



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

CRIMINAL APPEAL NO.513/2003

Salim Abbas Chaudhari,
aged 22 years, Occ.Tailoring Work,
r/o Hari Masjid Lane, LBS Marg, Mumbai,
Presently at District Prison, Akola.**APPELLANT**

..V E R S U S..

State of Maharashtra, through
Police Station Officer, Police Station,
Ramdaspath, Akola.**RESPONDENT**

Mr. Vinay Dahat, Advocate Appointed for appellant.
Mrs. Swati Kolhe, A.P.P. for respondent.

CORAM:- MANISH PITALE, J.
DATED :- JULY 16, 2018

ORAL JUDGMENT

1. By this petition, appellant has challenged the judgment and order dated 04.08.2003 passed by the Court of 1st Ad hoc Additional Sessions Judge, Akola (trial Court) in Sessions Trial No.132/2002, whereby the appellant (accused no.2) stood convicted for an offence punishable under Sections 363 and 365 read with Section 34 of the Indian Penal Code (IPC) and he stood sentenced to suffer rigorous imprisonment of 4 years and to pay a fine of Rs.500/- each on both counts.

2. The appellant was the original accused no.2. As per the prosecution case, on 01.05.2002, Anwar Ali (accused no.1) took Shahjad Ali (PW2), minor son of Shamsher Ali (PW1), from near his home in Akola. When Shamsher Ali (PW1) looked for his son, he could not find him and on the next day, he lodged an oral report on 02.05.2002 in Police Station, where First Information Report (FIR) was registered under Sections 363 and 366 of the IPC. The said witness Shamsher Ali (PW1) stated that he suspected Anwar Ali (accused no.1) for having kidnapped his son because the said Anwar Ali was initially employed with Shamsher Ali (PW1) and that there had been a quarrel between them. Later, Shamsher Ali (PW1) claimed to have received a call and he was informed that he should pay a ransom of Rs.2,00,000/-, if he wanted his son to be safe and that the amount be paid at Lucky Hotel, Saki Naka, Mumbai. According to the prosecution case, Anwar Ali (accused no.1) had taken the child victim Shahjad Ali (PW2) to Mumbai to one of his friends where they stayed in the night and on the next day i.e. on 03.05.2002, Anwar Ali (accused no.1) took Shahjad Ali (PW2) to the shop of a tailor Jinnan Ali (PW7), where the appellant (accused no.2) met accused no.1. It is from there that both the accused took Shahjad Ali (PW2) in an

auto-rickshaw from Saki Naka to near Lucky Hotel, where Anwar Ali (accused no.1) told the appellant to get down from the auto-rickshaw and collect the bag full of ransom money, which Shamsher Ali (PW1) had brought. According to the prosecution, Shamsher Ali (PW1) had been told that when the bag full of ransom amount was collected from him, he should give a signal and upon doing so, policemen in plain clothes followed the appellant, who had by then started walking towards auto-rickshaw in which Anwar Ali (accused no.1) and child victim-Shahjad Ali (PW2) were sitting. It was near a STD booth that the auto-rickshaw had been waiting, but upon the policemen chasing the appellant, he ran towards the said booth where he was caught by the policemen and, thereafter, Anwar Ali (accused no.1) was also apprehended. Custody of the child victim-Shahjad Ali (PW2) was handed over to his father Shamsher Ali (PW1). On this basis, both the accused including the appellant, were charged with having committed an offence under Sections 363, 365 and 384 read with Section 34 of the IPC.

3. The prosecution examined nine witnesses in support of its case. The material witnesses were; Shamsher Ali (PW1), father

of the child victim, Shahjad Ali (PW2), the child victim, Mari Muthu (PW6), auto-rickshaw driver and Dnyandeo Choudhari (PW9), the investigating officer. Hira Choudhari (PW3), Jumma Kasam (PW4) and Sk. Jumma Sk Buddhu Choudhari (PW5) were the pancha witnesses, who had turned hostile.

4. On the basis of the evidence and material placed on record, the trial Court found that although the witnesses had claimed that ransom amount was handed over by Shamsher Ali (PW1) to the appellant, but it was not seized. No currency notes were ever seized by the investigating officer during the course of investigation. On this basis, the trial Court found that the offence under Section 384 of the IPC was not made out against the accused. But, insofar as the offences under Sections 363 and 365 read with Section 34 of the IPC were concerned, the trial Court found that both the accused, including the appellant, had committed the said offences as there was sufficient material on record to prove their guilt beyond reasonable doubt. The trial Court convicted and sentenced the appellant and accused no.1 in the aforesaid manner.

5. Mr. Vinay Dahat, Advocate appointed by this Court on behalf of the appellant, submitted that insofar as the appellant (accused no.2) was concerned, there was hardly any evidence on record to show that he had committed an offence punishable under Sections 363 and 365 of the IPC. It was submitted that even if evidence of the prosecution was taken as it is, ingredients of the offence, for which he was convicted, were not made out in the present case. It was submitted that the evidence of child victim-Shahjad Ali (PW2), auto-rickshaw driver-Mari Muthu (PW6) and tailor-Jinnat Ali (PW7), also did not bring on record any material to show that the appellant had indeed taken or enticed the child away without the consent of his guardian or that he had kidnapped the child with intent to cause that child to be secretly or wrongfully confined. It was submitted that the trial Court did not appreciate the evidence and material on record in correct perspective and while convicting Anwar Ali (accused no.1), the trial Court also convicted the appellant, without appreciating that role of the appellant was not that of a person who could be held responsible for kidnapping Shahjad Ali (PW2).

6. On the other hand, Mrs. Swati Kolhe, learned A.P.P. on behalf of the respondent-State, submitted that evidence on record was sufficient to demonstrate that the appellant had accompanied Anwar Ali (PW1) from the shop of the tailor-Jinnan (PW7) to Lucky Hotel along with child victim-Shahjad Ali (PW2) and that the material on record indicated that the appellant was equally guilty for the offence punishable under Sections 363 and 365 of the IPC. It was submitted that the trial Court had correctly appreciated the material on record to convict the appellant along with accused no.1.

7. Heard counsel for the parties. Perused the evidence and material on record. The appellant in the present case is accused no.2. The evidence and material on record shows that the appellant was not at all involved from the stage when the child victim-Shahjad Ali (PW2) was taken away from Akola and brought to Mumbai. As per the prosecution case, Anwar Ali (accused no.1) had taken away the said child from Akola to a city and from there to Mumbai. The appellant appeared on the scene on 03.05.2002 in the shop of tailor-Jinnan (PW7). It is from this instant that the role of appellant had started till the time he was apprehended by

the police, a little while later near Lucky Hotel when he was allegedly taking away the bag full of ransom amount. The evidence of Shamsher Ali (PW1), Shahjad Ali (PW2), Mari Muthu (PW6) and Jinnan (PW7) is relevant for understanding as to what was the role attributed to the appellant, even as per the prosecution case.

8. Evidence of Shamsher Ali (PW1) shows that according to this witness, the appellant came to Lucky Hotel on 03.05.2002 and asked as to who was Shamsher Ali, upon which Shamsher Ali (PW1) stood up. The appellant orally asked Shamsher Ali (PW1) to hand over bag of cash to him and upon taking the said bag, the appellant left the hotel. According to Shamsher Ali (PW1), police in plain clothes followed the appellant and caught him near auto rickshaw wherein Anwar Ali (accused no.1) and the child victim-Shahjad Ali (PW2) were sitting. It is relevant that the cash amount was never seized by the police. In fact, the trial Court has completely disbelieved the theory of ransom amount being handed over to the appellant, due to which the appellant and the co-accused have been acquitted of the offence under Section 384 of the IPC. Thus, evidence of Shamsher Ali (PW1) as against the

appellant only gets restricted to the appellant entering Lucky Hotel and asking for Shamsher Ali (PW1)

9. Evidence of child victim-Shahjad Ali (PW2) shows that he saw the appellant for the first time in the shop of tailor-Jinnan (PW7). The said witness further stated that Anwar Ali (accused no.1) told the appellant that he would pay Rs.1,000/- and give him work. Thereupon, Anwar Ali (accused no.1) allegedly told the appellant to go to Lucky Hotel and bring the amount from the person named Shamsher Ali. Thereafter, statement of this witness is similar to that of Shamsher Ali (PW1), regarding the appellant being apprehended by the police. As the trial Court itself has found that the theory of existence of ransom amount was not believable because currency notes were not seized by the police, the statement of this witness that Anwar Ali (accused no.1) had told the appellant to go to Lucky Hotel and bring amount from Shamsher Ali, cannot be believed. The evidence of child victim-Shahjad Ali, shows that the appellant came to the tailor shop where he met Anwar Ali (PW1), who promised the appellant to give some work and that both of them took Shahjad Ali (PW2) to Lucky Hotel.

10. The evidence of Mari Muthu (PW6), auto rickshaw driver, shows that Anwar Ali (accused no.1) along with the appellant took child victim-Shahjad Ali (PW2) to Lucky Hotel. This witness clearly stated that the appellant had asked Anwar Ali (accused no.1) for giving work to him, upon which Anwar Ali (accused no.1) stated that his work was going on at 4 to 5 places and that he could give a job of supervisor to him. This witness then stated that Anwar Ali (accused no.1) asked the appellant to go to Lucky Hotel and to see whether one person had come or not. Thereafter, his evidence is consistent that the appellant was apprehended by the police. The evidence of this witness clearly shows presence of the appellant in the auto-rickshaw and there was conversation between two accused, indicating that Anwar Ali (accused no.1) promised the appellant to give him some job. There is no mention of any amount to be collected by the appellant from the person whom he would meet at Lucky Hotel.

11. Evidence of tailor-Jinnan (PW7) shows that Anwar Ali (accused no.1) had come with Shahjad Ali (PW2) to his shop at about 11.00 a.m. and thereafter again at about 3.00 p.m. It was this time that the appellant came to the said shop and that

thereafter all three of them went away from the shop. In cross-examination, this witness had stated that the appellant was doing tailoring work and that he used to come to the shop some times.

12. Thus, this is the nature of evidence of the prosecution witnesses as regards role of the appellant (accused no.2) in the present case. The evidence of these witnesses, even if accepted in totality, at worst, attributed the role to the appellant of having accompanied Anwar Ali (accused no.1) from Saki Naka to Lucky Hotel along with child victim-Shahjad Ali (PW2) and having met Shamsheer Ali (PW1). Since evidence regarding ransom amount had been completely disbelieved by the trial Court due to absence of seizure of cash amount, it cannot be said that the appellant could be connected to any demand or collection of ransom amount in the present case. In fact, the trial Court itself had acquitted both the accused of offence punishable under Section 384 of the IPC. The relevant question, therefore, in the present case, insofar as the appellant is concerned, is whether it could be said that the evidence and material on record proves beyond reasonable doubt guilt of the appellant for offence punishable under Sections 363 and 365 of the IPC.

13. Section 363 of the IPC pertains to punishment for kidnapping and the offence is defined under Section 361 of the IPC i.e. kidnapping from lawful guardianship. The essential ingredients of this offence are; taking or enticing a minor child from the custody of lawful guardian without the consent of such a guardian. In the present case, there is nothing on record to show that the appellant took away or enticed Shahjad Ali (PW2) from his lawful guardian i.e. his father Shamsheer Ali (PW1). Child victim in the present case-Shahjad Ali (PW2) was taken away or enticed from Akola and even as per the prosecution, the entire role in this regard was attributed only to Anwar Ali (accused no.1). In this situation, when even as per the prosecution case, the appellant for the first time appeared in the shop of tailor-Jinnan (PW7), where Anwar Ali (accused no.1) was already present with Shahjad Ali (PW2), it could not be said that the appellant had taken or enticed Shahjad Ali (PW2) from his lawful guardian at Akola. It is not even the prosecution case that the appellant was involved with Anwar Ali (accused no.1) right from the time when Shahjad Ali (PW2) was taken away from his house at Akola. There is no evidence or material on record to connect the appellant with

the role attributed to Anwar Ali (accused no.1) from the time Shahjad Ali (PW2) was taken away from Akola.

14. Insofar as Section 365 of the IPC is concerned, it is pertaining to kidnapping of a person to be secretly or wrongfully confined. The appellant was with Anwar Ali (accused no.1) and child victim-Shahjad Ali (PW2) only for the time period when they left from Saki Naka in the auto-rickshaw and reached Lucky Hotel, where the appellant got out from the auto-rickshaw on the instructions of Anwar Ali (accused no.1) to go and meet a person called Shamsheer Ali (PW1). Other than the aforesaid time period, there was no material on record to show that the appellant was in the company of Anwar Ali (accused no.1) or Shahjad Ali (PW2). The evidence of the prosecution witnesses indicates that the appellant was looking for work and that Anwar Ali (accused no.1) did inform him that he could be given the job of a supervisor to him as there were 4 to 5 places where the work of Anwar Ali (accused no.1) was going on. In fact, child victim-Shahjad Ali (PW2) himself stated in his evidence that Anwar Ali (accused no.1) had told the appellant that he would give him Rs.1,000/- for doing the work. All this material and the fact that the appellant

was in the company of victim child-Shahjad Ali (PW2) only for a brief period i.e. during the auto-rickshaw drive from the tailor's shop at Saki Naka to Lucky Hotel, clearly demonstrates that the essential ingredients of offence punishable under Section 365 of the IPC i.e. kidnapping with intention to cause the kidnapped person to be secretly or wrongfully confined, are not satisfied in the present case. As the ingredients of both the offences punishable under Sections 363 and 365 of the IPC are not made out, the trial Court could not have convicted and sentenced the appellant along with Anwar Ali (accused no.1).

15. In fact, a perusal of the impugned judgment and order of the trial Court shows that the role of the appellant has not been appreciated by the trial Court by analysing the evidence of the relevant prosecution witnesses in the correct perspective. Therefore, the impugned judgment and order, insofar as it convicts and sentences appellant (accused no.2), is erroneous and hence unsustainable.

16. In the light of the above, the appeal is allowed. The impugned judgment and order of the trial Court is set aside. The

appellant (accused no.2) is acquitted of the offence for which he was charged. Consequently, order dated 03.10.2017, issuing bailable warrant against the appellant stands recalled.

Professional charges of Mr. Vinay Dahat, learned Advocate appointed on behalf of the appellant, are quantified at Rs.5,000/-

(Manish Pitale, J.)

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