

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.308 of 2009

Arising out of PS.Case No.-47 Year-2007 Thana-Bela District- SITAMARHI

1. Newad Raut, Son of Late Jogi Raut
2. Ram Babu Raut, Son of Late Anand Raut
Both residents of village Chandi Rajwara, P.S. Bela, District Sitamarhi.
.... Appellants

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No. 320 of 2009

Arising out of PS.Case No.-47 Year-2007 Thana-Bela District- SITAMARHI

1. Sk. Mangar, Son of Late Sk. Habib
2. Saider Ali, Son of Ajim
Both residents of village Chandi Rajwara, P.S. Bela, District Sitamarhi.
3. Haider Ali, Son of Md. Khurshid
Resident of village Sunderpur, P.S. Sarlahi, District Sarlahi (Nepal).
.... Appellants

Versus

The State of Bihar

.... Respondent

Appearance :

(In CR. APP (DB) No. 308 of 2009)

For the Appellants : Shri Pushpendra Kr. Singh, Advocate
Shri Mrityunjay Kr. Mishra, Advocate

For the State : Shri Dilip Kumar Sinha, APP

(In CR. APP (DB) No. 320 of 2009)

For the Appellants : Shri Neeraj Kumar @ Sanidh, Advocate

For the State : Susri Shashi Bala Verma, APP

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 01-04-2015

The two appeals arise out of the judgment of
conviction dated 18.03.2009 and the order of sentence dated
24.03.2009, passed in Sessions Trial No. 98 of 2008/91 of 2008 by



the learned Presiding Officer, Fast Track Court No.-6, Sitamarhi. By the impugned judgment the appellants were held guilty of committing offences under Sections 323, 307, 365 and 376(2)(g) of the Indian Penal Code. The appellants were heard on sentence on 24.03.2009 and while no sentence appears passed under Section 323 of the Indian Penal Code upon any of the five appellants of the two appeals, each of them was directed to suffer rigorous imprisonment for life under Sections 307 and 376(2)(g) of the Indian Penal Code and were also directed to pay an amount of Rs. 25,000/- as fine on each of the two counts. It was directed that in case of making default in paying up the fine, the appellants were to suffer rigorous imprisonment for one year. As regards the conviction of the appellants under Section 365 of the Indian Penal Code each of them was directed to suffer rigorous imprisonment for five years and to pay a fine of Rs. 5,000/- else to suffer rigorous imprisonment for six months. The substantive sentences of imprisonment were directed to run concurrently. As regards the sentence of fine, it was directed by the learned trial judge that on its realization, 80% of the total amount of fine was to be paid as compensation to the victim and the remaining 20% of the amount shall go to the State exchequer. The appellants being aggrieved by and dissatisfied with the findings of the learned trial court as

regards their guilt and appropriateness of the sentence have preferred the two appeals. We have heard the two appeals together and we are disposing them of by the present common judgment.

2. Some of the undisputed facts may be noticed. Jannati Khatoon (P.W.12) was the daughter of Sadarul Khatoon (P.W.11) and Md. Jubair Ahmad (P.W.13). It is also not disputed that the informant Md. Jubair Ahmad (P.W.13) was residing outside and probably in Delhi and in his absence on 08.03.2007 Jannati Khatoon (P.W.12) was found absent from her house by her mother Sadarul Khatoon (P.W.11). The prosecution case was that a search was made by the mother of Jannati Khatoon and during that course she could learn that the appellants and other accused persons had taken her away by using a *Sumo* vehicle for the purposes of getting herself married to appellant Sk. Mangar and further that she was kept at village Sundarpur, district Sarlahi (Nepal) and from there they had brought her to Sitamarhi township where she was being wrongfully confined by appellant Sk. Mangar.

3. The informant Md. Jubair Ahmad (P.W.13) who described himself also in the petition of complaint as Jubair Alam stated in his complaint that a news item appeared in Dainik Jagran on 07.07.2007 about a girl that she had been attempted to commit



suicide by throwing herself by running train and that the girl was hospitalized in Sadar Hospital, Sitamarhi in an unconscious and injured condition. Md. Jubair Ahmad (P.W.13) stated that he came to find that it was Jannati Khatoon (P.W.11) the very daughter of P.W.13 and she stated to him that she had been taken and enticed away by the accused persons with intent to commit rape upon her and was moved from one place to another and ultimately during the course of being transported to another place, she was pushed out of a running train as a result of which she became injured for which she was being treated. The informant stated that he found that the condition of his daughter was not improved and as such, he withdrew her from Sadar Hospital, Sitamarhi and admitted her into the private clinic of Dr. Bharat Singh in Rajopatti where she was being treated.

4. It may be pertinent to point out that the prosecution was launched not by filing a report or lodging an oral information with the police rather P.W.13 chose to file a complaint petition before the Chief Judicial Magistrate, Sitamarhi on 21.07.2007 and a copy of the same was transmitted to the police for investigating the allegations under Section 156(3) Cr.P.C. As may appear from the evidence of S.I. Shashi Shekhar Thakur (P.W.16) who on the relevant date was the Officer-in-Charge of



the Bela police station. He drew up the First Information Report on the basis of complaint petition filed by P.W.13 and directed S.I. Ram Soren (P.W.14) to investigate the case. It appears from the evidence of S.I. Ram Soren (P.W.14) that after taking up the investigation, he came to Sadar Hospital, Sitamarhi for tracing out Jannati Khatoon (P.W.12) and he learnt that she was admitted into the private clinic of Dr. Bharat Singh and he went there into the clinic of Dr. Singh to record the statement of P.W.12. He also recorded the statement of the mother of the victim, i.e., Sadarul Khatoon (P.W.11) and went to the place of occurrence on 07.08.2007. The place of occurrence was the house of the informant (P.W.13) which was a brick built house, the two rooms of which was facing north, one room was facing east-north while the other one room was facing towards west. The entry of the house was from west and it was connected by a lane which was running in its back part so as to ejecting from there. He recorded statements of witnesses and also got the statement of the victim recorded under Section 164 Cr.P.C. He handed over the charge of investigation to P.W.16, the Officer-in-Charge of the police station Shashi Shekhar Thakur. It appears that the further investigation of the case was conducted by Ramashrey Yadav (P.W.15) and he did not do anything except that he submitted the charge sheet sending

up the accused persons for their trial.

5. The defence of the accused persons was that the lady herself walked out of her parents' house to go with appellant Sk. Mangar for getting herself married to him and was never taken away or enticed away from out of the lawful guardianship. It was further contended that the lady got married to the said appellant Sk. Mangar and had sworn an affidavit to this effect also besides being got herself photographed not only with the appellant but also with his previous wife and child. The plea was that it was not a case under Section 365 or 376 of the Indian Penal Code and the injury was earned by her while she was attempting to commit suicide for any particular reason.

6. 23 witnesses were examined during the course of the trial out of whom Bigan Mahto (P.W.1), Sk. Kurban (P.W.2), Bhikhari Mahto (P.W.3), Lal Babu Thakur (P.W.7), Sukhdeo Raut (P.W.8) and Ramchandra Mahto (P.W.9) were declared hostile. Nandlal Paswan (P.W.4) and Rampat Mukhiya (P.W.10) had given evidence on the fact that at about 4 a.m. on 08.03.2007 they had seen the accused persons named in the First Information Report taking away the victim girl in a while *Sumo* vehicle. Rajendra Paswan (P.W.5) and Bajaruddin (P.W.6) had also in their examination-in-chief said almost the same facts which were stated

by P.Ws. 4 and 10 but what appears from paragraph-3 of P.W.5, he stated that he had learnt about the incident from the villagers whose name he could not take. Similar is the evidence of Bajaruddin (P.W.6) in paragraph-2 of his cross-examination. Thus, what we find is that P.Ws. 5 and 6, i.e., Rajendra Paswan and Bajaruddin were hearsay witnesses.

7. Sadarul Khatoon (P.W.11) was the mother of the victim and she had stated that her daughter had gone out to attend the call of nature towards the *Bandh* and she did not return. P.W.11 set out on a search of the young girl at all possible places and could not find her. However, during the search which was made by her for her daughter Jannati Khatoon she could learn that the accused persons, namely, appellant Sk. Mangar, appellant Saider Ali had taken her away by using a *Tata Sumo* vehicle. It was stated by P.W.11 that the purpose for which P.W.12 had been kidnapped was to commit rape upon her. P.W.11 stated that she made a hectic search for her daughter but she could not trace the victim Jannati Khatoon. P.W.11 further stated that after 2½-3 months after kidnapping of his daughter, she could learn that the accused persons after having committed rape with her had pushed her out of the running train so as to kill her and the police had admitted her into Sadar Hospital treating her as unknown person.



It was stated by P.W.11 that she went there and found her daughter admitted in the Sadar Hospital and from there she withdrew her daughter to put her into the private clinic of Dr. Bharat Singh where she was being treated. It was stated that the whole transaction and facts relating thereto was stated by P.W.12 to her and then she could know that she had been kidnapped for being subjected to sexual intercourse.

8. Jannati Khatoon (P.W.12) during her short cross-examination stated that she could learn about the commission of rape after kidnapping from her and that the appellant Haider was a permanent resident of Nepal but he used to trade in cattle in India and was also married to a lady of the village of the informant as a result of which he was known to P.W.11. But, P.W.11 stated that she had never visited her house. A suggestion was given to P.W.11 that P.W.12, her daughter had herself gone out to marry appellant Haider and that P.W.11 had consented to the marriage. It was suggested that her husband had taken money and the same was not given by appellant Haider and as such, a false case was lodged. Md. Jubair Ahmad (P.W.13) who happened to be the father of P.W.12 Jannati Khatoon was not an eye witness to the occurrence rather he stated the facts after having come to know about it from P.W.12 Jannati Khatoon.

9. Jannati Khatoon (P.W.12) was the victim of the offence and she stated that she had gone out to attend to the call of nature. The accused persons were there sitting in a Tata Sumo and appellant Sk. Mangar and Saider caught her and pushed her inside the vehicle. Two persons were sitting on the front seat and the vehicle was driven away taking her. She stated that she was first taken to the house of the sister of appellant Haider at village Muhchatti where the three accused persons, namely, Mangar, Saider and Haider had committed rape upon her almost on every night. After a month from there she was taken to Sundarpur and was kept there for 1½ months. There also the same three appellants, namely, Mangar, Saider and Haider had perpetrated rape upon her. The lady was removed from Sundarpur to Kathmandu and from there she was brought to Sitamarhi and during these months she had been with the accused persons and either at Kathmandu or Sitamarhi she was subjected to sexual intercourse. It was stated that one day she ventured out of the place of captivity of the accused persons and she went to the market place and there she was given some cold drink, she drank and she felt uneasy out of it. The accused persons asked her to come back to the place they were residing but she was not ready whereafter she was picked up by the accused persons and thrown



on the railway track before a running train. P.W.12 stated that she could not understand what happened thereafter and she could find herself in the Sadar Hospital, Sitamarhi where parents were also there and she stated the whole story to her parents. She was treated there in the hospital and from there she was brought into the private clinic of Dr. Bharat Singh where she was treated. She stated that she had been injured on her left arm, left leg very seriously and she had also been injured on some inner private part of her body on account of being run over by the train. Her hip joint was displaced and there was a serious dislocation of the pelvis which was treated by Dr. Bharat Singh not only in his clinic but also in Patna Medical College & Hospital. During her cross-examination by the defence, the witness was shown a few photographs and she admitted that she was there in those photographs which were either with appellant Haider as also with his son or wife or only with appellant Haider. She stated that she had never sworn an affidavit in token of getting herself married to appellant Haider and the defence on that denial had brought the contents of the affidavit into her attention in paragraph-12 of her cross-examination. She was subjected to a very lengthy cross-examination and during that course as may appear from paragraph-13 of her evidence that she was suggesting to the statements made



before the G.R.P. police and had stated that in attempt to catch the train for going to village Kanhwa under police station Bela, she slipped from the train and receiving injuries what we find is that the statements which was allegedly recorded by the officer of the G.R.P. police station was not brought on record nor the officer was examined by the defence so as to seeking the corroboration of the above statements. On perusal of the remaining part of the cross-examination the defence suggested to her that she had herself married Haider and had lived with him as legally wedded wife in Nepal which facts the witness had denied. The defence had also suggested to the witness that the fact which was stated in her examination-in-chief was never stated before the Investigating Officer. However, what we find further from the record is that the defence did not draw the attention of the witness to facts stated by her before the Judicial Magistrate who had recorded her statement under Section 164 Cr.P.C. and thus, what could be said on a comprehensive consideration of the evidence of the witness is that while the defence was mainly drawing her attention to her statement made in court in respect of her statement before the Investigating Officer, it was not denying that the victim had made statement under Section 164 Cr.P.C. and from her evidence it appears that she had stated the facts before the Magistrate and that

was the reason the defence was never contradicted in respect of her 164 Cr.P.C. statement.

10. It appears from the record that after the victim was withdrawn from Sadar Hospital, Sitamarhi, a Board of doctors was formed by the Civil Surgeon and that Board went to the clinic of Dr. Bharat Singh for examining the victim. The evidence in the above behalf has come from P.Ws. 18 to 22 who were the members of the Board and it has been stated that the Board had moved into the clinic of Dr. Bharat Singh for examining Jannati Khatoon and as may appear from the evidence of Dr. Prem Puspa Lohia (P.W.18) as also from the evidence of Dr. Aloka Kumar Singh (P.W.19), Dr. Sudha Jha (P.W.20), Dr. Rajesh Kumar Singh (P.W.21) and Dr. Sangita Jha (P.W.22) that the lady was bearing a deep wound near perenial region on its right side. The wound was in the healing stage and there was no injury around the vagina of the lady. On medical examination and on consideration of the pathological report, the lady was opined to be around 17 years of age and it was very difficult for the Board to opine as to whether she had been raped or not. However, what appears from Ext.-5 was that the hymen was found ruptured with old tach and the vagina of the lady admitted two fingers easily thus indicating that she has habituated to sex. The evidence of Dr. Rajesh Kumar



Singh (P.W.21), one of the members of the Board indicates that the lady had dislocation of left hip joint which had already been reduced by treating surgeon, i.e., Dr. Bharat Singh and the patient was found on traction. The Board was of the opinion that the patient, i.e., Jannati Khatoon (P.W.12) needed a skin grafting and repair of perennial wound by a plastic surgery. The Board had advised her to move for P.M.C.H. for further management of her wounds.

11. On perusal of the evidence of P.W. 18 to P.W.22 what appears is that the Board was not expressing any opinion as to the manner in which the injury could have been incurred by P.W.12 nor it was giving any opinion as to the nature of the injury but what appears from over all consideration of the evidence of these five doctors is that the lady had definitely incurred grievous injury as her hip joint was dislocated, there was deprivation of the muscles of particular part of her body and she required to be given further treatment by plastic surgeon so as to putting the shape of her body back. Thus, what appears is that the injuries which were found by the doctors were necessarily grievous in nature and were serious as the dislocation of hip joint was reduced and still the lady was put on traction so as to putting the joints at their ordinary place.

12. Md. Jaffar (P.W.23) was running an x-ray clinic and he had produced the x-ray plates Exts. 7 to 7/2.

13. It was contended by the learned counsel appearing on behalf of the appellants that there was virtually no evidence against Newad Raut and Ram Babu Raut and whatever evidence was available on record against the three appellants of Cr. Appeal (DB) No. 320 of 2009, i.e., Sk. Mangar, Saider Ali and Haider Ali, it may not be constituting an offence under Section 376(2)(g) of the Indian Penal Code. Submission also was that the fact that she had herself gone out of her father's house and was not either taken away or enticed away by any other may not also constitute an offence under Section 365 of the Indian Penal Code. As regards Section 307 of the Indian Penal Code, it has been contended that who had indeed pushed or put the lady on the railway track before a running train was not clear. It was as such, contended that the offences which were held proved by the trial court appearing misconstrued.

14. Shri Dilip Kumar Sinha, the learned Additional Public Prosecutor has resisted the submissions and has submitted that the evidence on record duly constituted the offences for which the accused persons were convicted.

15. After considering the evidence of Sadarul



Khatoon (P.W.11), the mother of Jannati Khatoon (P.W.12) as also after considering the evidence of Nandlal Paswan (P.W.4) and Rampat Mukhiya (P.W.10) what appears is that the lady was outside her house and she had gone to attend to the call of nature. Nandlal Paswan (P.W.4) and Rampat Mukhiya (P.W.10) who were independent persons and who were instantly seeing the occurrence pointed out that it were accused Sk. Manger and Haider along with three unknown who had caught the victim P.W.12 also and had pushed her inside a *Sumo* vehicle whereafter she was taken away. It is true that she was not inside her house but it was in the knowledge of her mother that she had gone out of the house to attend to the call of nature. The contention which was advanced before us that framed on the statutory provision of Section 361 which defines the offence of kidnapping as taking away or enticing away of a minor under 16 years of age if a male, or under 18 years of age if a female, or any of unsound mind, out of the keeping of the lawful guardianship of such minor or person of unsound mind. The main thrust of his argument was that the lady had gone out to attend to the call of nature and thereafter she was picked up could not be amounting to taking away or enticing away out of the keeping of the lawful guardianship of the lady. Here in the present case, the lady was around 17 years of age and she had gone out in



the knowledge of Sadarul Khatoon (P.W.11), her mother to attend to the call of nature. The guardianship of her mother was extending whenever she had gone out of her house for attending to the call of nature. If any attempt was made by any person who forcibly took her out and to put her into a vehicle so as to taking away, it shall be taking away out of the keeping of the lawful guardianship of P.W.11 and, as such, the offence of kidnapping, in our opinion, is duly constituted. P.W.12 stated that she was picked up by the accused persons forcibly to be put into the vehicle for being driven away, she was confined at different places and was ultimately thrown on a railway track before a running train. The very taking away and enticing away a lady makes out a case of kidnapping from the lawful guardianship and as such, the conviction of the appellants on the facts of the case under Section 365 appears appropriately recorded.

16. It was suggested next that it may not be a case under Section 376(2)(g) of the Indian Penal Code because the lady was in the custody of the accused persons for many months and she was being moved from one place to the other and finally to Sitamarhi where she was residing with the accused persons. It was a case of consented sexual intercourse. The facts of the case and the evidence specially of Jannati Khatoon (P.W.12) indicates that



after being taken away she was raped not only by one accused rather by the three appellants of Cr. Appeal (DB) No. 320 of 2009, i.e., Sk. Mangar, Saider and Haider. She was beaten up if she resisted and she was also frightened and threatened by showing some fire arms as appears stated by P.W.12. She had denied that she married appellant Haider out of her own sweet Will as appears suggested to her and also by drawing her attention to the contents of an affidavit. But, what we find is that no document was brought except a *Nikahnama* to indicate that the lady had herself married appellant Haider. There is a categorical denial of the lady that she had entered into any *Nikahnama* with appellant Haider Ali and even assuming for the sake of argument that she had married appellant Haider which finding we do not record, we believe that it should be a case of consent under misconception of fact that she had legally married of any of the appellants. The very conduct of the appellants of throwing her before a running train on a railway track itself indicative of the fact that the lady was led into misconception of fact of being married wife of the appellants and after the appellant or appellants had exploited her sexually and had found that it was useless and rather she was a liability to them, they were disposing of her by throwing her on a railway track. In that view, we reject the defence that it could be a consented sexual

intercourse. In view of the evidence of P.W.12 pointing out that she was time and again raped by the three appellants, namely, Sk. Mangar, Saider Ali and Haider Ali, we find that it was a case of gang rape and the three appellants above named were duly convicted under Section 376(2)(g) of the Indian Penal Code.

17. So far as the conviction of the appellants under Section 307 of the Indian Penal Code is concerned, the lady had stated that the three appellants, namely, Sk. Mangar, Saider Ali and Haider Ali had thrown her on to the railway track. On a careful consideration of the evidence on record, we find that there was absolutely no evidence in any respect against the two appellants of Cr. Appeal (DB) No. 308 of 2009, namely, Newad Raut and Ram Babu Raut. Appellants Newad Raut and Ram Babu Raut were never implicated of in any manner by the victim and their complicity appears not established. On consideration of the evidence available to us on record, we find that the appeal preferred by appellants Newad Raut and Ram Babu Raut is meritorious as there is no evidence against them and the same is allowed. As regards the appeals preferred by Sk. Mangar, Saider Ali and Haider Ali, we find materials sufficient to uphold their conviction under Sections 307, 365 and 376(2)(g) of the Indian Penal Code.

18. In the light of the discussion of evidence made by us, we find that Cr. Appeal (DB) No. 320 of 2009 does not have any merit and the same is dismissed. We allow Cr. Appeal (DB) No. 308 of 2009 by setting aside the judgment of conviction and order of sentence. The two appellants, namely, Newad Raut and Ram Babu Raut are acquitted of the charges they had been held guilty of. Both the appellants are on bail, they shall stand discharged from the liabilities of their respective bonds.

(Dharnidhar Jha, J.)

(Amaresh Kumar Lal, J.)

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