

(2015) 09 BOM CK 0145
In the Bombay High Court
Case No : Criminal Appeal No. 776 of 2010

Banu Ramchandra Borgaonkar and Others	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 161(3), 361
Penal Code, 1860 (IPC) — Section 34, 341, 342, 361, 363

Citation : (2015) 09 BOM CK 0145

Hon'ble Judges : A.M. Thipsay, J.

Bench : Single Bench

Advocate : Ujwal Agandsurve, Advocate, for the Appellant; D.P. Adsule, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

A.M. Thipsay, J.—The appellants were prosecuted on the allegation of having committed offences punishable under section 363 of the IPC r/w section 34 of the IPC, 366A IPC r/w section 34 of the IPC, section 341 IPC r/w section 34 IPC and 342 IPC r/w section 34 of the IPC. The Addl. Sessions Judge, Solapur, after holding a trial, convicted them of the offences punishable under section 363 IPC r/w section 34 of the IPC and 342 IPC r/w section 34 of the IPC. He sentenced the appellant no.1 to suffer Simple Imprisonment for a period of three years and to pay a fine of Rs. 500/- with respect to the offence punishable u/s.363 of the IPC r/w section 34 IPC and Simple Imprisonment for six months and a fine of Rs. 500/- with respect to the offence punishable under section 342 IPC r/w section 34 of the IPC. He sentenced the appellant no.2 to suffer Rigorous Imprisonment for 5(five) years and to pay a fine of Rs. 500/- with respect to the offence punishable u/s.363 IPC r/w section 34 IPC and to suffer Rigorous Imprisonment for six months and a fine of Rs. 300/- with respect to the offence punishable under section 342 IPC r/w section 34 of the IPC. The learned Addl. Sessions Judge acquitted the appellants of the offence punishable u/s.366A IPC r/w 34 of the IPC and 341 IPC r/w section 34 of the IPC.

2. Being aggrieved by their conviction and the sentences imposed upon them, the appellant have approached this Court by filing the present Appeal.

3. The prosecution case was that Rani Shinde, a resident of Barshi used to reside near the house of appellant no.1 Banu. Rani had a daughter -Priya who used to reside with her. Banu had two children -son Shubham and daughter Shubhangi - who were, both, known to Priya. Banu was staying separately from her husband. Apparently, she was in some relationship with the appellant no.2 Sandip, and was staying with him at Mumbai. On 22nd September 2008, Rani Shinde had gone for her work as usual. When she returned, she noticed that Priya was not in the house. Rani made inquiries with her neighbours and others. She learnt from one Mrs. Kulkarni, who runs a grocery shop, that Priya had come to her shop with Shubham and Shubhangi, and that they had purchased some grocery articles from the shop. Mrs. Kulkarni also told Rani that Shubham had told his mother over telephone that he was coming to Mumbai along with Priya. Rani then lodged a report with the police, alleging commission of offences punishable under section 366 of the IPC, 363 IPC r/w 34 IPC by the appellant no.1 Banu, Shubham and Shubhangi. It was treated as the First Information Report, and investigation was carried out. It was revealed that Shubham and Shubhangi had taken Priya to a room in Mandane Chawl at Barshi where both the appellants were present. They all stayed in that room for that night, and thereafter, proceeded to village Gaudgaon where they stayed for about 10 -12 days. Thereafter, the appellant no.2 Sandip took Priya to Barshi, and they stayed there for some time in Nilai lodge. On one day, the appellant no.2 was taking Priya to Saraf katta in an auto-rickshaw. When the rickshaw stopped and the appellant no.2 got down, Priya escaped and went towards the policeman who was standing there. Priya was brought to the lodge along with the appellant no.2.

4. The statements of a number of persons were recorded in the course of investigation. Shubham and Shubhangi being juveniles, were prosecuted separately, and the present appellants were prosecuted separately.

5. The prosecution examined 8 witnesses during the trial. The first is Rani Shinde. The second is Priya. The third is Vijay Godepure. He is the health Officer in Municipal Council, Barshi. Through him, the birth certificate of Priya was got produced as evidence of her age.

6. The fourth witness Nishikant is the one who had allowed the appellants, Shubham, Shubhangi and Priya to stay in a room belonging to him. He had given the room to the appellant no.1 on rental basis.

7. The fifth witness Anand Mane is the Manager of Nilai lodge. His evidence shows that on 8th October 2008, the appellant no.2 had come to the said lodge along with a girl named Priya.

8. The sixth witness Tanaji is a Police Constable. His evidence shows that while he was on duty on 8th October 2008, a rickshaw in which a girl and a boy were proceeding, stopped. The boy got down and started going towards Saraf katta.

The girl got down and came to him. That girl told him that she was being taken to Mumbai against her wish. Tanaji has identified Priya as the same girl, and the appellant no.2 as the same boy.

9. The seventh witness Dashrath Ubale is the person who has recorded the First Information Report lodged by Rani. The eighth and last witness is Pandurang Gadade, the Investigating Officer.

10. After going through the evidence of Priya and the evidence of Tanaji, it can be safely accepted that Priya was being detained by the appellant no.2 against her wish. When this aspect of the matter was discussed, the learned counsel for the appellants submitted that he was not challenging the conviction of the appellants, so far as it related to the offence punishable under section 342 of the IPC r/w section 34 of the IPC. He, however, contended that the offence punishable under section 363 of the IPC was not made out against any of the appellants. He submitted that Priya voluntarily left the house of her parents with Shubham and Shubhangi and that, there was no basis for saying that the appellants had kidnapped Priya.

11. That, Priya, at the material time, was a minor, is not in dispute. The only question that therefore, arises is whether the appellants, or any of them, can be said to have committed the offence punishable under section 363 of the IPC.

12. The evidence of Priya shows that the appellants had come from Mumbai to Barshi about 5-6 months before the incident, and that thereafter, they had been residing in Mangane chawl. About the incident, Priya says that Shubham and Shubhangi used to stay with their father i.e. in the house of the husband of the appellant no.1. Shubham and Shubhangi told Priya that they were going to meet their mother and whether Priya would accompany them. Priya wanted to go to school so she refused, (this "refusal" is not stated by Priya in her statement recorded by the police under the provisions of section 161(3) of the Code) but Shubham and Shubhangi "told her to meet their mother". Shubham also made a telephone call to his mother from a public telephone that they all were coming there. (This was thought to be a call made to Mumbai by Mrs. Kulkarni -the owner of the grocery shop). Therefore, Priya, Shubham and Shubhangi went to a room in Mangane chawl. In that room, both the appellants were present.

13. Admittedly, Priya had gone with Shubham and Shubhangi. Priya does not say that any inducement was given to her to accompany Shubham and Shubhangi. She also does not say that any threats given to her by Shubham and Shubhangi. Priya clearly had gone to meet the appellant no.1 who is the mother of Shubham and Shubhangi on their simply asking her to meet their mother.

14. Section 363 of the IPC provides punishment for the offence of kidnapping, defined in section 361 of the IPC. Section 361 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 and exception omitted as not relevant)

15. The learned Addl. Public Prosecutor conceded that there was no evidence that the appellants had enticed Priya out of the keeping of her lawful guardian. He, however, emphasized on the word "takes". According to him, the words "takes" and "entices" are separated by the preposition "or". His submission is that these two words are to be read disjunctively, and that even having a minor difficulty keeping of the lawful guardian of such minor would amount to an offence described u/s.361 IPC which is made punishable under section 363 of the IPC.

16. The crucial question that would need determination is about the meaning of the word "takes" appearing in section 361 of the IPC. It has already been observed that in this case, there is absolutely no evidence that any threat, promise or inducement was given to Priya for meeting the appellant no.1. The case is simply that Shubham and Shubhangi asked her to come with them to their mother, and though Priya claims that she initially refused (which was not stated by her before the police) when the request was repeated, she went along with them. It is nobody's case that Priya was promised anything by Shubham and Shubhangi, or that Priya was made to believe that she would be benefited, in any manner, by meeting the appellant no.1.

17. In *S.Varadrajan Vs. State of Madras* 1965 AIR 942 the word "taking" appearing in Section 361 of the IPC fell for the consideration of Their Lordships of the Supreme Court of India. In that case, there was no allegation that the appellant before the Supreme Court -the original accused had "enticed" the victim, but the allegation was that he had "taken" the victim out of the keeping of her lawful guardian. Their Lordships went on to examine whether the part played by the appellant which was merely of permitting the victim to accompany him amounted to "taking" her out of the keeping of her lawful guardian. The observations made by Their Lordships in the aforesaid judgment, leave no manner of doubt that there must be some act or acts that can be attributed to the accused which would constitute in law "taking" Their Lordships categorically held that there is a distinction between "taking" and "allowing a minor to accompany a person".

18. Ofcourse, the facts of the present case are not exactly identical, but it cannot be doubted that even to hold that a person has "taken" a minor out of the keeping of her lawful guardian of such minor, one must be satisfied that some part was played by the supposed offender which led the minor to accompany him. Some sort of persuasion by the offender which results in creating willingness on the part of the minor to be "taken" out of the keeping of her lawful guardian, would be necessary to attract the penal provisions of the said section. In the instant case, what Priya states is that Shubhangi and Shubham asked her

to come with their mother and she went along with them. It would be difficult to hold that this amounts to Shubhangi and Shubham "taking" her out of the keeping of her lawful guardian. At the cost of repetition, it may be observed that though Priya claims that she initially refused and went along with Shubham and Shubhangi only when they repeated the requests, that she had initially refused to accompany them, was not stated by her before the police in her statement recorded under section 161 of the Code. However, even if it is held that she initially said "No", but on the request being repeated, went along with them, still it is not possible to hold that this repetition of request amounted to Priya being "taken" out of the keeping of her lawful guardian. Even if the version of Priya is accepted fully, there is not even a suggestion given by her that, any inducement was given to her, or any threats were given to her at that time. That she would benefit by meeting their mother, or would suffer some harm if she would not meet her, was also not said either by Shubham or Shubhangi to her. Under these circumstances, it is difficult to hold that the ingredients of the offence described under section 361 of the IPC, were made out from the acts attributed to Shubham and Shubhangi.

19. Apart from this, there is no allegation that a conspiracy had been hatched by and between Shubham, Shubhangi and the appellants. The appellants came in picture only after Priya actually came to their room along with Shubham and Shubhangi. Thus, with respect to the offence punishable under section 363 of the IPC, there was no satisfactory evidence against the appellants.

20. Undoubtedly, Priya does say that after going to the room in Mangane chawl, Shubham, Shubhangi and the appellants insisted that Priya should accompany them to Mumbai, that she should not raise her voice, that they gave her threats, etc. It is however, difficult to believe this evidence. In fact, the evidence of Priya and Rani indicates that they are suppressing certain relevant and vital facts from the Court. Priya simply says that Shubham and Shubhangi asked her to meet their mother and she went there, but does not disclose what was the reason for which it was suggested to her by Shubham and Shubhangi to meet their mother, and what was the interest which Priya was having in meeting her. The story put forth by Priya is, therefore, incomplete. She is obviously not telling all that happened, and is putting forth only a certain part of it, resulting in rendering the story unnatural. Priya went with the appellants, Shubham and Shubhangi to village Gaudgaon and stayed with them in a wada for about 10 -12 days. She then came back to Barshi along with the appellant no.2. The evidence shows that there are various tenements in Mangane chawl, but Priya did not tell any of the neighbors about her alleged detention in that room. She had travelled by S.T and had come to Barshi S.T. Stand. She admitted that Barshi S.T stand is a crowded place. She also admitted that Nilai lodge where she went is also in a crowded locality. It is difficult to accept that at that point of time, Priya was being detained against her wishes as she could have easily attracted the attention of the members of public, and got herself rescued.

21. Anyway, it does appear that for some period atleast, Priya was detained and confined against her wishes. The whole and complete story has not been put forth before the Court and it is quite obvious that there was some purpose for which Priya had been accompanying the appellants. The suggestion given by the appellants that Priya's marriage was being fixed by her parents against her wishes, and that therefore, she had left her parents' house, was denied by Priya. Anyway, since atleast for some time, apparently, the appellants had confined Priya, the appellants would be liable to be punished for having committed an offence punishable under section 342 of the IPC. As already observed, the conviction of the appellants with respect to the said offence is not challenged at all, and therefore, it is not necessary to enter into any further discussion on this aspect. What however, needs to be observed is that there is no case of an offence punishable under section 363 of the IPC against the appellants. It is nobody's case that the appellants had "taken" her out of the keeping of her lawful guardian. She had accompanied Shubham and Shubhangi voluntarily. In any case, even assuming that Shubham and Shubhangi who both were minors had "taken" her out of the keeping of her lawful guardian, still there is nothing to show that Shubham and Shubhangi had entered into any conspiracy with the appellants to "take" her out of the keeping of her lawful guardian. There is nothing to show that what was allegedly done by Shubham and Shubhangi, even if held as falling within the provisions of section 361 of the IPC, had been done at the instance of the appellants.

22. The learned Addl. Sessions Judge has not considered the ingredients of an offence punishable under section 363 of the IPC, and has erroneously convicted the appellants also with respect to the said offence. The impugned order, so far as it relates to the appellants' conviction with respect to the offence punishable under section 363 of the IPC r/w section 34 of the IPC being erroneous, needs to be interfered with.

23. The Appeal is partly allowed.

24. The conviction of the appellants with respect to offence punishable under Section 363 read with Section 34 of the IPC and the sentences imposed therefor, are set aside.

25. The appellants are acquitted of the said offence.

26. Fine, if paid by them, with respect to the sentence imposed upon them for the said offence, be refunded to them.

27. The conviction of the appellants, so far as it relates to the offence punishable under Section 342 read with Section 34 of the IPC, and the sentences imposed upon them therefor, are maintained.

28. The Appeal is disposed of in the aforesaid terms.