorous imprisonment for one year. He is also convicted for offence punishable under Section 506 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years to pay fine Rs.5000/-, in default, to suffer rigorous imprisonment for three months.

Learned Judge of the trial court directed that all sentences shall run concurrently.

2. Brief facts of the prosecution case as emerge from police papers and recorded evidence are as under:

The complainant (the victim), student of 10th Std. aged about fifteen 15 years, is studying in Adarsha Vidyalaya, Chikhali. She alleged that she used to attend the school by travelling in an auto-rickshaw from her village Antri Koli, taluka Chikhali along with her friends. On 13.7.2012, at about 11:30 am, when she reached the school along with her friends, the accused entered in the school

3

premises from backside gate of the school and restrained her by saying that he is intending to talk to her. On declination by the victim, he forced her to come along with him and snatched her school bag and dragged her towards motorcycle. Though her friends intervened, he ignored the same and took the victim along with him. At village Godri, the accused received a telephonic call of Sarpanch of the village, who is also the President of "Tanta Mukti Samiti". The Sarpanch convinced the accused to bring back the victim. The accused also received phone call of uncle of the victim who assured the accused that he will arrange for his marriage with the victim and, thereafter, the accused brought her back and she lodged a report.

3. After registration of the crime, the investigating officer visited the spot of the incident and drew spot panchanama and after completion of formality of investigation, submitted chargesheet against the accused.

4. In support of the prosecution case, the prosecution examined in all ten witnesses, as follows:

1. the victim vide Exhibit-14 (PW1);

4

2. Surekha Kailash Sonuone vide Exhibit-22 (PW2);
3. Laxmi Deopuri Gosavi vide Exhibit-21 (PW3);
4. Savita Ganesh Thete, the mother of the victim, vide Exhibit-22 (PW4);
5. Subhash Thete, the uncle of the victim, vide Exhibit-23 (PW5);
6. Madan Shinde, the President of "Tanta Mukti Samiti", vide Exhibit-24 (PW6);
7. Eknath Tukaram Harkal vide Exhibit-28 (PW7);
8. Baban Kale vide Exhibit-31 (PW8);
9. Madan Deshmukh, the headmaster of "Adarsha Vidyalaya, Chikhali", vide Exhibit-32 (PW9), and
10. Nishant Meshram, the investigating officer, vide Exhibit-34 (PW10).

5. Besides the oral evidence, the prosecution relied upon report Exhibit-15, First Information Report Exhibit-16, spot panchanama Exhibit-29, *bona fide* certificate Exhibit-33, and arrest panchanama Exhibit-35.

6. All incriminating evidence is put to the accused in order to obtain his explanation regarding evidence appearing against him by recording his statement under Section 313 of the Code of Criminal Procedure. Defence of

5

the accused of love affair and the victim joined her company at her own. Learned Judge of the trial court appreciated the evidence and held the accused guilty of offences as the aforesaid.

7. Heard learned counsel Shri D.C.Chahande for the accused and learned Additional Public Prosecutor Shri S.S.Hulke for the State.

8. Learned counsel for the accused submitted that as per the prosecution case, the victim was below 18 years of age and the accused forcefully taken her from lawful custody of her parents and thereby committed offences punishable under Sections 363 and 366 of the Indian Penal Code. He urged that the age of the victim is not proved by the prosecution by adducing material evidence. Though the prosecution examined the school headmaster PW9 Madan Deshmukh, his evidence is not helpful as he narrated date of birth of the victim on the basis of school leaving certificate which is received from earlier school. He further urged that the evidence of the victim shows that though she was having an opportunity to make her grievances, as she was

6

taken by the accused using the force, she has not made any complaint. She has not attempted to rescue herself from clutches of the accused. She herself went along with the accused. Thus, ingredients of offences are not established by the prosecution. Learned Judge of the trial court ignored the same and erroneously convicted the accused.

9. Learned Additional Public Prosecutor for the State supporting the judgment and order of conviction impugned in the appeal submitted that not only the evidence of the victim but also the evidence of PW2 Surekha and PW3 Laxmi, who are friends of the victim, corroborated fact of kidnapping by the accused. It is further corroborated by the President of "Tanta Mukti Samiti" PW6 Madan Shinde. Thus, there is ample evidence on record which proves that the accused has taken the victim from lawful custody of her parents and thereby committed offences punishable under Sections 363 and 366 of the Indian Penal Code. The evidence on record is sufficient to show that the accused has committed the offence.

7

10. After hearing learned counsel for the accused and learned Additional Public Prosecutor for the State, it reveals that the entire controversy in the matter revolves around issue whether the prosecution has proved that the victim was taken by the accused from lawful custody of her parents without consent and the offence of kidnapping is made out.

11. To prove offence under Section 363 of the Indian Penal Code, the prosecution has to establish that the victim is kidnapped from lawful guardianship of her parents.

12. Section 366 of the Indian Penal Code states that whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment or either description for a term which may extend to ten years, and shall also be liable to fine.

8

13. Thus, for the purpose of proving the offence under Section 366 of the Indian Penal Code, material required to be established is that a woman is taken with an intent to marry against her will or to force her or seduce her to illicit intercourse.

14. The evidence of the victim shows that she was taken by the accused forcefully without her consent from lawful guardianship and at the time of the incident, she was fifteen years of age. Her birth date narrated by her is 17.10.1997. Admittedly, her birth date is not seriously challenged by the accused.

15. To prove that the victim was below 18 years of age at the time of the incident, the prosecution examined the school's headmaster PW9 Madan Deshmukh. As per the said witness, birth date of the victim is 17.10.1997. His evidence further shows that the victim was admitted in his school by transferring from earlier school namely "Shivaji Vidyalaya" and her primary education is completed in village school. He issued *bona fide* certificate. His evidence further shows that school leaving certificates issued by

9

earlier schools are taken into consideration while admitting students in his school.

16. Thus, admittedly, “Adarsha Vidyalaya” is not the school wherein the victim was firstly admitted.

17. In order to prove the age of the victim, the prosecution has to produce evidence in the nature of birth certificate or school record wherein she is firstly admitted.

18. The Honourable Apex Court in the case **Jarnail Singh vs. State of Haryana**¹ dealt with issue regarding ascertaining age of victim in a sexual assault cases wherein it is held that on the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. It is also held that if the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of

¹ 2013 ALL MR Cri 2946

10

juvenility or otherwise. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. It is further held that highest rated option available, would conclusively determine the age of a minor. In the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the

11

determination of age of the concerned child, on the basis of medical opinion.

19. In view the above observation, admittedly, the prosecution has not adduced evidence by obtaining the certificate from school wherein she was firstly admitted.

20. Thus, evidence regarding age of the victim is missing in the present case.

21. To prove that the victim was kidnapped by the accused from lawful custody of her parents with intent to marry her against her will or she may be forced to have an illicit intercourse, the prosecution placed reliance on the evidence of the victim who deposed as per recital of the First Information Report. Sum and substance of her evidence is that on 13.7.2012, when she getting down from auto-rickshaw in the premises of the school, the accused approached her and asked her to come along with him and also snatched her bag and dragged her. He took her at village Godri and insisted her to marry with him. He also threatened her if she declined to marry with him, he will throw her in well. During her cross examination, it came on

12

record that she was taken on motorcycle from the courtyard of the school. She has not made any hue and cry or resisted the act of the accused. She also visited the temple at Godri wherein also there were shops and people, however she has not made any complaint to anybody. She further came in her evidence that the accused had also halted his motorcycle at petrol pump and she was standing nearby. She specifically admitted that the accused suggested her to sit on his motorcycle and she sat on his bike.

Learned counsel for the accused submitted that the above cross examination sufficiently shows that though the victim was having an opportunity, she has not made any grievances of the forceful act which is sufficient to draw an inference that the victim on her own joined the company of the accused and, therefore, she has not made any grievances to anybody though she was having an opportunity.

22. To corroborate the version of the victim, the prosecution examined PW2 Surekha and PW3 Laxmi in

13

whose presence the accused has taken the victim along with him.

The evidence of PW2 Surekha shows that when they got down from the auto-rickshaw, the accused came there, snatched school bag of the victim. At the relevant time, school bell rang and, therefore, she along with PW3 Laxmi went in the class room. Her evidence further shows that the victim did not raise any hue and cry when the accused snatched her school bag.

The evidence of PW3 Laxmi is also to the extent that the accused came there, but the school bell rang and, therefore, she went in her class.

Thus, both witnesses have not whispered about any force by the accused.

23. Insofar as the evidence of the President of "Tanta Mukti Samiti PW6 Madan Shinde is concerned, the same is on the aspect of disclosure by the victim after she returned home.

14

24. PW5 Subhash is her uncle. His evidence is to the extent that he called the accused and asked him to bring the victim back. Accordingly, he came back along with the victim and the victim disclosed him that the accused has threatened her as to why she is not marrying with him.

25. PW7 Madan Shinde is the President of "Tanta Mukti Samiti". As per his evidence, the mother of the victim informed him that the accused has taken her daughter and, therefore, he called the accused and asked him to bring back the victim. His evidence shows that he told the accused that he should bring back the victim and he would manage his marriage with the victim. His cross examination shows that he put such proposal before the accused at his own.

26. The last witness examined by the prosecution is Investigating Officer PW10 Nishant Meshram, who narrated about the investigation carried out by him. His cross examination shows that the spot of the incident, i.e. the place from which the victim was taken, was campus and students and staff used to be there within the campus

15

between 11:30 to 12:00 pm. It further shows that it was transpired during investigation that the victim did not raise shouts and did not ask help to anybody when she crossed distance between Neem tree and parking lot. She crossed the area of Sambhaji Nagar which is surrounded by residential houses and there is always heavy traffic on the road. It further came in the cross examination that there are various tea stalls and pan stalls at the bus stop of village Chandai. He had not noticed any visible injury on the face and hands of the victim.

27. Thus, the evidence of the above witness shows that the victim has not resisted the act of the accused though she was having an opportunity. The spot of the incident is crowded place and she has not asked any help from anybody. The evidence of the victim and her friends also shows she has not made any hue and cry though she was insisted by the accused to come along with him. On the contrary, the evidence shows that the victim crossed the college campus where there was rush of students and teachers. Her admission during cross examination shows

16

that though the motorcycle was halted to fill up fuel whereat also she has not made any complaint to anybody.

Learned counsel for the accused submitted that this evidence would show that the victim joined the company of the accused on her own and it is not within the definition of kidnapping.

28. The accused is facing charge under Sections 363 and 366 of the Indian Penal Code. Section 363 denotes punishment for kidnapping. Whereas, Section 366 denotes kidnapping, abducting or inducing woman to compel her marriage. Said Sections are reproduced below for perusal:

“Section 363. Punishment for kidnapping. - 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 be liable to fine.

Section 366. Kidnapping, abducting or inducing woman to compel her marriage, etc. - Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which

17

may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.]

29. From the entire version of prosecution witnesses, it nowhere points out that the accused kidnapped the victim to make to suffer sexual intercourse or to seduce her for sexual intercourse or to compel her to marry.

30. The law is well settled in the case of **S.Varadarajan vs. State of Madras**² wherein the Honourable Apex Court held that "there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was

² AIR 1965 SC 942

18

doing voluntarily joins the accused person. The accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian”.

31. From the evidence on record, it reveals that the prosecution failed to adduce evidence as to age of the victim by adducing reliable evidence. The evidence of the victim and her friends shows that the accused approached the victim and asked her to come along with her and she went along with the accused. Though the victim stated that the accused forced her to come along with him by snatching her school bag, her evidence itself shows that she has not made any hue and cry which is not only supported by her friends PW2 Surekha and PW3 Laxmi but also by Investigating Officer PW10 Nishant Meshram.

32. Thus, the evidence on record shows that though the victim was having an opportunity to come out of the

19

clutches of the accused, she did not avail the same and remained and in the company of the accused. Thus, the conduct of the victim in such eventualities demonstrates that she on her own joined the company of the accused and stayed along with him.

33. Thus, there is no evidence to show that the accused took the victim away by enticing her or using force on her. Upon careful scrutiny of the material on record, it shows that no offence under Section 363 of the Indian Penal Code has been established against the accused and, therefore, he is entitled to be acquitted. Accordingly, the appeal deserves to be allowed, as per order below:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of conviction and sentence dated 14.12.2013 passed by learned Additional Sessions Judge, Buldana in Sessions Trial No.112/2012 is hereby quashed and set aside.

Judgment

176 apeal1.14

20

(3) The accused is acquitted of offences for which he is charged and convicted.

The appeal stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

...../-