

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.173 of 2013

Against the judgment and order of conviction dated 18.02.2013 and 19.02.2013 passed by Sri Triloki Nath Tripathi, the learned Ad-hoc Additional Sessions Judge-2nd, Samastipur, in Sessions Trial No. 417 of 2011/287 of 2011 (arising out of Mohiuddin Nagar P.S. Case No. 89 of 2011 G.R. No. 7184 of 2011)

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1. Ram Japan Rai S/O Late Mahabir Rai Resident Of Village- Navtol Tara, P.S.- Mohiuddin Nagar, District- Samastipur
 2. Bedamiya Devi W/O Ram Japan Rai Resident Of Village- Navtol Tara, P.S.- Mohiuddin Nagar, District- Samastipur
 3. Indrasan Devi D/O Ram Japan Rai And W/O Ram Vivek Rai Resident Of Village- Majhauliya, P.S.- Biddupur, District- Vaishali
 4. Ram Vivek Rai S/O Ram Najar Rai Resident Of Village- Majhauliya, P.S.- Biddupur, District- Vaishali

.... Appellants

Versus

The State Of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr. Sunil Kumar Thakur, Advocate.
For the State : Mr. S. N. Prasad, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 17-12-2015

Learned counsel for the appellants at the outset submits that appellant No. 2 Bedamiya Devi has already died while she was in custody at Central Jail, Muzaffarpur and in this regard a letter has been issued by the Superintendent, Central Jail, Muzaffarpur which has annexed as Annexure-2 to the Interlocutory Application No. 354 of 2014.

2. Hence, the appeal against appellant no. 2, namely,

Bedamiya Devi stand abated.

3. Heard learned counsel for the rest of the appellants and learned counsel for the State.

4. This appeal arises out of judgment and order of conviction dated 18.02.2013 and 19.02.2013 passed by Sri Triloki Nath Tripathi, the learned Ad-hoc Additional Sessions Judge-2nd, Samastipur, in Sessions Trial No. 417 of 2011/287 of 2011 (arising out of Mohiuddin Nagar P.S. Case No. 89 of 2011 G.R. No. 7184 of 2011) by which the appellants had been convicted for offence under Section 364/34 of Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and payment of fine of Rs. 5000/- and for non-payment of fine further sentenced to undergo rigorous imprisonment for six months.

5. The prosecution case as alleged in the First Information Report by the informant Sunita Devi, P.W. 6 wife of Sunil Rai, P.W.5 that her sasural at Bidupur Majhauiliya, P.S. Bidupur, District-Vaishali, five months prior to this occurrence she had to come her Maika at Village- Navtol Tara under Mohiuddin Nagar P.S. in the District of Samastipur she is daughter of Baijnath Rai, P.W.9. On 31.05.2011 at about 9 P.M. she was sleeping at a cot at her dawaraja along with her 7 months old son namely Saniar Kumar. In the night at about 11.30 P.M. she got up at once then saw that her son was



missing. Thereafter, she disclosed about missing of her son to her father, mother and other members of her family. All members of her family then started searching her son, but her son was not found and in this connection on 08.06.2011, her father Baijnath Rai, P.W. 9 informed police and accordingly Sanha recorded regarding missing of her son. They were making out of search of the son of the informant then on 10.06.2011, in the evening it was learnt that her son had been kidnapped by Ram Japan Rai, Bedamiya Devi, Indrasan Devi, daughter of Bedamiya Devi and Ram Bivek Rai, son-in-law of Bedamiya Devi resident at Village- Jadhuwa in Distirct- Vaishali. Thereafter, the information was given to local police Mohiuddin Nagar. Then the informant along with her father and mother as well as police party proceeded for Jaduwa village and they reached at Jaduwa village on 11.06.2011 at early morning at 4.00 A.M. It was learnt from the neighbourers that four accused persons had taken the son the informant to Patna. On this information, the informant and her associates along with police force proceeded for Patna and they reached at Naya Chowk of Hamuman Nagar at Patna. They saw that four accused persons including the accused Indrasan Devi had kept the son of the informant in her lap and conceal in her Anchal. Thereafter, they were arrested by the police force and recovered the son of the informant. Four accused persons namely, Ram Japan Rai,

Bedamiya Devi, Indrasan Devi and Ram Vivek Rai were arrested by the Biddupur police and brought them to Mohiuddin Nagar P.S. It has been alleged that four accused persons in furtherance of their common intention to kill the son of the informant had kidnapped Saniar Kumar, the son of the informant.

6. On the basis of written report of Sunita Devi, the informant, F.I.R. was drawn. P.W. 7 Shiv Dahin Rai, the I.O. investigated the case and on the basis of Sanha entry, on 11.06.2011 he along with police force as well with the informant, her mother, Jagtarni Devi, father Baijnath Rai proceeded for Vaishali. Thereafter, with the aid of Vaishali P.S. raided the house of Indrasan Devi at Village-Jadhuwa and he found that room of Indrasan Devi was vacant and there it was learnt from the neighbourers that Indrasan Devi along with four persons left the Village- Jaduwa in the morning itself. Thereafter, they had gone to Patna. Thereafter, the police party along with prosecution witnesses as mentioned above reached at Naya Chowk of Hamuman Nagar, Patna, through by-pass and they saw the accused person Ram Vivek Rai, who was identified by the informant and thereafter, on interrogation regarding kidnapped boy he took to the place where the boy was kept and there they found that three accused persons Indrasan Devi, her father and mother were there and boy was in the lap of Indrasan Devi. The informant identified the child and

then three accused persons were arrested.

7. P.W. 5, 6, 8 and 9 supported the prosecution case regarding kidnapping of the child or missing of the child and thereafter, on making out a search it was learnt that the child has been kidnapped by the appellant and then the child was recovered from the possession of Indrasan Devi at Hanuman Nagar, Patna. However, P.W. 1, 2, 3 and 4, though, have supported the prosecution case, but they are only hearsay witnesses, as they are neither eye witnesses nor any recovery of accused in their presence nor they learnt about kidnapping of the child.

8. The trial court taking into consideration the evidence of witnesses convicted the appellants and sentence as mentioned above.

9. Learned counsel for the appellants however, challenged the order of conviction and sentence and it has been submitted that there is allegation of kidnapping of son of the informant, but there is no eye witness to the occurrence of kidnapping. It has further been contended that allegation is that the son of the informant was kidnapped for murder and charged had been levelled under Section 364 of Indian Penal Code. However, the boy was alleged to have been missing or kidnapped on 31.05.2011 and son of the informant was recovered from the lap of accused Indrasan Devi on 11.06.2011, the boy was well nursed and no injury was found in his body. Hence,



it is contended that under the fact and circumstance, the ingredient for offence under Section 364 of Penal Code has not been established and contended that on the allegation at best an offence under Section 363 of Penal Code is made out. It has further been contended that going to the evidence and taking into fact and circumstance, it appears that Indrasan Devi was issueless and so she may have taken the child or kidnap the son of the informant for rearing as her son. It has further been pointed out that defence has taken that the boy of the informant have been lost and Indrasan Devi was appellant who recovered and kept the son of the informant with due dignity when there is no evidence that appellant, Indrasan Devi herself has kidnapped or taken the boy and only evidence is with regard to recovery of the son of the informant from the possession of the Indrasan Devi. Hence the conviction under Section 364 of Penal Code is neither proper nor sustainable.

10. Learned counsel for the State however, opposed and contended that from the evidence it is apparent that boy was stolen away and was taken while he was sleeping with his mother and during investigation the boy was recovered from the possession of Indrasan Devi and said possession without consent of his parents or guardian of the child.

11. Having regard to the submission of the parties, the

question for consideration whether conviction under Section 364 of Penal Code is sustainable and if not, conviction can be recorded under Section 363 of Penal Code where there is requires for relaxation and sentence of the appellants.

12. Having regard to the fact as apparent that case was instituted on the written report of the informant, the mother of the child and on the said information, F.I.R. lodged and family members indulges themselves making out search, thereafter, when the boy was not found a Sanha entry was recorded regarding missing of the boy of the informant, subsequently accused persons were arrested who were kidnapped the son of the informant. However, there is no cogent and reliable evidence regarding kidnapping of the boy by the accused persons. However, it had come in evidence of P.Ws. 5, 6, 7 and 8 that on enquiry they learnt that the appellants had kidnapped the son of the informant. Thereafter, the matter was intimated to the police and police raided the rented house of Ram Vivek Rai at Village-Jaduwa and there it was learnt that Indrasan Devi along with other accused persons had taken the boy and gone to Patna. Thereafter, the police party along with witnesses P.Ws. 5, 6, 8 and 9 rushed to Patna and the son of the informant was apprehended in the lap of Indrasan Devi. Hence, the prosecution had proved the case by cogent, reliable and unimpeachable evidence even P.W. 7 had also supported the

prosecution case that he during the investigation raided the rented house of Ram Vivek Rai at Village-Jaduwa, District-Vaishali and thereafter, raid was conducted at Naya Chowk of Hanuman Nagar and boy was recovered in the lap of Indrasan Devi.

13. Having regard to this fact, there is no evidence that said kidnapping was made with intention to kill the son of the informant. There is no whisper except allegation that accused persons kidnapped the son of the informant, but the boy was kept with due dignity like a son found in the lap of Indrasan Devi beneath her Anchal itself indicates that there was no intention to kill the son of the informant. Moreover, the fact that the boy was kidnapped on 31.05.2011 and recovered on 11.06.2011 and during this period, there is no evidence that child was subjected to any brutality or there is no evidence that the boy was kidnapped with intention to kill, hence, offence under Section 364 of Penal Code is not sustainable.

14. However, going to the fact and circumstance of the case, hence recovery of the boy had been made in the possession of Indrasan Devi along with other accused persons and boy was kept well and there was no brutality nor there is any evidence to suggest that there was intention to kill. Hence, conviction can be converted from offence under Section 364 of Penal Code to offence under Section 363 of Penal Code.

15. Regard being had to the fact, there was no brutality with the victim boy nor there is any evidence that kidnapping was with intention to kill the kidnapped the boy, hence, the end of justice shall meet by sentencing the appellants for the period already undergone. Hence conviction for offence under Section 364 of Indian Penal Code having been converted to offence under Section 363 of Indian Penal Code and sentenced is for the period already remain in jail for about three years. **The appeal is allowed in part.**

m.p.
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(Gopal Prasad, J)

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