



Judgment

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1

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

CRIMINAL APPEAL NO.134 OF 2023

Narendra @ Guddu s/o Ambadas Wasu,
aged:- 42 years, occupation : teacher,
r/o Malgujaripura Beside Ingole Chowk,
Beside Mahadeo Temple,
Tahsil Wardha, district Wardha. **Appellant.**

:: V E R S U S ::

1. State of Maharashtra,
through PSO Wardha (City),
Wardha.

2. XYZ (victim)
through PSO Wardha (City)
Wardha. In Crime No.422/214. **Respondents.**

Shri C.D.Rohankar, Counsel for the Appellant.
Mrs.S.S.Dhote, Addition Public Prosecutor for Respondent
No.1/State.
Ms.Mohini Sharma, Counsel Appointed for Respondent
No.2/Victim.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 06/02/2025

PRONOUNCED ON : 04/03/2025

JUDGMENT

1. By this appeal, the appellant (accused) has
challenged judgment and order dated 9.2.2023 passed by

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2

learned Extra Joint Additional Sessions Judge and Special Judge, Wardha (learned Judge of the trial court) in Special (Ch.Act) Case No.31/2016.

2. By the said judgment and order impugned, the accused is convicted for offence punishable under Section 363 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for six years and to pay fine Rs.3000/-, in default, to undergo further simple imprisonment for six months.

He is further convicted for offence punishable under Section 12 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to undergo rigorous imprisonment for three years and to pay fine Rs.2000/-, in default, to undergo further simple imprisonment for three months.

3

He is also convicted for offence punishable under Section 354-A(1)(i) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year and to pay fine Rs.1000/-, in default, to undergo further simple imprisonment for one month.

He is further convicted for offence punishable under Section 506 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and to pay fine Rs.1500/-, in default, to undergo further simple imprisonment for one month.

3. Brief facts of the prosecution case are as under:

The victim girl aged about 17 years was residing with her parents at Nalwadi, Wardha and studying in 11th Standard in “Keshrimal Kanya Vidyalaya, Wardha”. On 1.9.2014, at about 10:00 am, when she was proceeding towards school on her bicycle and reached near Rajpal

4

Petrol Pump, the accused restrained her by coming on a motorcycle. As nobody was present there, he insisted her to sit on his motorcycle and took her at his house. He was residing on a rented premises owned by Savita Gondane. When the victim girl was brought in the courtyard of the house, she disclosed to Savita that the accused forcefully brought her and asked her to call her mother. On which, the accused fled away from the spot of the incident. The victim girl subsequently along with her mother and Savita approached police station and lodged the report. After registration of the crime, the Investigating Officer has visited the alleged spot of the incident, and drawn the spot panchanama. The accused was arrested. The Investigating Officer has collected the information as to the vehicle of the accused as well as his service record. After completion of the investigation, chargesheet came to be submitted against the accused.

5

4. Learned Judge of the trial court framed the charge vide Exh.5. The contents of the charge are read over to the accused who pleaded not guilty and claimed to be tried.

5. In support of the prosecution case, the prosecution examined in all seven witnesses, as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	Victim	12
2	mother of the victim	36
3	Amit Tiwari	38
4	Savita Gondane	60
5	Mohd. Awes, Junior Clerk in office of the Registrar	63
6	Sushma Bisandare, Investigating Officer	66
7	Suhasini Sahastrabudhe, Investigating Officer	76

1. Besides the oral evidence, the prosecution placed reliance on report Exh.13, birth certificate Exh.14, FIR

6

Exh.15, Birth Certificate Exh.50, letter to RTO Exh.69, communication from RTO Exh.70, letter to Primary School Sindhi Vahir Exh.71, communication from the School to the Police Station Exh.72, letter to the BDO Exh.73, communication from BDO Exh.74, arrest panchanama Exh.77, seizure memo Exh.78, spot panchanama Exh.79.

2. All incriminating articles are put to the accused by recording his statement under Section 313 of the Criminal Procedure Code. The defence of the accused is of total denial. In support of his defence, he has examined his wife Archana vide Exh.91.

3. After recording the evidence and appreciating the same, learned Judge of the trial court was pleased to hold the accused guilty and sentenced him as the aforesaid.

7

4. Heard learned counsel Shri C.D.Rohankar for the accused, learned Additional Public Prosecutor Mrs.S.S.Dhote for respondent No.1 (the State), and learned counsel Ms.Rohini Sharma appointed for respondent No.2 (the victim). They have taken me through the entire evidence on record.

5. Learned counsel for the accused submitted that the evidence of the victim is suffering from infirmities. Admittedly, the accused was unknown to her. The identification of the accused is not carried out. No independent witness is examined by the prosecution to prove the charge. The accused is implicated in crime as there is a dispute between PW4 Savita Gondane, his land lady, on account of rent. Therefore, with the help of the victim, he is implicated falsely. He further submitted that spot of the incident is a dense locality and from the said place taking the victim against her consent is completely

8

improbable and unbelievable story. Thus, considering the nature of the evidence and material omissions and contradictions, the evidence of the victim is not believable and liable to be discarded.

6. Learned Additional Public Prosecutor for the State and learned counsel appointed for the victim supported the judgment impugned in the appeal and submitted that the evidence of the victim is not only corroborated by the evidence of PW4 Savita but also it is corroborated by the evidence of the mother of the victim who received phone calls of said Savita and and PW3 Amit Tiwari who accompanied the mother of the victim. The victim was found at the house of Savita. The Investigating Officer has collected the information as to the vehicle and the involvement of the accused is revealed. Non holding of the Test Identification Parade is not fatal to the prosecution as the victim has identified the accused

9

before the court which is a substantial evidence. Thus, the appeal has no merits and liable to be dismissed.

7. The accused is charged with an offence of kidnapping the victim from the lawful guardianship of her parents. Being she is a minor, the definition of Section 363 of the Indian Penal Code as to kidnapping requires to be looked into. The said Section deals with the punishment for kidnapping. Section 361 of the Indian Penal Code ((137)(1)(b) of the BNS), defines “kidnapping from lawful guardianship” that 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.

10

Explanation to the said Section states that, the words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

8. As per the evidence of the victim, at the relevant time, she was 17 years of age. Her birth date narrated by her is 9.12.1997. As far as her cross examination is concerned, her age or date of birth is not challenged by the defence.

9. To prove her age, the prosecution has also examined PW5 Mohd. Owes who testified that he is serving as a Junior Clerk in the office of Births and Deaths Registration since 2014. On the basis of the record, he stated the date of birth of the victim is 9.12.1997. He brought extract of the register Exh.64 and submitted that entry as to the birth of the victim was taken on the basis

11

of the information received from the Government Hospital. The said fact is confirmed through the cross examination also. He admitted during cross examination that the entry was taken on the basis of information received from the Government Hospital. The birth certificate Exh.14 is also on record which shows date of birth of the victim as 9.12.1997.

10. As far as cross examination of the victim on the date of birth is concerned, nothing is brought on record and it remained unchallenged. The said birth certificate is issued by the Chief Officer of the Municipal Council at Wardha under the provisions of Sections 12/17 of the Registration of Births and Deaths Act, 1969.

11. PW5 Junior clerk Mohd Owes stated on the basis of the record that birth entry was taken on the basis of the information received from the hospital.

12

12. As per Rule 9 of the Maharashtra Births and Deaths Registration Rules 1976, this certificate is issued by the Sub Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969.

13. Section 7 of the said Act thereof deals with appointment of registration for each local area comprising the area within the jurisdiction of a municipality, panchayat or other local authority or any other area or a combination of any two or more of them. It is duty of the Registrar to register every birth which took place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully.

14. Section 8 of the said Act mandates that each head of the house to report birth in the family to the Registrar.

15. As per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 the birth

13

certificate as such is issued by the public officer and it is a document forming record of the acts of the public officer and, therefore, the same is a public document within the meaning of Section 74 of the Indian Evidence Act and the same is admissible in evidence in view of Section 77 of the Indian Evidence Act. Section 17 of the said Act provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The birth certificate is in fact the extract of Birth Register in respect of entry of birth of the victim child and as such, admissible in evidence. Section 35 of the Evidence Act makes it clear that if entry is made by public servant in the official book in discharge of his official duty, such entry becomes the relevant fact and admissible

14

in evidence. Section 35 of the Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law.

16. It is, thus, clear that the birth certificate issued by the public officer or by the competent authority under the provisions of the Registration of Births and Death Act and the Rules framed thereunder is required. The birth

15

certificate of the victim girl is issued in compliance with the above said provisions.

17. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 reads thus:

“Rule 12(3) : In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) i. the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

iii. the matriculation or equivalent certificates, if available;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

18. The Hon'ble Apex Court in the case of Jarnail Singh vs. State of Haryana, reported in 2013 ALL MR (Cri) 2946 observed that 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. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first

17

available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only 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

18

12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat.

19. Thus, the birth certificate issued in the present case is in compliance with the provisions of the Registration of Births and Deaths Act and therefore the evidence is acceptable.

20. As observed earlier, the age of the victim girl is not seriously challenged by the defence. Thus, there is no hesitation in holding that the victim was below 18 years of age at the time of the incident.

21. Second ingredient to be proved to prove the offence of kidnapping is as to the person was taken or enticed without consent of such guardianship.

22. The evidence of the victim is relevant which states that on the day of the incident i.e. 1.9.2014 when she was proceeding to her school on bicycle, the accused who was

19

unknown to her restrained her and took her forcefully on his motorcycle at his house with an ill-intention in courtyard of the house. She met Savita to whom she disclosed the incident that she was brought by the accused with an ill-intention and, therefore, the accused was restrained. However, he fled away on his motorcycle. Her evidence further shows that her mother's mobile number was mentioned on her ID Card. Therefore, she requested Savita to call her mother. Said Savita called her mother. Immediately, her mother came at the spot of the incident with PW3 Amit Tiwari. The victim and Savita narrated the incident to both of them. The evidence of the victim further shows that she was brought by the accused by threatening her and the accused has also told her that he will give a book of obscene picture and also enquired with her in an indecent manner.

20

23. The evidence of the victim is further corroborated by PW4 Savita who testified that on the day of the incident, the accused brought a girl of 15-16 years. After entering into the gate, he disclosed that the girl is his relative but the girl disclosed to her that the accused brought her forcefully and she took the possession of the girl and driven him out of the house. Thereafter, the accused was insisting the girl to come at his house and subsequently fled away. On the request of the girl, she made a phone to the mother of the victim and immediately called her at her house. The mother came along with PW3 Amit Tiwari. The mother of the victim has also substantiated the contention that she received a phone call of Savita and, therefore, she immediately came to the spot along with Amit Tiwari as her husband is serving in police and was deputed on Bandobast Duty at

21

Mumbai. Savita as well as her daughter narrated the incident to her.

24. PW3 Amit Tiwari also deposed that he received a phone call of the mother of the victim who requested him to come along with her and, therefore, he came and saw the victim sitting at the house of Savita and was scared and crying.

25. These three witnesses are cross examined at length. The nature of the cross examination of the victim is that the place from which she was brought is a crowded place which is denied by the victim. It is further brought on record that the accused was unknown to her and she was not called for the identification parade. The cross examination of the victim itself shows the accused forced her to sit by holding her hands. It was suggested that he

22

is implicated on the say of Savita as there is a strained relationship between him and said Savita.

26. The mother of the victim is also cross examined and she in her cross examination reiterated that she received a phone call from Savita and, thereafter, she came at the spot.

27. PW3 Amit Tiwari also in his cross examination stated that the house of Savita is on main road and there are many houses.

28. As far as cross examination of PW4 Savita Gondane is concerned, it has come in her cross examination that the accused was her tenant. Rest of the contentions that he is implicated on the say of Savita is denied by her.

29. On considering the evidence of the victim and other prosecution witnesses, it has to be seen whether

23

offence of kidnapping from lawful guardianship is made out.

30. Thus, taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping.

31. To find out whether the act played by the accused amounts to “taking” out of the keeping of the lawful guardian, learned counsel for the accused submitted the story narrated by the victim itself is improbable as the spot of the incident narrated by the victim is a crowded place. The victim is cross examined at length. However, nothing incriminating is brought on record to show that any other persons were present at the spot of the incident when the alleged incident has taken place. On the contrary, corroborative evidence of Savita clearly establishes that the victim was brought by the accused in

24

the courtyard of her house. It was she who restrained the accused and the victim has disclosed the fact that she is forcefully brought by the accused. The victim was also found at the house of Savita by the complainant and PW3 Amit Tiwari.

32. Thus, the evidence on record sufficiently shows that the victim was brought by the accused.

33. Admittedly, there is a distinction between "taking" and allowing a minor to accompany a person.

34. The evidence of the victim sufficiently establishes that the accused solicited and persuaded and forced the victim to sit on his motorcycle and she was brought at the spot of the incident by using force. This evidence sufficiently shows that the accused took the victim from the lawful guardianship of her father and thereby committed an offence of kidnapping.

25

35. The allegations levelled by the victim are that the accused forcefully brought her and enquired with her in an indecent manner by asking about her menses and whether she had a pubic hair in her underarm. He has also told her that he would show a obscene book to her. As far as this aspect is concerned, the same is absent in the FIR. Subsequently, her statement was recorded by the investigating officer on 3.9.2014 i.e. after two days and first time these aspects are narrated by her. The said omissions are brought on record by the defence counsel and also proved through the evidence of the investigating officer.

36. The accused is convicted under Section 354-A(1) (i) of the Indian Penal Code. The said Section states about sexual harassment and punishment for sexual harassment. As per the said Section, a man committing any of acts viz. physical contact and advances involving

26

unwelcome and explicit sexual overtures; or a demand or request for sexual favours; or showing pornography against the will of a woman; or making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

37. Though the victim has stated that the accused told her about the obscene pictures as well as enquired with her in an indecent manner, the same have not been narrated by her in the FIR while lodging the report. After two days, she disclosed the said fact and no explanation is brought on record by the prosecution why she has not narrated the incident at the initial stage.

38. Thus, the evidence of the victim as to the offence under Section 354-A(1))(i) of the Indian Penal Code falls short.

27

39. The accused is further convicted under Section 12 of the Protection of Children from Sexual Offences Act, 2012.

40. The definition of “sexual harassment” is given under Section 11 of the Protection of Children from Sexual Offences Act which shows that a person is said to commit sexual harassment upon a child when such person with sexual intent, (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or (iii) shows any object to a child in any form or media for pornographic purposes; or (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic,

28

digital or any other means; or (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or (vi) entices a child for pornographic purposes or gives gratification therefor.

41. As far as the evidence in the present case is concerned, the accused took the victim on motorcycle with an ill-intention. There is no other evidence adduced by the prosecution. There is no explanation also by the prosecution as to the omissions and contradictions which are brought on record by the defence.

42. As far as sexual intent is concerned, admittedly, at the initial stage, these facts are not narrated by the victim. The intention of the accused can be ascertained from the fact that by seeing the victim alone he took her by holding

29

her hands and forcing her to sit on his motorcycle, but as far as offences under Sections 354-A(1)(i) of the Indian Penal Code and 12 of the POCSO are concerned, the ingredients are absent.

43. The prosecution has also adduced the evidence of PW6 Sushma Bisandare and PW7 and Suhasini Sahastrabudhe, who Investigating Officers.

44. The evidence of PW6 Sushma Bisandare shows that she communicated with the RTO to obtain information of the vehicle MH-32/T/1507 on the basis of the information received vide Exh.70. The said vehicle belongs to the accused which was used in commission of the crime. During the investigation, it further revealed that the accused was serving as teacher in higher primary school at Sindhi Vahir and it revealed that on 1.9.2014 he was absent in the school. It further reveals that accused

30

was absent from 13.8.2014 without submitting any application.

45. The evidence of PW7 Suhasini Sahastrabudhe narrates about the investigation carried out by her. From her cross, an attempt was made to bring on record that the alleged spot of incident is a crowded place.

46. It is pertinent to note that though it was a crowded place, it is not essential that at every time it would be a crowded place. It is the general experience that people are reluctant to indulge in the activities which are taking place around them and, therefore, merely because the spot was a crowded place, the same is not sufficient to discard the evidence of the victim especially when it was corroborated by other evidence like the evidence of PW4 Savita and the fact that the victim was found at the house of Savita who was brought by the accused.

31

47. Thus, there is a sufficient evidence on record to show that the victim was taken by enticing her and thereby committed an offence under Section 363 of the Indian Penal Code.

48. As far as the conviction of the accused under Sections 354-A(1)(i) of the Indian Penal Code and 12 of the POCSO Act is concerned, the same is not sustainable due to in absence of the evidence. However, the conviction of the accused under Sections 363 and 506 of the Indian Penal Code requires to be maintained as the prosecution has established the charge against the accused to the extent that she was not only enticed and taken by the accused but also she was threatened by the accused.

49. In this view of the matter, I find that learned Judge of the trial court rightly convicted the accused under

32

Sections 363 and 506 of the Indian Penal Code. However, the conviction under Sections 354-A(1)(i) of the Indian Penal Code and 12 of the POCSO Act is not justified.

50. In view of the above, I pass following order:

ORDER

(1) The Criminal Appeal is **partly allowed**.

(2) The judgment and order dated 9.2.2023 passed by learned Extra Joint Additional Sessions Judge and Special Judge, Wardha (learned Judge of the trial court) in Special (Ch.Act) Case No.31/2016 convicting the accused under Sections 363 and 506 of the Indian Penal Code is maintained.

(3) The conviction of the accused under Sections 354-A(1)(i) of the Indian Penal Code and 12 of the POCSO Act is hereby quashed and set aside.

33

(4) The accused is acquitted of offences under Sections 354-A(1)(i) of the Indian Penal Code and 12 of the POCSO Act.

(5) Fees of learned counsel Ms.Mohini Sharma appointed for the victim be quantified and the same be paid to her as per rules.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!