

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.11 of 2015**

Arising Out of PS.Case No. -129 Year- 2010 Thana -BIHRA District- SAHARSA

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1. Md. Habib Son of Md.Rafid Resident of Village-Sattar,P.S-Bihra,District-Saharsa

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Md. Nafisuzzoha, Adv.

For the Respondent/s : Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**ORAL JUDGMENT****Date: 01-12-2017**

Appellant Md. Habib has been found guilty for an offence punishable under Section 365 IPC and sentenced to undergo SI for three years as well as to pay fine appertaining to Rs. 5,000/- in default thereof, to undergo SI for six months additionally vide judgment of conviction and order of sentence dated 25.11.2014 by the Additional Sessions Judge-2nd, Saharsa in Sessions Trial No. 139/2011.

2. Surendra Ram (PW 6) filed a written report on 12.12.2010 divulging the fact that he happens to be resident of Village-Kataiya, PS. Bihra, Distt-Saharsa and for the present, he resides at Punjab to earn his livelihood. About two months ago, i.e. on 22.10.2010 Md. Habib son of Md.Rafid Resident of Village-Sattar, P.S-Bihra,District-Saharsa, who is a resident of adjoining village forcibly on the point of fire arm, kidnapped his wife along with cash appertaining to Rs. 24,000/- as well as ornaments of Rs. 10,000/-.



After having been informed, he came and then inquired. He met with Mukhiya, Sarpanch and respectable persons of the locality whom he informed with regard to occurrence whereupon they have assured that they will take proper steps in getting his wife to him. As they failed, on account thereof, written report is being filed having some delay.

3. After registration of Bihra PS Case No. 129/2010. police swung into action by way of investigation, examining witnesses, recovered the victim, got her examined under Section 164 CrPC as well as she was also medically examined and then, after completing investigation submitted charge-sheet against the appellant whereupon trial commenced and concluded in a manner subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has specifically been pleaded that informant Surendra Ram had borrowed Rs. 5,000/- from him and only to digest the aforesaid amount got this case filed with false and frivolous allegation.

5. In order to substantiate its case, prosecution had examined altogether 6 PWs who are PW-1, Umesh Ram, PW-2, Birendra Ram, PW-3, Durgi Sharma, PW-4, Binod Sharma, PW-5, Gita Devi, Victim, PW-6, Surendra Ram, and PW-7, Dr. Karuna Kumari. Side by



side, had also exhibited Ext-1, Written report, Ext-2, injury report.

Nothing has been adduced on behalf of accused in his defence.

6. It has been submitted on behalf of appellant that false implication of the appellant is itself apparent from the evidence of PW-5, the victim who had admitted borrowing of Rs. 5,000/- by her husband and for that, the parties had developed strained relationship. That being so, there was explicit, motive to falsely implicate the appellant. Apart from this, it has also been submitted that prosecution case suffers so many flaws. The first and foremost happens to be institution of prosecution after inordinate delay without having cogent, legal explanation. In criminal case, delay happens to be fatal to the interest of the prosecution unless and until is properly explained. During course of trial, none of the prosecution witnesses explained the delay coupled with the fact that in spite of admission at the end of PW-5, her husband PW-6 had denied that he had borrowed loan from the appellant which is indicative of the fact that informant was bent upon to digest the money borrowed from the appellant and the cumulative effect, did not justify the finding recorded by the learned lower court.

7. Furthermore, it has also been submitted that PW-5 had stated that she was kept by the appellant only for getting his cash from her husband and nothing more. So neither it could be a kidnapping nor



abduction. Apart from this, it has also been submitted that from the evidence of victim it is evident that anyhow she managed to meet with Ram Chandra, her co-villager, a labour contractor and informed who accordingly, contacted her husband who came and took the victim in his custody but subsequently, the victim resiled stating that he came along with police and so, this inconsistency is bound to ruin the prosecution case, more particularly, in the background of the fact that Investigating Officer has not been examined.

8. Now, showing the dubious character of the victim, it has been submitted that there happens to be disclosure that she was forcibly taken away by the appellant on motorcycle on the point of fire arm and then to Punjab but during midst thereof, she had not raised alarm and that is sufficient to destroy the allegation with regard to kidnapping. So, cumulative effect of the deficiency as well as considering the conduct of the victim coupled with inordinate delay in launching prosecution, non examination of I.O. is sufficient for getting the judgment impugned set aside. Accordingly, the appeal be allowed.

9. On the other hand, learned APP while controverting the submissions made on behalf of appellant, has submitted that though the Investigating Officer has not been examined but, from the facts which the other witnesses exposed during course of trial is sufficient



to identify the appellant to be abductor of the victim (PW 5) as well as her minor children and on account thereof, the judgment of conviction and sentence recorded by the learned lower court happens to be just, legal, proper and fit to be confirmed.

10. First of all, the ocular evidence is to be taken into consideration. P.W.1, during course of his examination-in-chief had stated that on the alleged date and time of occurrence he was in the village. Wife of Surendra Ram was forcibly kidnapped along with child. She was recovered in Punjab along with the child. Cash and ornament were taken away by the accused. Identified the appellant. During cross-examination at para-2, he had stated that Surendra Ram was not at Punjab at the relevant time rather he was at Delhi. He had further stated that he happens to be a driver engaged under Lakhan Yadav. He had further stated that he is not remembering the date and day of the occurrence. It was 5.00 PM. Wife of Surendra Ram was taken away over a motorcycle but he is unable to say whose motorcycle it was and what was its registration number? His wife had raised alarm, but they could not stop as the appellant was armed with pistol. He is not knowing the name of the child. He is not knowing the name of wife of Surendra Ram. In para-3, he had stated that he is not knowing whether there was money transaction between Surendra Ram and the appellant but they were friends. He had further state that he



had not seen carrying cash and ornaments but people had said like so. Birendra Ram (PW 2) had disclosed that they had not gone to the house of the appellant. They had not rushed to the police station soon after the occurrence. The case was instituted by her husband. He had further stated that he is not remembering wherefrom the police had recovered the victim. Then again said that there was transaction of money amongst them. He denied the suggestion that Surendra Ram wanted to digest the amount which he had borrowed from the appellant and on account thereof, this case has purposely been instituted by Surendra Ram.

11. PW-2 is Birendra Ram, own brother of informant, Surendra Ram. He had deposed that occurrence is of about one year ago. At that very time, he was at Delhi. He was informed that wife of Surendra Ram as well as his children have been kidnapped and then thereafter, he came from Delhi. On query, he came to know that Md. Habib had taken away wife and children of Surendra Ram. He identified the appellant. During cross-examination at para-2, he had stated that he had not seen the appellant taking away wife and children of Surendra Ram. At that very time, the husband of victim was employed at Punjab. The victim was recovered from Punjab. He has got no proof with regard to intention of the accused whether he kidnapped her to marry. Presently, the victim is residing with her



husband. He had further stated there was money transaction amongst Habib and husband of the victim. They had developed strained relationship on account of demand. Then had denied the suggestion that in the aforesaid background, the appellant has been implicated.

12. PW-3 had stated that the occurrence is of about an year ago. Habib came over motorcycle and took away wife and children of Surendra Ram. He had heard with regard to the occurrence. He identified the accused. During cross-examination at para-2, he had stated that as per instruction of Surendra he has come to depose. He is unable to disclose the date of occurrence. He had further stated that he knew regarding occurrence from the family members of Surendra Ram. Surendra Ram was at Punjab at that very time. He is unaware with the fact whether any kind of money transaction was in between Habib and Surendra. He is unaware with the fact that for an amount of Rs. 5000/-, there was some sort of strained relationship amongst them. Then there happens to be contradiction. He denied the suggestion that on account of demand of money Habib has been falsely implicated.

13. PW-4 is Binod Sharma who had deposed that about 6-7 months ago, there was an uproar in the house of Surendra Ram to the effect that Habib fled away with the wife of Surendra. He had seen Habib taking away from a distance of 1/2 K.M. He heard that wife of Surendra was recovered from Amritsar after six months. Presently,



wife of Surendra is residing with him. He also identified the accused. During cross-examination, he had stated that his house lies in front of house of Surendra Ram intervened by a road. House of Habib lies at distant place. Habib and Surendra are friends. He is unaware whether amount borrowed by Surendra from Habib was returned back or not. While Habib was taking away wife of Surendra, it was evening. Darkness had fallen. There was an uproar that she was taken away over a motorcycle. He is not knowing the registration number of the vehicle. Till the time when he came out, Habib had already escaped therefrom. At that very time, Surendra was at Amritsar. Wife of Surendra came along with Surendra. Then had denied the suggestion that in order to digest the amount of Rs. 5000/- of Habib, this false case has been instituted.

14. PW-5 is the victim. She had stated that the occurrence is of about 1 years and 6 months ago. It was 6.00 PM. She was at her house. Habib came on the motorcycle and on the pretext of fire arm forcibly took her away. He also took children. Wife of Habib offered food. After consuming food, she became unconscious. After regaining sense she found herself at Punjab. She regained sense after four days. On query, he disclosed that he will hand over her to her husband. After 2-4 days, he began to abuse her and further directed that he will not allow her to go as her husband had borrowed Rs. 5,000/-. She met



with Ram Chandra who also happens to be her co-villager whom she disclosed the occurrence. Ram Chandra informed her husband and disclosed the event. Then her husband came and took her away. Her husband came along with the police. Thereafter, her statement was recorded on the court. Identified the accused. During cross-examination, she had stated at para-2 that she was knowing Habib since a year ago. There was cash transaction in between Habib and her husband. Rs. 5,000/- was taken by her husband from Habib was not repaid and for that, Habib was regularly demanding. She had further stated that there was no registration number affixed over the motorcycle. She had not raised alarm at the time of kidnapping. Her husband resided at Punjab. Ram Chandra happens to be contractor there. Habib works under him. Ram Chandra had informed her husband. She accompanied her husband along with children. In para-3, she had stated that except this, she had stated that no other kind of occurrence was committed with her. Then she said that she had got no information whether Ram Chandra was also borrowing money from Habib and that she along with her husband had got full knowledge regarding the same. She had denied hatching of conspiracy, in order to digest the money borrowed from Habib, whereunder this false case has been instituted against Habib.

15. PW-6 is Surendra Ram/informant, husband of the



victim. He had stated that the occurrence is of dated 22.10.2010. On that day, Md. Habib on the point of fire-arm abducted his wife as well as children. At that very time, he was at Punjab. After kidnapping, his brother, Birendra informed him that his wife and children had been kidnapped by Habib on the pretext of fire arm. After 5-7 days of getting such information, he returned from Punjab. He inquired from his brother as well as Bhabhi whereupon, they elaborately detailed. His brother is separate from him. Then thereafter, he began to search his wife and children but could not trace. Then thereafter, on 12.12.2010 he had filed a written report before the police whereupon a case has been registered. During course of investigation, police took him to Punjab (Amritsar). With the help of Punjab Police, Habib was arrested while his wife and children were recovered from his place. Then they returned back conjointly. Statement of his wife was recorded in the court. Then thereafter, she was medically examined and then his wife was handed over to him and accordingly, he brought his wife along with children. On query, she disclosed that on the pretext of fire-arm, Habib kidnapped her. He had also taken ornaments from her. He had also claimed to identify the accused. During cross-examination at para-2, he had stated that Habib was on visiting terms for the last one year. In para-3, he had stated that about six months ago, Habib made house trespass as a result of which he



was apprehended and handed over to the police. Then thereafter, he had not allowed Habib at his house. In para-4, he had stated that he had not borrowed Rs. 5,000/- any time from Habib. If his wife has disclosed like so, happens to be wrong/incorrect. At the time of occurrence, he was at Punjab. In para-5, he had stated that he does not know Ram Chandra. Then had been suggested that it is not a fact that he knew Ram Chandra and he works under him. He had also denied the suggestion that his wife was residing at Punjab. He also denied the suggestion that when Habib demanded Rs. 5000/- which he had borrowed, then thereafter, after leaving his wife at Punjab he came to his house and then got this case filed. At para-6, he had shown ignorance with regard to the fact that Habib was residing at Punjab along with wife of and children. In para-7, he had stated that police had arrested Habib at Punjab. On that day itself his wife was traced out. He was arrested at Amritsar. He was arrested at Bairka Phatak. He was residing at Manda. In para-8, he had stated that Bihra police had gone to Punjab. Police had got information and on that very basis informed him that his wife was kept at Punjab by Habib. At para-9, he had given boundary of his house, West, Road and house of Sohan Sharma, North, house of his brother, Ashok Ram, South, houses of Sanwa Devi and Ashok. Then at para-10 had denied suggestion that no such kind of occurrence had even taken place but only to digest the



money which he had borrowed from Habib, this case been filed.

16. PW-7, Dr. Karuna Kumari who had examined the victim on 29.01.2011 and had not found any kind of injury over her person as well as over her private part. She had not found hymen. Uterus was normal. On pathological examination, she had not found spermatozoa dead or alive and as per clinical finding she was not conclusive over rape. Furthermore, age of the victim has been disclosed as in between 18 to 19 years.

17. Appellant has been convicted for an offence punishable under Section 365 IPC. Before scrutinizing the evidence, it looks better to see as to how Section 365 IPC which reads as follows:-

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.

18. In order to attract Section 365 IPC, there should be kidnapping and the accused thereby intended that kidnapped should be kept on wrongful or secret confinement. From the evidence of the victim as, the other witnesses are not at all relevant in the background of the fact that they are not an eyewitness to the occurrence rather more or less they happen to be hearsay

19. Though, during course of cross-examining, the



appellant himself changed PW-1 to an eyewitness which, during course of the his examination-in-chief he had not stated like so, kidnapping of victim, a married woman out of her husband's custody is found properly substantiated. Furthermore, from the evidence of PW-5, victim it is evident that the appellant had not controverted nor challenged the theme of kidnapping and in likewise manner, had not controverted her assertion that she was taken to Punjab by him. In likewise manner, she had not been cross-examined with regard to presence of police along with her husband and was recovered from the place of appellant. This fact is found further exposed when the evidence of husband PW-6 has been gone through who elaborately been cross-examined and during course thereof, happens to be consistent that he along with local police had gone to Amritsar and with the help of Punjab police, raid was conducted and Habib was arrested wherefrom victim was also recovered. That means to say, presence of victim at the place of Habib is found properly established. Non examination of Investigating Officer in the facts and circumstances of the case is not at all found averse to prosecution as neither there happens to be contradiction in the evidence of witness nor recover of PW-5, victim along with children has been denied.

20. That being so, the conviction and sentence recorded by the learned lower court is found in accordance with law whereupon



the instant appeal sans merit and is accordingly, dismissed.

21. Appellant is on bail. Hence, his bail bond is cancelled directing him to surrender before the learned lower court to serve out remaining part of sentence, failing which the learned lower court will proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

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