

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.119 of 2015**

Arising Out of PS.Case No. -143 Year- 2009 Thana -MANIHARI District- KATIHAR

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Rajul Bind, S/o Late Siya Ram Mahto @ Bind, resident of village - Charwaha
Vidyalaya Manihari, P.S. - Manihari, District - Katihar.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Jitendra Kumar Giri-Advocate

For the Respondent/s : Mrs. Abha Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 03-08-2017

Appellant, Rajul Bind has been found guilty for an offence punishable under Sections 366 and 376 of the I.P.C. and under both heads has been directed to undergo rigorous imprisonment for seven years as well as to pay fine appertaining to Rs.1,000/- and in default thereof, to undergo simple imprisonment for a month, additionally with a further direction to run the sentences concurrently having the period undergone during trial set off under Section 428 Cr.P.C. vide judgment of conviction dated 19.12.2014 and order of sentence dated 23.12.2014 passed by the Additional Sessions Judge-3rd, Katihar in Sessions Trial No.270 of 2010/ 431 of 2010.

2. PW-2 Rabia Khatoon had filed written report before the Superintendent of Police, Katihar alleging inter alia that her daughter (name withheld PW-1) aged about 15 years while had gone



to bring vegetables from Manihari Market on 31.10.2009 at about 5.00 p.m., did not return. On account thereof, she gone in her search, but could not get a clue. In the aforesaid background, she shown her apprehension against the appellant Rajul Bind to have kidnapped her as, about a year ago, he had taken Rs.10,000/- from her on the pretext that they will bifurcate profit half and half from the earning by selling 'striped guard' (Parwal). She was insisting for the aforesaid amount for which, Rajul Bind was threatening that if you persist in demand then, she will have to face its consequence. Out of fear, she had not complained. After disappearance of her daughter, wife of Rajul Bind was threatening that she will commit suicide and will implicate her. Sons of Rajul Bind namely Karwa and Dharmendra were threatening to ravish as well as to commit loot of her belongings as well as to kidnap her sons and so, it has been prayed that necessary steps be taken in the aforesaid circumstance.

3. The aforesaid written report was forwarded to the local police as a result of which, Manihari P. S. Case No.143 of 2009 was registered under Section 366A of the I.P.C. and as is evident, first of all, accused Dharmendra was apprehended whereupon, chargesheet was submitted against him keeping the investigation pending against the others against whom, supplementary chargesheet was submitted and that being so, the trial commenced and concluded in a manner, the subject matter of instant appeal.



4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence. It has also been pleaded that on account of animosity prevailing amongst the parties, this case falsely been instituted in order to teach a lesson.

5. In order to substantiate its case, prosecution had examined altogether seven PWs, out of whom, PW-1 victim, PW-2 Rabia Khatoon, PW-3 P. K. Ratan, Judicial Magistrate, 1st Class, who had recorded the statement of the victim under Section 164 of the Cr.P.C., PW-4 Dr. Laxmi Sen, the doctor, who had examined the victim, PW-5 Birendra Jha, a part Investigating Officer, PW-6 Nawab, brother of victim, PW-7 Khushbu Khatoon, sister of the victim. The prosecution had also exhibited the document viz. Exhibit-1 injury report, Exhibit-2 endorsement over the written report and Exhibit-3 formal F.I.R. Defence had also exhibited certified copy of deposition under Exhibit-A series relating to Sessions Trial No.655 of 2012.

6. From the evidence of the victim, PW-1, it is evident that she happens to be a consenting party, otherwise there was no occasion for her to carry Rs.5,000/-, which she also disclosed to have snatched away by the appellant. She continued, enjoyed the company of appellant right from her place to Punjab without any resistance, protest. It is also evident that she was never threatened nor allured. She remained at Punjab for three consecutive months having full



access without any obstacle or rigor as she used to work as a labourer along with the appellant during the intervening period. It has also been disclosed that accused had indulged in sexual activity. In the aforesaid background, the crucial aspect happens to be with regard to status of the victim whether she happens to be major or minor. Had there been a conclusive evidence that she happens to be a major, then in that circumstance, her conduct would be adverse to her, simultaneously lend in favour of appellant by way of recording judgment of acquittal. To trace out the same, evidence of all the witnesses have minutely been gone through. It is evident that in the written report, there happens to be disclosure at the end of the informant (PW-2) that victim was 15 years of age. But during course of evidence, it is evident that she had not disclosed her age nor from her cross-examination, it is evident that she was tested on that very score. In likewise manner, happens to be the evidence of PW-6, PW-7. Now, coming to evidence of PW-1, victim, it is evident that she also had not disclosed her age whether she happens to be major or minor at the time of occurrence. But from the format of the deposition, it is evident that she had disclosed her age to be 17 years and occurrence, as alleged, occurred about one year, five months ago. So, on that very score, she was minor below the age of 16 years. Surprisingly, the victim was not at all cross-examined to explore whether she was minor or major on the alleged date of occurrence.



Now, the only evidence remains that of PW-4, Dr. Laxmi Sen, who happens to be a gynaecologist. She had, on her own, estimated the age of the victim in between 18-19 years. A gynaecologist would not be recognized to be competent enough to opine over age of victim, unless and until, the victim is to face the ossification test for that purpose and only thereafter, age of the victim would be given. Consequent thereupon, the age so ascertained by the PW-4, a gynaecologist would not be, even prima facie piece of evidence in order to ascertain the identity of the victim. From the judgment impugned Para-24 and 25, the learned lower Court had perceived the statement of the victim to be major on the basis of finding recorded by the PW-4 and on that very score, altered the finding from Section 366A and 366 of I.P.C. whereunder appellant was charged not at all found favoured and so, needs interference. So far rape is concerned, PW-1, the victim did assert in her examination-in-chief that during her stay, she was raped. Defence, though cross-examined victim on other aspect, but did not cross-examine on that score. The evidences of the other PWs are irrelevant on that very score as they would not be witness on that score. PW-5 is the part I.O. From his evidence, it is apparent that he had not recovered the victim girl. From his evidence, it is also evident that he had shown apprehension of appellant on 09.12.2009, but the same happens to be mistake, as from the record, it transpires that Dharmendra was arrested. Moreover from the evidence



of PW-1, it is evident that she was recovered from the place of appellant.

7. So far PW-4, doctor is concerned, during course of examination of victim, she had found absence of injury over her body or private part. Hymen found old ruptured. Vaginal canal admitted one finger loose, absence of spermatozoa. However, opined that the victim was used to sexual intercourse since last long and the same is found from the evidence of PW-1, the victim.

8. Because of the fact that being minor, neither she is to be enticed away nor her consent happens to be recognizable in the eye of law and that being so, with modification with regard to finding of the learned lower Court relating to Section 366 to Section 366A I.P.C. the conviction as well as the sentence so inflicted by the learned lower Court is maintained, on account of being this appeal meritless is accordingly, dismissed. Appellant is under custody, which he shall remain till saturation of the sentence.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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