



Sonam

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.9 OF 2023

Issub Khan
Son of Sayed Khan,
Age 30 years,
R/o House No. 540,
Maina Patto,
Camurlim-Bardez, Goa.
And presently undergoing Sentence
At Colvale Jail,
Bardez, Goa.

... APPELLANT

V/S

1. STATE
Through P.P.
High Court of Bombay at
Porvorim, Goa.

2. The Police Inspector,
Mapusa Police Station,
Mapusa-Goa.

... RESPONDENTS

Mr. Vibhav Amonkar, Advocate for the Appellant.

Mr. Shailendra G. Bhobe, Public Prosecutor for the
Respondent-State.

CORAM : SHREERAM V. SHIRSAT, J.

RESERVED ON : 19TH SEPTEMBER, 2025.

PRONOUNCED ON : 29TH SEPTEMBER, 2025.

JUDGMENT:

1. Heard Mr. Amonkar, learned Advocate for the Appellant and Mr. Bhole, learned Public Prosecutor for the Respondent-State.

2. This is an appeal against the conviction of the Accused/Appellant by the Fast Track Court (POCSO) at Panaji vide Judgment and order dated 03.01.2023 passed in Sessions Case (ors) No. 76/2018, convicting the Accused/Appellant of the offences punishable under Section 363 of the IPC. The Accused/Appellant has been sentenced to undergo 3 years Rigorous Imprisonment and to pay a fine of Rs. 50,000/- (Rupees Fifty Thousand only) and, in default, to undergo 1 month Rigorous Imprisonment. The Accused/Appellant has been acquitted of the offences punishable under Section 376, 354, 452 of IPC and Section 4 and 8 of the Prevention of Children from Sexual Offences (POCSO) Act.

3. The case of the prosecution is that on 17.02.2015, between 16.00 hrs to 19.45 hrs in the village 'P', Bardez, Goa, the Accused/Appellant, without the consent of the

complainant (lawful guardian) kidnapped her minor daughter, aged 17 years from the lawful guardianship and committed house trespass by entering into the house of the complainant and also used criminal force with intent to outrage the modesty of the victim girl; kept her in secret and committed rape, penetrative sexual assault and sexual assault on her.

4. Upon the complaint of the mother of the victim, the Accused/Appellant came to be arrested on 19/2/2015 and was thereafter released on bail on 26/2/2015. Thereafter, the investigation progressed, which culminated into the filing of a chargesheet. The offences being triable by the Court of Sessions, the said case was committed to the Court of Sessions vide order dated 29/11/2018. After committal, the Charge was framed on 25/3/2022 and explained to the Accused/Appellant, who pleaded not guilty and claimed to be tried.

5. In order to prove the case, the prosecution has examined in all 9 witnesses. PW1/the victim. PW2/the mother of the victim, PW3/pancha in respect of the clothes

of the victim. PW4/Dr. Ankush Patil who produced on record letter addressed to the Forensic Department for examination of the accused , a letter addressed to the Investigating Officer, forwarding material of the accused to be forwarded to the CFSL, Hyderabad, a letter addressed to the Blood Bank referring the accused for blood test and RH grouping examination. PW5/Dr. Ankita Joshi, who produced a letter addressed to the Casualty Medical Officer, Goa Medical College, requesting a medical examination of the victim girl; Report of medical examination in sexual offences for females in respect of the victim, addressed to the blood bank. PW6/pancha to the arrest and attachment panchanama in respect of the clothes of the accused, attachment panchanama in respect of the scooter belonging to the brother of the accused. PW7/the Investigating Officer, PW8/ Second Investigating Officer. PW9/brother of the accused, at whose instance the scooter involved in the incident was attached.

6. Thereafter, 313 statement of the Accused/Appellant came to be recorded. Arguments were heard, and the Trial Court was pleased to convict the Accused/Appellant for the

offence punishable under Section 363 of the IPC. However, the Trial Court has acquitted the Accused/Appellant for the offences punishable under Section 376, 354, 452 of IPC and Section 4 and 8 of the POCSO Act.

7. The Judgment of conviction passed by the Sessions Court has been assailed in this appeal on various grounds, which have been argued by the learned Counsel for the Accused/Appellant. The submission of the learned Counsel for the Accused/Appellant was that as the Accused/Appellant has been acquitted for the offence of section 376, 354, 452 of the IPC and Section 4 and 8 of the POCSO Act, there was no material before the Trial Court to convict the Appellant under section 363 of the IPC and therefore could not have been convicted under Section 363 of IPC as the ingredients of the said section are totally lacking. It is the submission of the learned Counsel for the Appellant that the Trial Court could not have come to the conclusion that the Appellant is guilty of committing an offence punishable under Section 363 of IPC in view of the deposition of the victim girl i.e PW No 1 and PW No 2, and when the prosecution has miserably failed to produce any evidence in support of its case. It is further

the submission that, the Trial Court has totally misinterpreted the ratio laid down in the Judgment of ***Bharwada Bhoginbai Hirjibhai V/s State of Gujarat***. It is the submission that the victim girl was aged more than 17 years of age and was therefore capable of knowing the consequences of her act and that she was not a child of tender years, who was unable to think for herself. Considering her age, that she was on the edge of attaining the majority and was capable on knowing what was good and what was bad for her, she also being the student of Hotel Management. It was further submitted that in view of the fact that there is nothing that has come in evidence to the effect that there was any enticing, the Appellant could not have been convicted by the Trial Court. The Learned Counsel for the Appellant also invited the observation of the Trial Court, where the Trial Court records that in view of the same, there creates a doubt on the story of the prosecution that the accused is really involved in the said crime. The learned Counsel for the Appellant therefore prays that the Appellant deserves to be acquitted. The Learned Counsel, in support of his contention has also relied upon the judgment of **S.**

Varadrajan V/s State of Maharashtra¹.

8. Per Contra the Ld. Public Prosecutor submitted that the offence is of a very serious nature and that, considering the evidence on record, no leniency should be shown to the appellant. The age of the victim should be taken into consideration as she was a minor and therefore the consent was immaterial, and therefore prayed that the conviction be confirmed. The Learned Prosecutor further submitted that evidence of PW1 and PW2 is sufficient enough to convict the Accused/Appellant for the offences charged off. The Learned Prosecutor therefore prayed for confirming the order of conviction.

9. As the Appellant has been acquitted of the offence under Section 376, 354, 452 of IPC and Section 4 and 8 of the POCSO Act, upon going through the evidence, it can be seen that the Trial Court has rightly acquitted the Accused/Appellant. However, since the Appellant has been convicted under Section 363 of the IPC, the evidence of PW1 and PW2 i.e. the victim and the mother of the victim, who

¹ (1965) ISCR, page 243

are the material witnesses, will have to be scrutinized in order to see whether or not, there is evidence on record to sustain the charge for the offence under Section 363 of the Indian Penal Code.

10. As per the evidence brought on record, the date of birth of the victim is 1.12.1997, which is established from the birth certificate of the victim which is at Exhibit PW2/12/C. The incident took place on 17.2.2015; therefore, the age of the victim on the date of the incident was more than 17 years. Even though the age of the victim was more than 17 years but less than 18 years, it will have to be seen whether the offence of section 363 can be said to have been established in the wake of the various judicial pronouncements.

11. Section 361 and Section 363 of the IPC reads as under:

361. Kidnapping from lawful guardianship. —Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a 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.

Explanation. -The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.— This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

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.*

12. The PW1 in her deposition has stated that she got introduced to the Accused/Appellant in the year 2013, through her Facebook account, of which her parents were unaware of. She has deposed that they became friends and thereafter they developed a relationship between them. She has further deposed that they would talk to each other on the mobile phone and he had come 3 to 4 times near her house to meet her, and she used to accompany him whenever he used to come near her house. She has further deposed that they were in love and since her parents did not accept their relationship, the victim and the Accused/Appellant has eloped from the house. She has further deposed that they

went to Mumbai by train, where they were apprehended by the police, and the parents had come to Mumbai to collect her. During her deposition, the learned Special Public Prosecutor was of the opinion that PW1 was deviating from her statement recorded by the police under Section 161 and therefore sought permission of the Court to cross-examine the victim, which was granted. During the cross-examination by the learned Special Public Prosecutor, it has further come on record that on 17.02.2015, her parents came to know that she was friendly with the Accused/Appellant, and her parents did not like the relation to continue. She has further deposed that she called the Accused/Appellant at about 2.00 p.m. and spoke to him, and has further agreed that it is true that they decided to go away from Goa. She has further deposed that the Accused/Appellant came to her house in the evening at 5.00 p.m., after which they left the house and went to Thivim by Activa scooter belonging to the Accused/Appellant. She has further deposed as to which places she travelled with the Appellant. The said PW1 was further cross-examined by the learned Counsel for the Accused/Appellant, wherein she had denied the suggestions

put to her. From the analysis of her deposition, it can be inferred that there is nothing to suggest that there was any enticement on the part of the Accused/Appellant to take her away from the lawful guardianship of her parents.

13. The PW2 in her evidence has stated that the victim is her daughter and she had lodged a complaint to the Mapusa Police, but she does not remember the date, month, and year due to lapse of time. She further deposed that on that day, she and her husband had decided to go for the Carnival at Mapusa; however, the victim had not come along with them. She has further deposed that when she returned home in the evening, she did not find her daughter there; however, she found a note on the table written by the victim, but she does not recollect the contents of the note due to the lapse of time. She further deposed that at the relevant time, the victim was about 16-17 years of age and her date of birth is 01.12.1997. She has also produced the Birth Certificate of the victim, which was admitted in evidence marked as Exhibit PW2/12-C. On the point of a note having been found in the house, she has denied the said suggestion. Upon scrutiny of the said evidence, it can be seen that there is nothing to bring home

the charge of kidnapping as against the present Accused/Appellant. For the reasons best known, even the note written by the victim was not produced during her examination before the Court, and as such, her deposition does not take the case of the prosecution any further.

14. At this stage, it would be apposite to refer to the decision of ***S. Varadrajan V/s State of Maharashtra***².

Relevant paragraphs are quoted below:

“6. It is not disputed that Savitri was born on November 13, 1942 and that she was a minor on October 1st. The other facts which have already been stated are also not disputed. A two-fold contention was, however, raised and that in the first place Savitri had abandoned the guardianship of her father and in the second place that the appellant in doing what he did, did not in fact take away Savitri out of the keeping of her lawful guardian.

7. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that “taking” of Savitri out of the keeping of her father has not been established. The offence of “kidnapping from lawful guardianship” is

² (1965) ISCR, page 243

defined thus in the first paragraph of Section 361 of the Indian Penal Code:

“Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a 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.”

It will thus be seen that taking or enticing away a minor put of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to “taking” out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law “taking”. There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to

*make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision in *Re Abdul Satar* [54 MLJ 456] in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her*

husband's house, there was sufficient taking in law for the purpose of Section 363 and expressing agreement with this statement of the law observed: "In this case the minor, PW 4, would not have left the house but for the promise of the appellant that he would marry her". Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In *Re Abdul Sathar* case [54 MLJ 456] Srinivasa Aiyangar, J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed:

"If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or not brought about by something that the accused did."

In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself : it was she who telephoned to the appellant and fixed the rendezvous she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him.

9. *It must, however, be borne in mind 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 circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present 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 doing voluntarily joins the accused person. In such a case we do not think that the accused can 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.*

10. *It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to “taking”.*

15. From the deposition of PW1, therefore, a conclusion cannot be drawn that the Accused/Appellant can be said to have taken the victim away from the keeping of her lawful guardian. Something more ought to have been shown in the case of this type that there was some inducement held out by the Accused/Appellant or an active participation by the Accused/Appellant in the formation of the intention of the victim girl to leave the house of the guardian. The Accused/Appellant, by accompanying her, cannot be said to have taken her out of the keeping of her lawful guardian. There is nothing in the evidence to suggest that the victim left the house at the instance of the Accused/Appellant. It has not even come in the deposition of any of the witnesses, including PW2, that there were any instances earlier where PW1 was solicited or persuaded by the Accused/Appellant to do any act which would constitute an offence under Section 363. Therefore, it would be incorrect to infer that the Accused/Appellant is guilty of taking the minor daughter out of the keeping of the lawful guardian, just because the victim had left the house of her parents and accompanied the Accused/Appellant, and the Accused/Appellant had fulfilled

her desire of eloping with her. Thus, in my opinion, it falls short of his inducement to the victim to keep out of the keeping of the lawful guardian. There is no evidence to suggest that there was any enticement on the part of the Accused/Appellant. Thus, from the evidence that has come on record, it can be specifically inferred from her conduct that she was capable of understanding the consequences of her act. I am therefore of the opinion that the Trial Court has erred in convicting the Accused/Appellant for committing an offence under section 363 IPC.

16. Even as far as PW2 is concerned, the evidence that has come on record do not satisfy the ingredients of Section 363 of the IPC for which the Accused/Appellant has been convicted.

17. Upon marshalling the evidence of other witnesses i.e PW No 3 to PW No 9, there is no material to sustain the charge of the offence under section 363 of the Indian Penal Code and the Appellant has been acquitted of offences under section 376, 354, 452 of the IPC and section 4 and 8 of the POCSO Act by the trial court.

18. The Trial Court has relied upon the Judgment of ***Bharwada Bhoginbai Hirjibhai V/s State of Gujarat***³. However, upon going through the facts of the case, it can be seen that the facts are different and not applicable to the facts of the present case.

19. For the reasons stated above, the Appeal is allowed and the impugned Judgment and Order dated 03.01.2023 passed by the Special Court (POCSO) at Panaji in Sessions Case (ors) No 76/2018, convicting the Accused/Appellant for the offence under Section 363 of the IPC, is set aside and the Accused/Appellant is acquitted of the said offence.

SHREERAM V. SHIRSAT, J.

³ 1983, AIR 753