

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.93 of 2009

(Against the judgment of conviction and order of sentence dated 19.4.2006, 22.4.2006, 30.1.2006 and 31.1.2006 passed by Shri Anit Ram, 4th Additional District and Sessions Judge, Gopalganj in Sessions Trail No. 78 of 2005/12 of 2005 and 44/2005 arising out of Barauli P.S. Case No. 134 of 2003)

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Harendra Yadav, son of Ramashish Yadav, resident of village- Sadauwan Kothi, P.S.- Sidhwalia, District-Gopalganj.

..... Appellant/s

Versus

State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 190 of 2006

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Sahabuddin Mian, son of Nazabuddin Mian, resident of village- Sadauwan, P.S.- Sidhwalia, District-Gopalganj.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 443 of 2006

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Unush Mian @ Yunus Mian, son of late Ali Raza Mian, resident of village- Sadauwan, P.S.- Sidhwalia, District-Gopalganj.

..... Appellant/s

Versus

State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 210 of 2006

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1. Nazarul Mian, son of late Zahir Mian
2. Tasauwar Mian, son of Nazarul Mian, both are resident of village-Sadauwan Kothi, P.S.- Sidhwalia, District-Gopalganj.

..... Appellant/s

Versus

State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 205 of 2006

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Hakim Mian, son of late Jahir Mian, resident of village- Sadauwan, P.S.- Sidhwalia,
District-Gopalganj.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.93 of 2009)

For the Appellant/s : Mr. Ranbir Singh, Amicus Curiae
Mr. .S.N.P. Singh, APP
Mr. Binod Bihari Singh, APP

For the Respondent/s : Mr.

(In CR. APP (SJ) No.190 of 2006)

For the Appellant/s : Mr. Raghav Prasad
Mr. Neeraj Kumar @ Sanidh
Mr. Maheshwar Prasad

For the Respondent/s : Mr.

(In CR. APP (SJ) No.443 of 2006)

For the Appellant/s : Mr. : Mr. Raghav Prasad
Mr. Neeraj Kumar @ Sanidh
Mr. Bipin Kumar,APP

For the Respondent/s : Mr.

(In CR. APP (SJ) No.210 of 2006)

For the Appellant/s : Mr. Raghav Prasad
Mr. Neeraj Kumar @ Sanidh
Mr. Maheshwar Prasad

For the Respondent/s : Mr. S.A. Ahmad, APP

(In CR. APP (SJ) No.205 of 2006)

For the Appellant/s : Mr. Raghav Prasad
Mr. Neeraj Kumar @ Sanidh
Mr. Maheshwar Prasad

For the Respondent/s : Mr. S.N.P. Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
CAV JUDGMENT

Date: 17.10.2017

All these appeals arise out of Barauli P.S. Case No. 134
of 2003.

1. Cr. Appeal No. 93 of 2009 and Cr. Appeal No. 443 of
2006 arise out of Sessions Trial No. 44 of 2006 whereas Cr. Appeal



No. 190, Cr. Appeal No. 205 of 2005 and Cr. Appeal No. 210 of 2006 arise out of Sessions Trial No. 78/12 of 2005.

2. Both the Sessions Trial Nos. 44 of 2005 and 78 of 2005 are essentially of the same police case but the trial was splited and Yunus Mian and Harendra Yadav were tried for the offence under sections 363/364/34 of the Indian Penal Code in Sessions Trial No. 44 of 2005 whereas appellants Tasauwar Mian, Sahabuddin Mian, Nazarul Mian and Hakim Mian were tried in Sessions Trail No. 78 of 2009.

3. The judgment in Sessions Trial No. 78 of 2005 was rendered on 30.1.2006 whereas judgment in Sessions Trial No. 44 of 2005 was delivered on 19.5.2007. Since both the trial arises of the Barauli P.S. Case No. 134 of 2003 and appellants were committed in Sessions Trail vide order dated 27.1.2005 and they have been charged on the same allegation of commission of crime under sections 363/364/34 of the Indian Penal Code. The judgment in both the cases in Sessions Trial No. 44 of 2005 and 78 of 2005 are almost copious and they have been convicted for the offence under sections 363/364/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years for the offence under section 364/34 and seven years for the offence under section 363/34 of the Indian Penal Code.

4. Both the appeals are heard together and are being disposed of by this common judgment.



5. The prosecution case, in short, is that the informant, Noor Jahan Khatoon filed a complaint petition in the court of C.J.M., Gopalganj on 16.07.2003 alleging therein that the husband of the informant-complainant resides in Arab country in connection with his service and the informant and her dewar and her son Ishfak, aged about 10 years, reside in the village. It is further alleged that Ishfak reads in Class III. The accused persons, namely Tasauwar Mian, Md. Hakim Mian and Md. Nazarudin are next door neighbours of the informant. The accused persons were always demanding money from the informant. It is alleged that on 8.7.2003 at about 6.30 P.M. in the evening, Ishfak, the son of the informant was playing in the Sahan and in the meantime the accused Tasaurar Mian came with his Maruti Car, in which accused Nazarul Mian and Hakik Mian were sitting. It is further alleged that the accused Tasauwar Mian told the son of the informant that let us go to visit sadauwan Bazar and on this pretext the accused got the son of the informant boarded in his car and went towards Bazar but when Ishfak did not return home till 10 P.M. the complainant started searching her son and in course of search she alongwith other witnesses went to bazaar, where she learnt that accused Tasauwar Mian was driving the car and other accused persons named in the FIR were sitting in the car alongwith her son and they went towards east (Mohammadpur). Thereafter the informant came back to her house and she was waiting for return of the accused



persons.

6. It is further alleged that after two days of the alleged occurrence of kidnapping of Ishfak, the accused Tasauwar Mian, Nazarul Mian and Hakim Mian came back to their house. The informant went to the house of the accused persons and asked the accused persons about her son whereupon the accused person said that her son is in Siwan at the house of his relatives and after two days he will come to his house and the informant waited for two days for the return of her son but her son did not return. Then on 14.2.2003 she again enquired from the accused persons about her son on which the accused Tasauwar Mian said that her son is in custody of criminals and they are demanding one lakh by way of 'Firauti' and if she will pay the amount of Firauti her son will be returned. Thereupon the informant started weeping and also informed the police station but the officer-in-charge of P.S. concerned did not register any case then the complainant filed a petition before the S.P., Gopalganj who also not taken any action in this regard, therefore, the informant filed the said complaint petition before the C.J.M., Gopalganj, who sent the complaint petition to the P.S. concerned for institution of case and investigation of the case and this case was registered on 19.07.2003 at Sidhawalia (Barauli) P.S. against the accused persons and investigation was taken up and after completion of investigation the investigating officer submitted charge-sheet against the accused persons for the offence under sections 363/364/34 of the Indian Penal



Code.

7. Thereafter, the learned Magistrate took cognizance on 27.2.2005 and the case was committed to the court of sessions as the case is exclusively triable by the court of sessions. The accused persons have pleaded not guilty and as such they were put on trial.

8. In order to prove the charges, the prosecution has examined ten witnesses out of which P.W.1 is the co-villager. P.W. 2 and 3 are the uncle of the victim, P.W. 4 is the mother of the victim and informant of the of the case. P.W. 5 is the 'Mama' of the victim boy. P.W. 7 is the chance witness. P.W. 8 is the I.O. of the case and P.Ws. 6, 9 and 10 are the formal witnesses.

9. The trial court on the basis of scrutiny of the evidence of the prosecution held out that the accused persons are guilty of commission of offence punishable under sections 363/364/34 of the Indian Penal Code and vide judgment and order of sentence dated 30.1.2006 and 31.1.2006 they have been awarded punishment of 10 years rigorous imprisonment for the offence under section 364 of IPC and rigorous imprisonment for seven years for the offence under section 363/34 of the Indian Penal Code in Sessions Trial no. 78 of 2005 so far as the appellants Tasauwar Mian, Nazarul Mian and Hakim Mian are concerned and on the basis of the same material the trial court convicted the appellants Yunus Mian and Harendra Yadav in Sessions Trial No. 44 of 2005 vide a separate judgment of conviction and sentence on 19. 5.2007 they have been awarded



punishment of 10 years rigorous imprisonment for the offence under section 364/34 of the Indian Penal Code and seven years rigorous imprisonment for the offence under section 363/34 of the Indian Penal Code

10. Cr. Appeal No. 93 of 2003 is a jail appeal whereas other appeals namely, Cr. Appeal No. 190 of 2006, Cr. Appeal No. 205 of 2006, Cr. Appeal No. 210 of 2006 and Cr. Appeal No. 443 of 2006 are regular appeals filed by the appellants.

11. The appellant in Cr. Appeal No. 210 of 2006 namely, Tasauwar Mian and Nazarul Mian were enlarged on bail on completion of custody approximately six years whereas appellant Hakim Mian was granted bail on completion of four and half years.

12. The appellant Yunus Mian was granted bail after completion of two years and nine months and appellant Harendra Yadav was granted bail after completion of three years.

13. In Cr. Appeal No. 93 of 2009 Mr. Ranbir Singh appeared as Amicus Curiae and in another case Mr. Niraj Kumar appeared on behalf of the appellant and Mr. S.N.P. Singh, A.P.P. appeared on behalf of the State.

14. In this batch of the appeal Mr. Neeraj Kamar counsel appearing on behalf of the appellant case has submitted that the appellant has been convicted only on the basis of suspicion. There is no material or legal evidence to establish the charges beyond all reasonable doubts. The counsel for the appellant has submitted that



the informant of the case is the mother of the victim boy and her conduct in this case is most artificial and unnatural. He submitted that keeping mum for eight days in filing of complaint in the matter and lodging of FIR after a delay of nine days renders the prosecution case doubtful. He submitted that if the mother of the victim has seen his son kidnapped and that too by her pattidar and next door neighbours it is most unreasonable and artificial to believe the story of the informant in keeping silence for such a long time and filing complaint only on 16.7.2003 and thereafter lodging FIR on 13.7.2003. He submitted that unexplained delay in lodging of FIR makes the whole case under serious doubt and on that score the prosecution case is liable to be disbelieved. He next submitted that from the prosecution case, it appears that the prosecution story are in two parts. The first part is that the victim boy was taken by Tasauwar and Nazarul while he was playing in the Sahan on the Maruti Car of the Tasauwar Mian. The second part of the story is that when the informant did not find that her son has not returned till 10:00 P.M. then in order to search her son she along with other witnesses went to sadauwan Bazar where she learnt that Tasauwar Mian was driving the car and in the said car the persons named in the FIR were sitting along with her son. He submitted that the informant has not disclosed in her complaint about the person who disclosed in Sadauwa bazaar that accused persons were sitting with her son in a Maruti car, thus, he questioned the credibility of the FIR itself. He next submitted that in the instant case



there is no material to substantiate any motive to kidnap the victim boy. Referring to the material exhibit, he submitted that there was absolutely no material to establish the motive behind kidnapping. Referring to the deposition of the P.W.2 to P.W.4 he submitted that P.W.2, P.W.3 and P.W.4 have made mere contradictory statement and in particular he refers to para-17 to 20 of the prosecution witnesses no.2 and submitted that the statement of the aforesaid witnesses if read as a whole one could find that there statement stand contrary and contradictory. He refers the statement of I.O. (P.W.8) in para 3 and 13 and submitted that trial court committed error in holding the appellant guilty. Counsel for the appellant has emphatically argued that trial court has failed to consider the fact that appellants are Pattidar and next door neighbours and as such the court has not appreciated the fact that such next door neighbours and Pattidar could not have committed the alleged offence in broad day light. He also submitted that if the informant came to know about kidnapping of her son, the natural conduct would have been to lodge FIR on the same day at least at 10:00 P.M. when she alongwith others visited to Sadauwa bazar to search her son. The natural conduct would have been to report the matter to the police, he submitted that in fact the victim boy was not kidnapped but he was missing and as such the informant was searching her son and the case of kidnapping was subsequently build up on suspicion. Referring to exhibit-8 he submitted that one cannot find any motive of kidnapping of the boy on the basis of Ext.8.



15. Learned counsel for the appellant submitted that appellants Tauswar Mian and Nazarul Mian has already served punishment of six years of imprisonment and others have also completed approximately three years and above sentence of imprisonment, this court should consider the case of appellants pragmatically in a case where the genesis of the crime is unfounded, motive is totally lacking and appellants have been convicted only on suspicion. The court should consider the desirability of allowing of the appeals and setting aside the judgment of conviction and order of sentence.

16. Counsel appearing on behalf of the State submitted that in the totality of the facts of the case when the victim boy was found by the witnesses in the company of accused persons the trial court has committed no error in convicting the appellant. He submitted that delay in lodging of FIR has been explained as the police was not registered the case and as such the mother of the victim boy has approached the Judicial Magistrate on 16.8.2003 and thereafter FIR was registered on 18.7.2003.

17. On going through the entire materials on record, I find substance in the submission of the counsel for the appellant that the informant was under the believe that the boy is missing and that is the reason the informant has waited till 14.7.2003 and then she approached the S.P. on 14.7.2003 and thereafter she filed complaint. I also find substance in the submission of the appellant that the conduct



of the mother of the victim boy is not natural. If her version is accepted that the accused persons namely, Tasauwar Mian, Nazarual Mian and Hakim Mian used to always demand money in such a situation is not expected to wait for two days for returning of her son. She has knowledge that her son was accompanied by the appellants-accused next door neighbours and Pattidar. Her further conduct of further waiting on the assurance of the appellants that her son is in Siwan at the house of his relatives and after two days he will come to his house is the reason for non filing FIR is also not trustworthy. Further conduct of the informant in believing the story of Tasauwar that her son is in the custody of criminals and he demanded one lakh rupees by way of Firouti then he will be returned on payment of Firouti appears to be a story coined to explain delay in lodging FIR.

18. In the totality of the facts and circumstances of this case, when the trial court itself disbelieved the allegation of kidnapping for ransom and that is why the appellants have been convicted under section 363/364/34 of the Indian Penal Code and not under section 364A of the IPC the case of prosecution case as framed is not trustworthy.

19. Having considered the entire facts and circumstances and the peculiar facts and conduct of the parties, the conviction of the appellants under section 364/34 are set aside and conviction under section 363/34 of the Indian Penal Code is confirmed.

20. Considering the fact that the case is of 19.1.2003 and



appellants Tasauwar Mian and Nazarul Mian have remained in custody for six years and the appellant Hakim Mian has remained in custody for two years and above and appellant Yunus Mian has remained in custody for two years and nine months and Harendra Yadav has remained in custody for three years and as such no useful purpose could be served by sending them in jail custody and I find that period undergone is sufficient punishment and as such while upholding the conviction of the appellant under section 363/34, I direct that the sentence undergone should be treated as sufficient sentence and accordingly they should be discharged from the liability of bail bonds.

21. With the aforesaid modification in the order of trial court the present appeal stands partly allowed. The appellants who are on bail are discharged from the liability of the bail bonds.

(Anil Kumar Upadhyay, J)

Ravi/-

AFR/NAFR	NAFR
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