

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No. 1036 of 2011**

Against the judgment of conviction dated 28.04.2011 and order of sentence dated 03.05.2011 passed in Sessions Trial No. 244 of 2008 by Shri Ashok Kumar Pathak, learned Sessions Judge, Vaishali at Hajipur

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Muskan Das, Son of Chandeshwar Das, Resident of Village – Pukraira, P.S. –  
Rajapakar, District – Vaishali

.... .... Appellant

Versus

1. The State of Bihar
2. The Bihar School Examination Board, Patna
3. Ram Chandra Sahni, S/O Gyani Sahni
4. Paroo Kumari, D/o Shivjee Sahni, both R/O village Faridpur, P.S. Raja Pakar,  
Distt. Vaishali

... .... Respondent

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**Appearance :**

For the Appellant : Mr. Shahzad Hassan Khan, Advocate

For the B.S.E.B. : Mr. Amrendra Kumar, Advocate

For the State : Mr. S. A. Ahmad, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD**

**ORAL JUDGMENT**

**Date: 22-01-2016**

Heard learned counsel for the appellant and the State.

2. The appellant has been convicted under Section 363 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and a fine of Rs.2,500/- and in default of payment of fine to undergo imprisonment for one year. He has further been convicted under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for eight years and a fine of Rs.2,500/- and in default of payment of fine to undergo imprisonment of two years. However, it has been ordered that both the sentences shall run concurrently.

3. The prosecution case, as alleged in the First Information Report drawn on the basis of written report filed by Ram Chandra Sahani the uncle of the victim, is that his niece aged about 13 years a juvenile was taken by the appellant Muskan Das in the pretext of visiting

Mela with intention to marry him. On the same day, the informant made a search of the victim at the house of his relative, but he could not find her. He also tried to trace out the victim at the house of the relative of Muskan Das, but he could not find. He again tried to find out the victim from 02.10.2006 to 07.10.2006 at his own level, but he could not have been found then he gave in writing a written report at the police station on 08.10.2006. It has further been stated that Muskan Das urged to give tuition to the niece of the informant.

4. During investigation, the Investigating Officer recorded the statement of the informant, inspected the place of occurrence, recorded the statement of the witnesses and the victim Paro Kumari under Section 164 Cr.P.C. as also recorded the statement of the mother of the victim Tiliya Devi. The Investigating Officer got the victim medically examined and then submitted charge-sheet. After submission of the charge-sheet, cognizance was taken, case was committed to the Court of Session and consequently the charge was framed under Sections 366A and 376 of the Indian Penal Code. During trial, 11 witnesses were examined on behalf of the prosecution.

5. P.W.1 is Lalita Devi who has deposed that on 02.10.2006 the parent of appellant had enticed away Paro Kumari to show Mela and they gave some intoxicant to her with sweets.

6. P.W.2 is Nilam Devi who has deposed that on the day of

occurrence, on the eve of Durga Puja she had gone to Punchshalla Chauk to see Mela along with Sima (P.W.4), Reshma (P.W.3) and Paro (P.W.6). Further that in the Mela accused Muskan Das called Paro Kumari and took her into a hotel, Paro Kumari did not return till 11:00 P.M. hence, they all returned to home and disclosed the incident to the parents of Paro Kumari. In the cross-examination, she has deposed that police did not record her statement.

7. P.W.3 is Resham Kumari who has also deposed that she along with Nilam Devi, Sima Kumari, Rubi Kumari, Paro Kumari had gone to see Dashahara Mela at Punchshala Chauk and accused Muskan Das is a tutor of Paro Kumari who met in Mela and he took away Paro Kumari to show Mela and asked the other girls to go away. She has further deposed that till 10:00 P.M. Paro Kumari did not return, so they went to their house and after ten days police recovered Paro Kumari with Muskan Das. In the cross-examination, she had again testified that in the evening she had gone with her friends to see Dashahara Mela and about 8:00 P.M. Muskan Das met with them. She has clarified in para 8 that since Muskan Das is teacher, therefore, Paro Kumari went with him though this witness suggested not to go. She has also deposed that they informed parents of Paro Kumari about incident and in para 15 she has admitted that Ajay Das, cousin of Muskan Das had lodged a case under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act

against father, brother and uncle of Paro Devi, but she has denied that due to this reason this case has been lodged.

8. P.W.4 Sima Kumari has deposed that she along with Rubi Kumari, Nilam Kumari, Resham Kumari, Paro Kumari had gone to Punchshala Chauk to see Dashahara Mela where Muskan Das met with them and on the pretext of showing fair, he took away Paro Kumari with him. On return to home, she informed parents of Paro Kumari about the occurrence. In the cross-examination in para 9 she has again stated that she had gone to see Dashahara fair and returned about 10:00 P.M. in the night. She has further deposed in para 10 that she disclosed about incident to the mother of Paro Kumari and uncle, brother of Paro Kumari searched her.

9. P.W.5 Rubi Kumari also accompanied with Nilam Kumari, Sima Kumari, Paro to see Dashahara Mela at Punchshala Chauk and she has also corroborated that Muskan Das met them in Mela and took away Paro Kumari with him on the pretext of showing her Dashahara fair. Till 10:00 P.M. after enjoying Mela, they returned to their house and when uncle and aunt of Paro Kumari enquired about Paro Kumari all the girls disclosed that Muskan Das had taken her away to show Mela.

10. P.W.6 Paro Kumari, the victim herself, has narrated the occurrence that she along with Nilam Devi, her aunt Latita Devi, Shima Kumari, Rashmi Kumari, Rubi Kumari had gone to visit Dashahara fair

at Punchshala Chauk where Muskan Das met her and he told other girls to go away and took her away to show Dashahara fair on the pretext that she will take her back to her house. She has further stated that Muskan Das took her in a hotel and gave Rasgulla to eat and thereafter she fell unconscious. When she regained consciousness she found herself in Chak Sikandar. Muskan Das took her to Bachhwara by train and also raped her. When she protested, Muskan Das used to assault her and sent information to her uncle to give Rs.50,000/- as ransom otherwise she would be killed. She has further deposed that Muskan Das also took her to his own house and there police recovered her. She narrated all story to the police and gave statement under Section 164 Cr.P.C. before the Magistrate and signed on it which is marked as Ext.1.

11. P.W.7 Tiliya Devi, mother of victim girl, has deposed that her daughter Paro Kumari had gone to see fair with her friends at Punchshala Chauk and her friends came back and informed that Muskan Das had taken away Paro Kumari to show fair. In her cross-examination she has stated that Rubi Kumari (P.W.5), Sima (P.W.4) and Nilam (P.W.2) informed her about the occurrence and her daughter also narrated about the occurrence when she came back. She has also deposed in para 11 that Muskan Das was teaching her daughter for last six months.

12. P.W.8 Ramchandra Sahni, uncle of the victim girl, who is

informant has stated that Paro Kumari had gone to see fair with her friends, but did not return to house. Other girls told him that Muskan Das had taken away Paro Kumari, so he lodged First Information Report which is marked as Ext.2. He has further deposed that his niece (Paro Kumari) was recovered after 13 days of the occurrence and she has disclosed about the occurrence.

13. P.W.9 Shri Sushil Kumar Tripathi, learned Judicial Magistrate, 1<sup>st</sup> Class, Hazipur recorded the statement of the victim (Paro Kumari) under Section 164 Cr.P.C.

14. P.W.10 Dr. Mani Dipa Majumdar who examined Paro Kumari has opined that there is no external injury over body and private parts. Auxiliary hair sparse, public hair shaved. Breast developed. No discharge or foreign body on perineum, hymen partially torned. Granulation tissue formed and entarotitus admits 1½ finger easily. Swab taken and sent to Pathologist, Sadar Hospital for presence of spermatozoa and opined that the age of the victim appears to be 14 to 16 years. History and clinical finding suggests sexual contact.

15. P.W.11 Surendra Prasad Ram, the Investigating Officer of this case had deposed that on 08.10.2006 he was posted as Sub-Inspector at Rajapakar Police Station and a written report from Ramchandra Sahni was received whereupon formal First Information Report Ext.7 was registered and he was entrusted with investigation. The endorsement has

been proved as Ext.8. During course of investigation, he recorded re-statement of informant Ramchandra Sahni and also inspected the place of occurrence. He then recorded statement of witnesses Rubi Kumari, Sima Kumari and other witnesses. The victim was medically examined and then he submitted charge-sheet.

16. The trial court taking into consideration the evidence of the witnesses, convicted the appellant as mentioned above.

17. Learned counsel for the appellant has challenged the judgment of conviction and order of sentence and submits that though there is evidence regarding the victim having gone along with Muskan Das, but the evidence regarding the rape has not been specifically mentioned by the victim herself and the statement of the victim that the appellant played with her chastity is only vague in terms that she has deposed that “Mere Ijjat Se Khelbar Kiya” and hence, it is submitted that there is no specific evidence regarding rape as no act has been mentioned. It has further been contended that the medical evidence is also not specific and hence, the offence of rape is not established, accordingly, the judgment of conviction and order of sentence be set aside.

18. Learned counsel for the State submits that the victim is a minor and her expression may not be there, but it can well be inferred that the appellant committed rape upon her.

19. However, having regard to the submissions, the prosecution case in the First Information Report is that the victim had gone to see Dashahara fair where Muskan Das took her away with him on the pretext of showing her Dashahara fair, but thereafter did not return and had taken away somewhere else. The witnesses P.Ws.1, 2, 3, 4, 5 and 6 have supported the prosecution case that the victim went along with the appellant and there is evidence that Muskan Das promised to return the victim after visiting fair, but he did not return and took the victim somewhere else. From the evidence of the witnesses, it is apparent that the evidence is obvious of kidnapping as the victim did not return and the statement of the victim that she was taken, molested and assaulted from the evidence of the witnesses, the offence under Section 366A is apparently established. So far as Section 376 of the Indian Penal Code is concerned, except the victim none have supported the statement of the victim as her statement is only to the extent that the accused “Mere Ijrat Se Khelbar Kiya”. However, the wording of the victim itself is so vague that on this single line evidence, it is difficult to confer that Muskan Das raped the victim. However, when there is no specific evidence about rape, inference of rape on the basis of the medical evidence is neither proper nor acceptable. There is no specific mention about the act of rape or to infer a rape on the basis of the evidence that “Mere Ijrat Se Khelbar Kiya” is neither proper for conviction under Section 376 of the Indian

Penal Code. The statement of the victim both in the Court as well as in the statement under Section 164 Cr.P.C. is only to the effect as she has repeated the same line in both places in her statement under Section 164 Cr.P.C. as well as in her evidence before the Court and hence, conviction recorded under Section 376 of the Indian Penal Code is not sustainable and except the evidence of the victim there is no other evidence hence, conviction under Section 366A of the Indian Penal Code is sustained and the conviction recorded under Section 376 is hereby set aside and the appeal is allowed in part.

**(Gopal Prasad, J)**

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