

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 18 OF 2022

1. Khadarkhan Khanajade,
R/o. H.No. EWS-424,
Housing Board Davorlim,
Salcete Goa, N/o Lazra Bazar,
Savanur Haveri Karnataka.,
Presently residing at
C/o. Mohammad Rafiq Shaikh,
Chandwada, Fatorda

... APPELLANTS

Versus

1. State
Through PP
Hon'ble High Court of Bombay
at Porvorim, Goa.

2. State
Through I.O./P.I.,
Through Police Station Officer,
Maina Curtorim South Goa.

... RESPONDENT

Mr. Sahil Sardesai, Advocate for the Appellant.

Mr. S. G. Bhobe, Public Prosecutor for the Respondent.

CORAM:- A. G. GHAROTE, J.
DATED :- 04th March, 2024

ORAL ORDER

1. Heard Mr. Sahil Sardesai, for the Applicant and Mr. Bhobe, learned Public Prosecutor for the Respondent. The

Appellant questions the Judgement dated 19.08.2022 passed by the Ld. Special Court (POCSO) Panaji, convicting the Appellant/Accused for the offences punishable under Section 363 of the Indian Penal Code (IPC) and sentencing him to undergo one year simple imprisonment and to pay a fine of Rs.15,000/-(Rupees Fifteen Thousand only), in default to undergo one month simple imprisonment. The Appellant stand acquitted of the offences under Section 376 of IPC and Section 4 of POCSO Act, 2012.

2. Mr. Sardesai, learned Counsel for the Appellant submits that even the offence of kidnapping under Section 363 of IPC is not made out as the basic ingredient required is taking away from the lawful guardianship of parents which has not been established. He further contends, that the accused as well as the victim, both were residents of the same locality and love had blossomed between them, as a result of which though the victim was more than 17 years old at the relevant time, she was aware of the consequences of her actions and had voluntarily accompanied the Appellant in the year 2019, where-upon they went to Karnataka and have subsequently

got married and also having a child from the said wedlock. He therefore submits that the basic ingredient of the offence punishable under Section 363 of IPC has not been made out, considering which the conviction rendered by the Court below cannot be sustained.

3. He also places reliance upon **S.Varadarajan Vs. State of Madras, AIR 1965 SC 942** to contend that considering the facts on record, the requirement of taking away have not been satisfied. Reliance is also placed upon **Gaurish Shamba Haldankar Vs. State of Goa, 1997 ALL MR (Cri) 629.**

4. Mr. Bhobe, learned Public Prosecutor for the State supports the conviction submitting that the necessary ingredients have been established for which he relies upon the evidence of PW-2 i.e. the brother of the victim and contends that the Appellant/Accused had infact taken away the victim who was a minor at that point of time and therefore, the requirement of Section 363 of IPC stands satisfied.

5. The evidence of the victim in such a case, assumes importance. Her evidence at exhibit C-12, indicates that she was in love with the Appellant/Accused, since the time she

was in Standard IXth studying in DHS High School, Davorlim, Salcette, Goa. She also states that her parents were also aware of it, however, they were opposed to it. She further deposes that since the relation was not accepted by her parents as well as the parents of the Appellant/Accused, both of them eloped from the house on 19.12.2019.

6. In her deposition, the victim categorically states that she had met the Accused on 19.12.2019 at around 08:00 pm near her house during night time and thereafter they proceeded to Karnataka and while leaving her house the victim had taken cash of Rs. 99,000/-(Rupees Ninety Nine Thousand only) and one gold ring belonging to her.

7. In **S. Varadrajan (Supra)** what has been held by the Hon'ble Apex Court regarding the word 'Kidnapping' is material to be noted. The observations of this Court in para 9 reads thus:-

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 purpose of S. 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.

8. Same position has been reiterated by the learned Division Bench of this Court in **Gaurish (supra)**.

9. The evidence of the victim at exhibit C-12 would indicate that the Accused/Appellant, did not take her away from the lawful guardianship of her parents, rather on the contrary the victim herself, voluntarily walked out of her parental house. Not only this, it can be safely presumed that the victim was aware of the consequences of her action for the reason that at the time of doing so she has also taken cash of Rs. 99,000/-(Rupees Ninety Thousand only) and one gold ring belonging to her. She also in her deposition indicates, that for several days she went along with the Appellant/Accused and stayed at several places. What is also material to note is that before leaving, the victim had penned down a letter to her parents which is at exhibit PW-1/13-C, which she has admitted in her examination in chief itself, which while expressing regret for her actions indicates that she had voluntarily walked out of the parental custody.

10. This would clearly demonstrate that though the victim was 17 years and 10 months of age at that relevant time, she was clearly aware of the consequences of her action and was capable of taking a considered decision in that regard. In this

view of the matter it cannot be said that the ingredients of Section 363 of the IPC have been established by the prosecution.

11. Though the learned Special Court in the impugned judgment has noted the position, stated by the victim in her cross examination that she had left the house of her parents on her own wish and was not forced by the Accused when she left the house, the learned Special Court merely on the ground that the victim had not completed the age of majority at the relevant time has accorded the conviction. The evidence of her brother namely PW-2 at exhibit PW-2/15-C does not support, the satisfaction of the requirement of the offence under Section 363 of IPC.

12. It is therefore apparent, that the requirement of the offence under Section 363 of the IPC has not been established by the prosecution considering which the findings rendered by the Special Court in that regard as well as the sentence imposed cannot be sustained. The impugned Judgement dated 19.08.2022 passed by the learned Special Court (POCSO) at Panaji in Sessions Case (Ors) No. 21/2022, State Versus

Khaderkhan Khanajade, is hereby quashed and set aside and the Appellant is acquitted of the offence punishable under Section 363 of the Indian Penal Code. Bail bonds of the Appellant/Accused stands cancelled and the fine deposited by him be returned back to him.

A. G. GHAROTE, J.