

Court No. - 15

Case :- CRIMINAL APPEAL No. - 1958 of 2008

Appellant :- Nand Kumar @ Nandu

Respondent :- State of U.P.

Counsel for Appellant :- Mohd. Wajid Irfan

Counsel for Respondent :- Govt. Advocate

Hon'ble Mohd. Faiz Alam Khan,J.

1. Heard learned counsel for the appellant well as learned A.G.A. for the State and perused the record.
2. The instant criminal appeal under Section 374(2) Cr.P.C. has been preferred by the appellant- **Nand Kumar @ Nandu** against the judgment and order of the trial court dated 30.07.2008 passed by Additional Sessions Judge/F.T.C., Court No.4, Faizabad in Sessions Trial No. 444 of 2003 (State vs. Nand Kishore alias Nandu), arising out of Case Crime No. 538 of 2003, under Sections 363, 366 and 376 I.P.C., Police Station Raunahi, District Faizabad/Ayodhya, whereby the appellant has been convicted for committing offence under Section 366 I.P.C. and have been sentenced for a maximum rigorous imprisonment of five years' pertaining to offence under Section 366 I.P.C. with fine of Rs. 3000/- along with default clause.
3. The necessary facts required for disposal of the instant appeal appears to be that, an F.I.R. was lodged by the father of the victim on 31.08.2003 at 4:30 pm. at Police Station Raunahi, District Faizabad/Ayodhya, alleging therein that on 29.08.2003 he had gone to the shop of a barber and his wife had gone to work in agricultural field and at about 4:00 pm. when they returned, her daughter (victim) was not available in the house and when inquired the other two daughters informed that the appellant had come to their house at 3:00 pm. and informed the victim that she is being called by her father and thereafter victim followed him and did not

return thereafter. It is further alleged that the age of the victim is about 13 years and he has searched her everywhere and in the process of searching her, one shop owner Peerbaksh informed that the victim has been seen by him with the appellant while boarding a train and his relative Raju has also informed him that he had seen the victim with the appellant at Faizabad railway station.

4. On the basis of this written information, an F.I.R. at Case Crime No. 538 of 2003 was lodged at Police Station Raunahi, District Faizabad/Ayodhya, under Section 363 and 366 I.P.C.

5. During the course of investigation, the victim was recovered on 31.08.2003 at about 8:50 pm. and her statement under Section 161 and 164 Cr.P.C. was recorded and the investigating officer also get the victim medically examined on 01.09.2003 and thereafter submitted the charge sheet against the appellant under Sections 363, 366 and 376 I.P.C.

6. The trial court framed the charges against the appellant under Sections 363, 366 and 376 I.P.C., to which, he denied and claimed trial.

7. The prosecution in order to prove its case has presented P.W.-1/Informant, who is being referred in the judgment as 'O', P.W.-2/Sister of the victim, who would now be referred by letter 'R' and P.W.-3/victim, who would be referred in the judgment by word 'V', P.W.-4/Dr. Meera Verma, P.W.-5/Constable Vijay Bahadur Singh, P.W.-6/Sub Inspector of Police, Dev Narayan Mishra.

8. Apart from the above-mentioned oral evidence, the prosecution has also relied on documentary evidence e.g. Tehrir F.I.R., Chik F.I.R., G.D. Qayami, medical examination report of the victim, recovery-memo, site plan and charge sheet.

9. After conclusion of the evidence of the prosecution, the statement of the appellant/accused was recorded under Section 313 Cr.P.C., wherein he denied all the evidence produced by the prosecution and claimed that

he has been falsely implicated, however, no evidence in defence was produced by the appellant.

10. The trial court after perusing the evidence available on record, found the case of the prosecution proved beyond reasonable doubt to the extent of Section 363 and 366 I.P.C. and was of the view that the offence under Section 376 I.P.C. has not been proved beyond reasonable doubt and, thus, convicted the appellant for committing offence under Section 366 I.P.C. and sentenced him in the manner described in the second paragraph of this judgment.

11. Learned counsel appearing for the appellant, while drawing the attention of this Court towards the impugned judgment and order passed by the trial court as well as the statement of the prosecutrix/victim recorded under Section 164 Cr.P.C., vehemently submits that the trial court has believed that the prosecutrix/victim was aged more than 16 years and as she has cohabited/indulged into sexual intercourse with the appellant with her consent, no offence under Section 376 I.P.C. is emerging. However, in the same breath, the trial court has found that the prosecutrix has been abducted from legal guardianship of her father for committing sexual intercourse and found the appellant guilty of committing offence under Section 366 I.P.C.. It is submitted that contradictory findings have been recorded by the trial court while acquitting the appellant for committing offence under Section 376 I.P.C. and convicting him for the offence under Section 366 I.P.C. In this regard, learned counsel for the appellant has drawn the attention of this Court towards the statement of the victim recorded before the Magistrate under Section 164 Cr.P.C., wherein the victim has stated that she was in love with the appellant and she had herself gone to him and has informed him that she is leaving her home, to which, he did not agree and persuaded her not to leave her home and also further asked her that she must return to her home but she did not pay any heed to his advice and it is thereafter the appellant had followed her.

12. It is vehemently submitted that to constitute an offence under Section 366 I.P.C., it is necessary to establish that a woman has been kidnapped or abducted with the intention that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will or that she may be forced or seduced to illicit intercourse and such intention must be present at the time when the victim or woman is being kidnapped or abducted.

13. While highlighting the above statement of the prosecutrix, recorded before the Magistrate under Section 164 Cr.P.C., it is vehemently submitted that if this statement is believed as it is, it will emerge to be an admitted fact that the appellant has not persuaded victim to leave her home nor has enticed her away and, thus, the trial court has committed manifest illegality in ignoring this glaring contradiction.

14. It is further submitted that the evidence of P.W.-3/Victim is also full of material contradictions, embellishments and she in her statement has also admitted that she was taken away by the appellant on the pretext that she is being called by her father and she remained with appellant at Baragaon Railway Station for quite long and, thereafter, also stated to have accompanied him to a mango orchard where they cohabited. It is vehemently submitted that accompanying the appellant to Baragaon railway station would itself be a sufficient indication that she had joined the company of the appellant on her own and having regard to the statement given by the prosecutrix under Section 164 Cr.P.C., it will emerge that she is telling lie before the trial court and this aspect of the matter has not been appreciated by the trial court in right perspective.

15. It is next submitted that the prosecution had miserably failed to prove its case beyond reasonable doubt before the trial court and the judgment of the trial court is required to be interfered.

16. Learned A.G.A. on the other hand submits that the factum of abduction for the purpose of subjecting the prosecutrix/victim to sexual intercourse has been fortified by the informant as well as the sister of the

victim and also by the victim and, therefore, the trial court has not committed any illegality in appreciating the evidence of these witnesses and, thus, no interference is required.

17. Having heard counsel for the parties and having perused the record, it is reflected that the allegations against the appellant are in terms that, he had enticed away the prosecutrix, who at the relevant point of time was minor, aged about more than 16 years and less than 18 years and she has been enticed away for the purpose of sexual intercourse by the appellant.

18. The degree of proof required for establishing the case of the prosecution is now no more *res integra* and the same has been set at rest by Catena of Judgments passed by the Hon'ble Supreme Court. It appears to be an established law that every criminal trial proceeds with a presumption of innocence in favour of an accused person and in order to convict a person the quality of evidence produced before the trial court must be of the degree and character which may meet parameter of proof beyond reasonable doubt. However, it doesn't mean that the case of the prosecution must be so strong to exclude every doubt. However, the quality of evidence must be such which a normal prudent person may believe in the existence of the facts alleged by the prosecution.

19. Perusal of established facts before the trial court, would evidently reveal that the prosecutrix is alleged to have been abducted in the evening of 29.08.2003 and she is stated to have been recovered on 31.08.2003 at 8:50 pm. and interestingly the F.I.R. of this case has been lodged by the informant on 31.08.2003 itself at 16:30 (4:30 pm.). In this regard, if the statement of P.W.-2/ 'R' is perused, it will emerge that she has stated that the victim was recovered on the next day of her abduction and an argument has been canvassed before this Court that the prosecution is not coming with clean hands and it appears that the F.I.R. of this case has been lodged after the recovery of the prosecutrix/victim.

20. Perusal of the evidence of the prosecutrix given before the trial court, would reveal that she has fortified the allegations, as levelled in the first information report, but in the same breath she has admitted that when she was taken away by the appellant, her parents were not at home and her two elder sisters were present and it is on the persuasion of these two sisters he had gone with the appellant and in categorical terms she admitted that when she was accompanying the appellant, he (appellant) asked him to accompany him to Baragaon railway station and they went together to Baragaon railway station. A big question mark, which hangs before the prosecution is, as to why the prosecutrix did not resist when she, instead of being taken to her father was asked to accompany the appellant to Baragaon railway station and in this background the statement of the prosecutrix recorded under Section 164 Cr.P.C. assumes more significance and importance, wherein she in categorical terms has admitted to have left her home on her own and in specific words admitted not to have been abducted by the appellant.

21. This Court is of the considered view that to convict a person under Section 366 I.P.C., it is desirable that he should either commit kidnapping as defined under Section 349 of the I.P.C. or abduction as defined under Section 362 of the I.P.C. and both these sections would project that the taking away of the women or the girl or victim must be without her consent while in the statement of the prosecutrix recorded under Section 164 Cr.P.C., which in the considered view of this Court, has not been correctly appreciated by the trial court, she had in categorical terms admitted to have left her home on her own and also that she was persuaded by the appellant to go back to her home but she insisted and it is thereafter perhaps for the sake of protection of the prosecutrix, the appellant had gone after her and if the statement of the prosecutrix given as P.W.-3 before the trial court, is believed, she had gone to the railway station Baragaon and, thus, the evidence available on record, clearly suggests and reflects that the prosecutrix/victim was neither kidnapped nor abducted and the trial court has committed manifest illegality in appreciating the evidence available on record in

ignoring the statement of the prosecutrix recorded before the trial court under Section 164 Cr.P.C.

22. At the cost of repetition, it is highlighted that the statement under Section 164 Cr.P.C. is recorded before the magistrate and may be used for corroboration as well as for contradiction and is in contrast with the statement recorded under Section 161 Cr.P.C., which could only be used for the purpose of contradiction.

23. The net result of the above discussion is that a material illegality has been committed by the trial court in appreciating the evidence available before it and also in convicting the appellant for committing the offence under Section 366 I.P.C. and for the reasons recorded herein-before, the impugned judgment and order passed by the trial court may not sustain and is liable to be set-aside.

24. In result, the appeal filed by the appellant- **Nand Kumar @ Nandu** is, hereby, **allowed** and the impugned judgment and order of the trial court is, hereby, **quashed/set-aside**.

25. The appellant appears to be on bail, his sureties are discharged. He need not to surrender in this case unless his detention is required with regard to any other criminal case.

26. Having regard to the provisions contained under Section 437-A of the Cr.P.C., the appellant shall file his personal bond with two sureties of Rs. 50,000/- before the trial court for the purpose of securing his presence before the Hon'ble Supreme Court if any S.L.P. or to say any criminal appeal is filed against this judgment.

27. A copy of this order be immediately sent to the trial court through the Sessions Judge concerned for information.

Order Date: 22.08.2024

Praveen/-