

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

**Criminal Appeal (SJ) No.322 of 2014**

Arising Out of PS.Case No. -136 Year- 2010 Thana -BELA District- SITAMARHI

=====

1. Raudi Mandal Son of Late Bithu Mandal R/o village- Bliswa, P.S.- Bela,  
District- Sitamarhi

.... .... Appellant/s

Versus

1. The State of Bihar

.... .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Animesh Kumar Mishra, *Amicus Curiae*

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**

**C.A.V JUDGMENT**

**Date: -08-2017**

This appeal has been preferred by the appellant against the judgment dated 4<sup>th</sup> April 2014 and order of sentence dated 10.04.2014 passed by Sri Prabhu Nath Singh, 1<sup>st</sup> Additional Sessions Judge, Sitamarhi, in S.T. No. 22/11/199/13, whereby the appellant was convicted for the offence punishable under Sections 376(2)(g) and 366(A) of the Indian Penal Code and was sentenced to undergo rigorous imprisonment of ten years under each Section with a fine of Rs. 25,000/- and 5,000/- respectively and in default of payment of fine, rigorous imprisonment for one year.

Brief facts necessary for adjudication of present appeal are that a written report was filed on behalf of P.W. 3, Rajkumar Sah stating therein *inter alia* that the appellant and other two accused persons had



kidnapped his minor daughter, namely, Pooja Kumari and kept her in the village Matihani (Nepal) and she was recovered with the help of Nepal Police and villagers and she was brought back to her house and, thereafter, a panchayati was held, in which, the informant came to know from other villagers that the appellant and accused persons were engaged in the business of human trafficking as they used to kidnap the children and sell them.

On the basis of above written report Bela P.S. Case No. 136 of 2010 under Section 365 and 366(A) of the Indian Penal Code was registered against the appellant and other accused persons and the police after investigation submitted charge-sheet against the appellant and investigation against the other two accused persons, namely, Pramod Paswan and Hari Paswan was kept pending. Cognizance of the offence was taken and, thereafter, the case was committed to the court of sessions, which ultimately traveled to the file of learned Sri Prabhu Nath Singh, 1<sup>st</sup> Additional Sessions Judge, Sitamarhi, for trial and disposal.

Charges were framed under Section 363, 366 and 376(2)(g) of Indian Penal Code against the appellant.

In this case altogether eight witnesses have been examined from the side of the prosecution and they are: P.W. 1- Ashok Sah (uncle of the victim girl), P.W. 2- Usha Devi (mother of the victim girl), P.W.



3-Raj Kumar Sah, (informant and father of the victim girl), P.W. 4- Pooja Kumari (Victim of the present case), P.W. 5 – Md. Abbas Khan (investigating officer of the case), P.W. 6 – Santosh Kumar (cousin brother of the victim girl), P.W. 7- Ramji Sah and P.W. 8 – Doctor Bibha Kumari Jha, who examined the victim girl.

Apart from the above, following documents have been admitted into evidence and marked as ; Ext. 1 – written petition, Ext. 2- Signature of victim Pooja Kumari on the written report, Ext. 3- endorsement on written report, Ext. 4 – formal F.I.R, Ext. 5- requisition for medical examination of the victim girl, Ext. 6 – Medical report of victim girl.

It appears from perusal of the records that neither any oral nor any documentary evidence has been adduced on behalf of the defence and it appears from the suggestion given to the witnesses and his statement under Section 313 Cr.P.C, the defence of the appellant is of false implication and complete denial of the alleged occurrence and of innocence.

Learned Trial Court after conclusion of trial convicted the appellant under Section 376(2)(g) and 366(A) and sentenced him as stated above.

Aggrieved by the said judgment, the appellant preferred the present appeal.



At the time of argument, nobody appeared on behalf of the appellant and as such Mr. Animesh Kumar Mishra, has been appointed *amicus curiae* to assist the court.

Learned *amicus curiae* has assailed the judgment on the ground that in this case, there is delay in lodging of the F.I.R as according to informant himself, the girl was kidnapped and later on was recovered on 26.07.2010, but the F.I.R was lodged on 31.07.2010 i.e. after lapse of five days and no plausible explanation has been offered for the same. Further submission of learned *amicus curiae* is that according to P.W. 3, informant, and other witnesses that the prosecutrix/victim girl was recovered from the Nepal at Village Matihani with the help of local police and villagers but neither any witness of the said village nor the Nepal police has been examined in this case, which creates a serious doubt on the prosecution story. It has also been submitted that at the time of recovery only accused Pramod Paswan along with victim girl was present there, whereas, the appellant has been arrested from his house and evidence of witnesses show that house of the appellant is situated just after one house of the informant and, therefore, the prosecution story that the appellant along with others kidnapped her and committed rape upon her, does not appear to be probable especially when the evidence has come that the appellant is older than the informant and has grand daughters and grandsons.



Further submission is that the medical report also does not support the prosecution story of rape, as no sign of rape was found on the person of the victim girl and her age in the medical examination was assessed as seventeen years plus minus two years and, therefore, the girl was not minor at the time of alleged occurrence. Further submission of learned *amicus curiae* is that in this case in earliest story of prosecution ( F.I.R), there was no allegation of rape on the victim girl either by the appellant or by the other accused persons, though F.I.R has been lodged after lapse of five days of her recovery and even the charge-sheet has been submitted only under Section 365 and 366 of Indian Penal Code but later on during trial, the victim girl as well as witnesses came out with a story of gang rape, which appears to be an afterthought to make the offence serious and the learned trial court without considering all these facts have convicted the appellant under Section 376(2)(g) and 366(A) of Indian Penal Code, which shows that learned Trial Court has not appreciated all the materials available on record and convicted the appellant in most mechanical way.

On the other hand, learned counsel for the State has argued that there are cogent, consistent and reliable evidences available on record to prove that the appellant and other two accused persons enticed away the victim girl and took her to village Matihani (Nepal) and kept



her there and committed rape on her one by one and, thereafter, she was recovered from there along with other co-accused Pramod Paswan. It has further been submitted that even though the medical evidence did not support the case of prosecution with regard to rape, however, in the case under Section 376 Indian Penal Code, the conviction can be based on sole testimony of the prosecutrix, even if the same is not corroborated by the medical evidence, if otherwise, the same is found reliable and free from any embellishment. Hence the conviction of appellant under Section 376 (2)(g) and 366(A) are just and proper and the same does not require any interference.

On the above background, let me examine the ocular evidence as well as other evidences available on record.

P.W. 3, Rajkumar Sah, is the informant and father of the victim girl and his evidence in chief disclosed that, he found his daughter traceless and on enquiry, he came to know that appellant and co-accused Pramod Paswan and Hari Paswan has taken her away and, thereafter, he went on search for his daughter to their houses, but they all were not present at their houses. His evidence also shows that he came to know that his daughter was kept in village Matihani (Nepal) and then he along with Santosh (nephew) and Ashok (brother) went to Matihani after two days of occurrence and with the help of Nepal Police recovered the victim girl – Pooja Kumari, where co-accused



Pramod Paswan was also present. His evidence also disclosed that his daughter Pooja Kumari revealed him that appellant and other co-accused persons have committed rape on her one by one. His evidence further disclosed that thereafter, he also got a panchayati held but appellant was not ready to participate in the said panchyati and in the said panchayati, he came to know that appellant and other accused person were engaged in the business of human trafficking as they used to kidnap the children and used to sell them. This witness has been cross-examined and in his cross-examination, he has stated about the recovery of the girl from village Matihani (Nepal). In para -6 of his cross-examination, this witness has admitted that appellant is older than him and has grandsons and granddaughters. A suggestion was also given to this witness that there was love affair between the victim girl and co-accused Pramod Paswan and the same was disclosed to him but he denied the said suggestion.

P.W. 2, is the mother of victim girl and she has also supported the prosecution case and stated that in course of search, the victim girl was recovered from village Matihani (Nepal) and the victim girl disclosed about the commission of rape by appellant and other two accused persons. Her cross-examination in para -4 also shows that house of the appellant is just after one house of the informant. Her evidence also shows that appellant was arrested from his house and



she has also supported the prosecution story of holding of panchayati with regard to the occurrence.

P.W. 1, is the uncle of the victim girl, and he has also supported the prosecution case. He has also stated in his evidence that he saw the appellant and other two accused persons, taking the victim girl with them, however, the same appears to be an improvement as had it been in knowledge of this witness, he ought to have disclosed the same to the father and mother of the victim girl but neither the F.I.R. nor the evidence of P.W. 2 and 3, who are mother and father of the victim girl show that he disclosed this fact to them. Further this witness has stated about the recovery of victim girl from the village Matihani (Nepal) with the help of police and accused Pramod Paswan was also apprehended there. However, this witness has also supported the prosecution story of kidnapping of the victim girl.

P.W. 4 is the victim girl in this case and she has stated that appellant had called her to his house and when she went there Pramod Paswan and Hari Paswan was also present there, who administered some intoxicated drink, thereafter, she became unconscious and when she regained consciousness, found herself in village Matihani (Nepal) in the house of sister of co-accused Pramod Paswan. She further stated about commission of rape on her by appellant and Pramod Paswan and Hari Paswan one by one and her recovery was made with



the help of Nepal police. She further stated that she disclosed about everything to her father. Her attention was drawn towards her earlier statement made before the police in para -4 to show that she has not disclosed about the administering of intoxicated drink to her and after that she became unconscious and also about the commission of rape by appellant and other two accused persons. Her evidence further disclosed that she remained in the house of sister of Pramod Paswan for five to six days. She has also stated about the Panchayati in her cross-examination.

P.W. 6 Santosh Kumar is the cousin brother of the victim girl, and he has stated in his evidence about the recovery of girl from village Matihani and also supported about the Panchayati. He has also disclosed that with the help of Nepal police the victim girl was recovered.

P.W. 7 is a witness, who has prepared written report on the instruction of the informant and except that there is nothing important in his evidence.

P.W. 8, is the Doctor Bibha Kumari, who has examined the victim girl and her evidence shows that on examination she found that there was no trauma or injury on the person of the victim girl. Her evidence further shows that vaginal swab was taken and on examination of vaginal swab no spermatozoa was found. She further



stated that on examination, it cannot be said that whether rape has been committed on her or not and the age of the girl was assessed as 17 years. Further in her cross –examination she has stated that the age of girl around seventeen years means plus minus two years and further stated that hymen may be ruptured, other than due to sexual intercourse.

P.W. 5 is the Investigating Officer of this case and he has stated that he has recorded the statement of the witnesses and victim girl and got her examined by the Doctor. In his cross examination, he has stated that he has not recorded the statement of victim girl under Section 164 Cr.P.C. before the Magistrate. Further he has denied a suggestion that the same has not been done as the victim girl was not ready to support the prosecution case. In his cross –examination, attention of this witness has been drawn towards the statement of the witnesses during the investigation and he has stated that none of the witnesses has stated about the gang rape on victim girl – Pooja Kumari and the witness Pooja Kumari has stated Hari Paswan and appellant Raudi Mandal were also with the co-accused Pramod Paswan and Pramod Paswan committed rape on her. Further his evidence in cross – examination also shows that witness Usha Devi and Rajkumar Sah has not stated about the commission of rape on the victim girl by the appellant and other two accused persons.



Considering the entire discussions made above it appears that so far prosecution case of kidnapping is concerned, there are cogent, consistent and reliable prosecution evidence available on record that the victim girl was kidnapped by the appellant and other accused persons and was recovered from Nepal. From the evidence of P.W. -8, Doctor, it appears that age of girl at the time of alleged occurrence was assessed as seventeen years and evidence of Doctor in cross examination shows that seventeen years means plus and minus two years. In such a situation Hon'ble Apex Court in the case of **Deelip Singh @ Dilip Kumar Vs. State of Bihar** reported in [ **AIR 2005 SC 2003**] has observed that in such a situation, the defence is entitled to rely on the higher side of the age given by the Doctor, which shows that the girl is aged about more than eighteen years of age and hence the prosecution story that the girl was minor and was aged about 12 years, does not appear to be true. Prosecution evidence also shows that a Panchayati was also held and the same found corroboration from F.I.R (ext. 4), which bears the signatures of villagers in Panchayati along with FIR. No doubt the witness of Panchayati other than the family members have not been examined except P.W. 7, in whose writing, written report was prepared. P.W. 7, in his cross examination has admitted that witnesses have put their signatures on the papers as a social initiative.



On the other hand, defence has tried to show that whole prosecution story is absurd and improbable on the ground of inordinate delay of five days in lodging the F.I.R and conduct of family, as even in spite of the fact that family members were aware that their daughter was traceless, they neither approached the Panchayat nor reported the matter to police rather they sat quietly till recovery of the girl and even after recovery they waited for five to six days to lodge the F.I.R, which clearly appears to be an afterthought. However, the submission of learned counsel for the defence cannot be acceded to as generally in the cases of sexual offence, family members of victim are hesitant to disclose the true facts to others or to the police as the prestige and reputation of family especially of victim girl is involved and there are cases also in which the victim or his family members may choose to suffer the ignominy rather than to disclose the true fact, which may cause stigma for the rest of their lives. As such in a case of abduction and rape, even if initial hesitation of the prosecutrix or her family members to disclose the true facts may cause delay in lodging the F.I.R. but on the ground of delay in lodging the F.I.R, the entire prosecution story cannot be brushed aside especially when there are other cogent and reliable materials available on record and when the plausible explanation for delay has been given. In the present case, it is the case of prosecution that informant



and others had first gone for panchayati and as the appellant and other accused persons were not agreeing to participate in the said Panchayati, then the informant and others lodged the case. Thus in the present case, the explanation given by the prosecution appears to be probable, in the facts and circumstances as discussed above.

Further submission of learned counsel for the defence is of false implication in this case due to village politics as he is a person having grandsons and granddaughters and he is older in age than the father of the victim girl and it is not expected from such person to be involved in kidnapping and human trafficking and also involved in committing gang rape. Moreover, there is nothing available to suggest that the appellant had kidnapped the girl to sell her.

Prosecution evidence shows that appellant is older in age than father of the victim and having grandsons and granddaughters but at the same time as discussed above, there are cogent consistent and reliable evidences available on record to show that appellant and others had kidnapped the victim girl and in spite of cross-examination of the prosecution witnesses, there is nothing to doubt the above consistent evidence. Even there is nothing available on record to suggest his false implication in this case. Hence, the prosecution evidence is impeccable and unrebutted. Prosecution evidence except the statement of the informant also shows that appellant and other



accused persons were engaged in human trafficking, however, there is absolutely nothing available on record to show as to whether any case was earlier lodged or there was any evidence showing any talk with regard to sale and purchase of victim girl. Except the information supplied by others that appellant and other were engaged in business of human trafficking, there is no evidence available on record. Section 366 and 366(A) of Indian Penal Code deals with kidnapping, abduction to compel her marriage and procurement of minor girl respectively, which reads as follows:-

**366. Kidnapping, abducting or inducing woman to compel her marriage, etc.**—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].

**366A. Procurement of minor girl.**—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit



intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.].

At the same time, Section 365 of Indian Penal Code provides that:-

**“365. Kidnapping or abducting with intent secretly and wrongfully to confine person.** - whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

So far story of commission of rape by the appellant on the victim girl, is concerned, there was no such story in the earliest version of the informant (P.W. 3) in written report and F.I.R (Ext. 1 & 4) and charge-sheet was also not submitted under Section 376 of the Indian Penal Code nor medical evidence supports the same, however during trial witnesses have developed the story of rape. Considering the fact that F.I.R has been lodged after lapse of five days of recovery of girl and a panchayati was also held and in such a situation not mentioning about commission of gang rape by appellant and others in the F.I.R, casts a serious doubt on the prosecution evidence with regard to commission of gang rape and that appear to be an afterthought in order to make the allegations graver. Apart from that Investigating Officer has also stated that none of the witnesses have stated about the commission of gang rape on the victim girl. He



has also stated that P.W. 4- Pooja Kumari has stated about commission of rape by Pramod Paswan Further the doctor (P.W. 8) has also not found any sign of rape on the victim girl. I am well aware that the Hon'ble Supreme Court in catena of its decisions has held that in a case under Section 376 conviction can be based on the sole testimony of the prosecutrix, if it is otherwise found free from doubt or any embellishment as it depends on various circumstances such as the girl being habitual of sexual intercourse, secondly, no force was used by the girl and other circumstance. It is also held that the evidence of prosecutrix is considered to be on better footing than that of injured person and she cannot be compared with an accomplice. At the same time, it is also well established that the evidence of prosecutrix has to be considered in totality and only when it inspire confidence and free from any embellishment, conviction can be based on sole testimony of victim girl. However in the present case as I have discussed above P.W. Pooja Kumari is the only eye-witness of rape and there was no story of gang rape in the F.I.R and medical report also negates the factum of rape. In such a situation relying on the prosecution evidence of kidnapping and commission of rape does not inspire confidence and it does not appear to be reliable and believable. P.W. 4- Pooja Kumari, as well as her family members are rustic, poor villagers and illiterate also and in a society like present



one, there is tendency of exaggerating the allegations and there is also tendency amongst villagers and even the urban people to keep themselves aloof, from happening in society, they do not come forward to become witness of an occurrence. In such a situation, responsibilities of court increases and instead of throwing out the whole case on the ground of omissions, development and inconsistencies, the court has to separate the truth amongst them that is called separating grains from chaffs. As I have discussed above, there is consistent and unrebutted evidence available on record to show that appellant and others kidnapped the victim girl and P.W. 7, who is a villager has stated that villagers had put their signatures as social initiative that proves the factum of kidnapping and abduction. However, conviction of appellant relying on the sole evidence of P.W. 4 of rape by appellant in absence of any such story in F.I.R (Ext. 4) and evidence of Investigating Officer (P.W. 5) that none of the witnesses have stated about the commission of rape on the victim girl as well as the evidence of Investigating Officer that P.W. 4 has stated about rape by the co-accused Pramod Paswan. Further even the evidence of doctor (P.W. 8) and medical report does not support the same.

It has also been argued by the appellant that though it is the prosecution case that she was recovered with the help of Nepal Police



and villagers but neither they had been examined in this case nor anything is available on record to show that their statements had ever been recorded by the police. Even the police has not got the statement of the victim girl recorded under Section 164 Cr.P.C. So far above contention of learned *amicus curiae*, appearing on behalf of the appellant is concerned, it is also well settled that for the latches on the part of Investigating Officer, the otherwise reliable and cogent evidenced cannot be doubted, as investigation is not under control of the victim or her family members.

Considering the entire discussions made above so far conviction of appellant under Section 376(2)(g) and 366A is concerned, that does not appear to be sustainable in the eye of law as the evidence discussed above, clearly shows that the victim girl does not appear to be minor rather appears to be major and further prosecution story of rape is also not sustainable. However, the evidence shows that the appellant along with others kidnapped the victim girl and took her to Nepal from where, she was recovered. Hence there are sufficient cogent and unrebutted evidence under Section 365 of the Indian Penal Code is available against the appellant and Section 365 Indian Penal Code is a minor offence of Section 366A of Indian Penal Code and Section 464 of Cr.P.C. provides that no finding, sentence or order by a Court of competent jurisdiction



shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. Further in the present case charge has been framed against the appellant for kidnapping of the victim for which he has been provided a chance to cross examine witnesses also. Section 365 Indian Penal Code also provides punishment for kidnapping or abducting with intent to secretly and wrongfully confine person, as such no prejudice will be caused to the appellant if the conviction of appellant under Section 366A be modified to conviction under Section 365 of the Indian Penal Code, which is a lesser offence carrying lesser punishment.

Considering the entire discussions made above, the conviction and sentence of appellant under Section 376(2)(g) is set aside and the conviction and sentence of appellant under Section 366A is modified to conviction under Section 365 of Indian Penal Code and sentence of R.I. of ten years is also reduced to the period already undergone by the appellant in judicial custody as he has remained in judicial custody for four years.



Accordingly, with the above modification in sentence, this appeal is disposed of.

**(Vinod Kumar Sinha, J)**

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