IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.473 of 2013

Arising Out of PS.Case No. -147 Year- 2011 Thana -KADMA District- KATIHAR

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Rajendra Rai S/O Late Patu Rai @ Fattu Rai Resident of Village- Shikarpur Mahinagar, P.S.- Baliya Belon, District- Katihar

.... Appellant

Versus

The State of Bihar

.... Respondent

with

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Criminal Appeal (SJ) No. 494 of 2013

Arising Out of PS.Case No. -147 Year- 2011 Thana -KADMA District- KATIHAR

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Ramu Rai S/O Rajendra Rai Resident of Village- Sikarpur Mahi Nagar, P.S.- Baliya Belon, District- Katihar.

.... Appellant

Versus

The State of Bihar

.... Respondent

with

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Criminal Appeal (SJ) No. 514 of 2013

Arising Out of PS.Case No. -147 Year- 2011 Thana -KADMA District- KATIHAR

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Pradeep Rai S/O Satiya Rai Resident of Village- Ujain, Police Station- Baisi, District- Purnea

.... Appellant

Versus

The State of Bihar

.... Respondent

with

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Criminal Appeal (SJ) No. 572 of 2013

Arising Out of PS.Case No. -147 Year- 2011 Thana -BALIA BELON District- KATIHAR

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Kakru Rai S/O Late Patru Rai Resident of Village- Mahi Nagar Shikarpur, Police Station- Balia Belone, District- Katihar

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.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :
(In CR. APP (SJ) No.473 of 2013)
For the Appellant/s : M/S Bhola Prasad, Mukesh Kr. Jha, Advocates
For the Respondent/s : Mr. S.A.Ahmad, APP
(In CR. APP (SJ) No.494 of 2013)
For the Appellant/s : Mr. Bhola Prasad, Advocate
For the Respondent/s : Mr. Z. Hoda, APP
(In CR. APP (SJ) No.514 of 2013)
For the Appellant/s : Mr. Md. Qumrul Hoda, Advocate
For the Respondent/s : Mr. Z. Hoda, APP
(In CR. APP (SJ) No.572 of 2013)
For the Appellant/s : Mr. Md. Rahmatullah, Mr. Fahinuddin, Advocates
For the Respondent/s : Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
ORAL JUDGMENT
Date: 21-07-2017

All the above mentioned four appeal are directed against the judgment and order dated 6.6.2013 and 12.6.2013 respectively, passed by Sri Bateshwar Nath Pandey, Sessions Judge, Katihar in Sessions Trial No. 54 of 2012, arising out of Kadwa (Balia Belon) P.S.Case No. 147 of 2011 by which he has convicted the four appellants under Sections 363/34 IPC as well as under Section 372/34 IPC and convicted appellant Ramu Rai under Section 376 IPC. All the four appellants have been sentenced to undergo R.I. for seven years and a fine of Rs.5,000/- under Sections 363/34 IPC and in default they have to undergo R.I. for one year and further sentenced them to undergo R.I. for seven years under Section 372/34 IPC and a fine of Rs.10,000/- and in default they have to undergo R.I. for one year.

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Further appellant Ramu Rai has been sentenced to undergo R.I. for seven years and a fine of Rs.10,000/- and in default he has to undergo R.I. for one year under Section 376 IPC.

2. Prosecution case as per written report is that P.W.9, Kutub Alam has lodged his written report before police stating therein, inter alia, that on 9.8.2011 his sister has gone to ease herself at 8 P.M. but she has not returned and thereafter, in spite of search she was not found. Further case is that on 10.8.2011 at 11 P.M. his brother has received an informant from Korahat on mobile that accused persons were apprehended, who had kidnapped his minor sister. Further case is that thereafter, he along with his family members and villagers went to Korahat and found the minor sister along with the appellants. It is further alleged that appellants had kidnapped her with a view to sell her for the purpose of prostitution. It has also come that her sister told that while she went to ease herself the appellants had kidnapped her and taken her for selling her and she has also disclosed that at Korahat, seeing some persons, she raised alarm and they were apprehended. On the basis of written report Kadwa (Balia Belon) P.S.Case No. 147 of 2011 has been instituted under Sections 363, 372/34 IPC and after investigation police has submitted charge-sheet against the appellants under Sections 363 and 376 IPC. Cognizance of the offence has been taken and the case has

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been committed to the court of sessions, which was taken up by the court of Sessions Judge for trial and disposal.

3. During trial charges were framed against the appellants under Sections 363, 372 and 376 IPC.

4. In support of prosecution case the prosecution has examined altogether 13 witnesses, they are Mantu Sah (P.W.1), Md. Safiullah (P.W.2, who is I.O. of the case), Dr. Kanak Ranjan (P.W.3), Md. Jamil Akhtar (P.W.4), Md. Izhar (P.W.5), Juned Alam (P.W.6), Ansar Alam (P.W.7), Md. Shamim Akhtar (P.W.8), Kutub Alam (P.W.9, who is informant of the case), Noorshadi Khatoon (P.W.10, who is the victim), Md. Madsud (P.W.11), Rukhsana Khatoon (P.W.12) and Manjoor Alam (P.W.13). Out of the aforesaid witnesses, P.W.2 is the Investigating Officer, P.W.3 is Medical Officer, who has examined the victim.

5. Apart from the above evidence, the following documents have been admitted into evidence, they are Ext.1; signature of Mantu Sah on seizure list, Ext.2; signature of Mantu Sah on written report, Ext.3; forwarding of Fardbeyan by Md. Saffiullah, Ext.4; signature on FIR by Imam Hassan, Ext.5; signature and writing of Md. Saffiulla in FIR, Ext.6; Memo of arrest, Ext.7; Medical report and Ext.8 is statement of victim under Section 164 Cr.P.C.

6. Apart from the above evidence, one witness has been

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examined on behalf of defence, who is Somani Rai, who has stated that there was love affairs between appellant Ramu Rai and the victim and, as such, with a view to solemnize marriage they have taken the victim and no such occurrence took place and appellants have falsely been implicated in this case.

7. After conclusion of trial the appellants have been convicted and sentenced, as stated above.

8. Learned counsel for the appellants has assailed the judgment on the ground that there are contradictions between the evidence of victim girl and her statement under Section 164 Cr.P.C. and, as such, the prosecution case as stated in the FIR. stands falsified. It has further been submitted that evidence of the victim itself shows that there is contradiction with respect to place of occurrence as stated in the FIR that she had gone to ease herself and thereafter she was kidnapped, whereas in her statement under Section 164 Cr.P.C. she has stated that they have taken her from the house, whereas in her evidence she has stated that she had gone to Baspatti from where she was kidnapped. It has also been submitted that evidence of the victim also shows that she has not raised any alarm, rather when the people stopped the vehicle and enquired from them, she informed about the occurrence. Further submission is that prosecution case is full of improbabilities and absurdities as it is not believable that Ramu Rai

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would commit rape in presence of his father and uncle or they in connivance were on way to sell her for prostitution. So far appellant Pradeep Rai is concerned, it has been submitted that he only a tempo driver and besides that there is no other involvement, but learned Trial Court did not consider above aspect of the matter. Further submission of learned counsel is that the allegation of committing rape does not find support from the medical report and the victim was found to be 17-18 years in the medical report.

9. Submission of learned counsel for the appellants is that the whole prosecution case is full of absurdity and improbability as the conduct of the informant (P.W.9) shows that he has not lodged either sanha or FIR with respect to the kidnapping of the girl or even the girl being traceless and waited for two days and when the girl was recovered at Karahat he has filed the case making such allegation. It has also been submitted on behalf of defence a witness has been examined showing that there is love affairs between appellant Ramu Rai and the victim girl and they are going for marriage and D.W.1 has also stated in her evidence in court that in spite of the fact the learned trial court has not considered the aforesaid evidence in right prospective and convicted the appellants.

10. It has also been submitted that on the basis of prosecution case as well as the evidence available on record that no

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case under Section 372 IPC is made out as there is no evidence available on record that they had talked to any one for selling her or handing over her, rather he was arrested while coming along with the appellants.

11. In the circumstances, as mentioned above, it has been submitted that conviction of appellants is not sustainable in the eye of law.

12. On the other hand, learned APP has submitted that there are sufficient evidence available on record to show that the appellants were apprehended by other persons, who are neither related to the informant nor they are in any way interested, before them P.W.10, the victim has disclosed about the occurrence and in such a situation it cannot be said that they have falsely been implicated. Further submission is that there is nothing available on record to show that there was any love affairs between the parties though some cross examination has been made but he has denied the same and the evidence of defence is vague that there was some relationship between appellant Ramu Rai and the victim girl and, as such, evidence of D.W.1 does not inspire any confidence.

13. In the above background of the case, this Court has to scrutinize the evidence available on record. On perusal of prosecution evidence it appears that P.W.9 is the informant of this

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case and his evidence in chief shows that his sister went to ease out and she did not return for which he searched for her till next day and thereafter he received a phone call from Korahat that his sister was caught in a tempo and he was called and he along with Mukhiya and others went to Korahat and informed the police. Thereafter police has come. This witness is not an eye-witness of the kidnapping and from his evidence it appears that he has only stated that his sister was kidnapped and further evidence is that she was taken to Korahat in a tempo by the accused persons.

14. P.W.10 is the victim girl and her evidence shows that at 8 P.M. she went out to ease herself and accused persons, namely, Ramu Rai, Rajendra Rai and Kakru Rai had forcibly apprehended her, dragged her by putting clothes on her mouth and she was taken Katra Chowk on a tempo and during whole night she was kept at Roshanganj where accused Ramu Rai had committed rape on her twice and on the next day when she was taken back to Korahat in a tempo the accused Rajendra Rai, Ramu Rai and Kakru Rai were talking that they would sell the girl, when the tempo teached at Korahat seeing the other persons there the girl raised alarm and thereafter the tempo was stopped and she has informed them that appellants had kidnapped her for sale and on such information they informed the village people of the girl on phone. Further evidence is

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that thereafter brother of the victim, Mukhiya of village and other people came and informed the police. She has further stated in her evidence that her statement was recorded under Section 164 Cr.P.C.

15. P.W.1 had also supported the prosecution case about her recovery from Karahat and P.W.4, who is her cousin brother, has also stated about kidnapping while she went to ease herself. Though both of them are not eye-witnesses of either kidnapping or recovery. P.W. 5, P.W.6, P.W.7 and P.W.8 are the witnesses on the point of girl being rescued from the appellants and their evidence shows that they saw a lady, going along with appellants on a tempo and she raised alarm and on alarm being raised they stopped the tempo and she has informed them that accused persons were taking her to sell her. P.W.11 is the father of the victim and his evidence in chief shows that he has also corroborated the prosecution case about the kidnapping of girl while she went to ease herself. P.W.12 is the sister of the victim and she has also supported the prosecution case in her evidence in chief.

16. P.W.3 is the Doctor, who has examined the victim girl after her recovery on 12.8.2011 and she has stated in paragraph-3 of her evidence that no mark of injury was present on her body or on external genetallia. Hymen was old torn, Vaginal orifice admitted two fingers. Vaginal swab report given by Pathologist Dr. R. Suman, on

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microscopical examination no spermatozoa was found and from the above findings the Doctor was of the opinion that she had been used for sexual intercourse and the Medical Report was marked as Ext.7. In her cross examination by defence she has stated that no external and internal injury was found on the body of victim.

17. P.W.2 is the Investigating Officer and he has also stated that the on the basis of written report of Kutub Alam (P.W.9) formal FIR was lodged and he has also seized the auto and recorded the statements of witnesses. His evidence also shows that he has inspected both the place of occurrence at Korahat and at the village of the girl. Thereafter he sent the girl for medical examination and also got her statement recorded under Section 164 Cr.P.C.

18. On perusal of the FIR as well as evidence on record, as stated above, it appears that there is consistent evidence available on record that the girl was traceless since 9.8.2011 and the girl was recovered on 10.8.2011 in the night and thereafter FIR has been lodged and this creates some suspicion but from perusal of evidence of informant (P.W.9) it appears that this witness has stated in chief that he had searched for her throughout night and even on next day he searched for her and thereafter in the night he got information, as such, it does show that as informant was not making hectic search. In a situation when a girl is traceless, the natural conduct of the parents

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is to search her first in house of the relatives and friends and thereafter to lodge a case. As such the delay in lodging FIR does not make the prosecution case improbable and absurd.

19. In this case defence has come with a case that there was love affairs between P.W.10, victim girl, and Ramu Rai and suggestion has been given to P.W.9, brother of the P.W.10, and also to P.W.10. D.W.1 has also stated about the same. However, P.Ws. 9 & 10 had denied the suggestion and D.W.1 has admitted in her evidence that she does not know about their daily affairs.

20. Appellants were examined under Section 313 Cr.P.C. but none of the appellants has stated there was love affairs between Ramu Rai and the victim Nurshadi Khatoon, as such, they have gone for the purpose of marriage and this demolishes the defence story of love affairs between Ramu Rai and P.W.10.

21. Further submission of learned counsel for the appellant is that evidence of P.W.10 is contradictory to her earlier statement and the statement made before the Magistrate under Section 164 Cr.P.C. as she has stated in her evidence in chief that she was kidnapped while she had gone to ease herself, whereas under Section 164 Cr.P.C. she has stated that appellants had kidnapped her from her house. Further she has stated in her evidence that she has raised alarm and thereafter witnesses stopped the vehicle and she was recovered

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and she has disclosed about the kidnapping and taking her with a view to sell her and her evidence in paragraph-7 clearly shows that she has not made any alarm, rather when the witnesses enquired for her she disclosed about the same and this circumstance clearly shows that this witness has suppressed the material facts.

22. In this case appellants have been convicted under Sections 363, 372 and 376 IPC. However, learned counsel for the appellants in all the appeals has submitted that no case under Section 372 IPC is made out in this case but the learned trial court without appreciating the fact has convicted the appellants under Section 372 IPC on the basis of evidence of P.W.10 that the appellants were found to be guilty for the offence of selling her. Section 372 IPC. Provides as follows :

> *S. 372. Selling minor for purposes of prostitution, etc.- Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

It appears from perusal of Section 372 IPC that such offence may be completed on proof of sale, lets to hire or disposes of any person and the ingredients of the said Section do not appear in the

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case under the given facts and circumstances and whatever material available on record, is the statement of P.W.10, the victim, and there is nothing available in her evidence about sale or with whom they were talking to sell her and what consideration and even no transfer was made and in such a situation conviction of the appellants under Section 372 IPC does not appear to be sustainable in law.

23. All the appellants have also been convicted under Section 363 IPC and, as stated above, there is evidence available on record of P.W.10 that shows that while she had gone to ease herself she was kidnapped by the appellants and taken in a tempo and they were apprehended there at Korahat by villagers, i.e., P.Ws. 5 to 8, and evidence of P.Ws. 5 to 8 shows that they have recovered the girl on her alarm while she was taken by the appellants. In spite of cross examination there is nothing in the evidence of P.Ws. 5 to 8 to discard those witnesses on the point of recovery of the girl from the appellants. Further P.Ws. 5 to 8 are independent witnesses and of other village.

24. No doubt, it appears that the girl has only named Rajendra Rai, Ramu Rai and Kakru Rai as kidnapper and not named Pradeep Rai. The evidence later on shows that appellants were carrying her in tempo and Pradeep Rai is said to be driver.

25. Considering the evidence, as discussed above, it

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appears that there are consistent evidence available on record that appellants Rajendra Rai, Ramu Rai and Kakru Rai had kidnapped P.W.10 and appellant Pradeep Rai assisted them in the aforesaid kidnapping.

26. So far conviction under Section 376 IPC is concerned, it has been submitted on behalf of appellant Ramu Rai that evidence of prosecutrix has not been corroborated by medical evidence and in such a situation relying on sole testimony of the evidence of victim girl is not sufficient for conviction of the appellant under Section 376 IPC.

27. On the other hand, learned counsel for the State has opposed the said submission and submitted that there is nothing in the evidence of P.W.10 to doubt the commission of rape and the same has been corroborated by her statement recorded under Section 164 Cr.P.C. and, as such, the conviction of the appellant Ramu Rai under Section 376 IPC is just and proper.

28. It is well established principle that conviction can be based on sole testimony of the prosecutrix if her evidence is found to be otherwise reliable and free from any embellishment. Otherwise the evidence of prosecutrix requires corroboration by other witnesses. In the present case there is evidence of P.W.10 about commission of rape by appellant Ramu Rai and that was corroborated by her statement

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under Section 164 Cr.P.C. (Ext.8). No doubt the medical evidence does not show in clear terms that rape has been committed on her but from perusal of the record it appears that she has been examined on 12.8.2011 after three days of occurrence and in such a situation not finding sign of rape on her does not make prosecution case unbelievable, when the evidence of P.W.10 is corroborated by her statement under Section 164 Cr.P.C. and there is nothing in her cross examination to doubt her credibility.

29. Considering the entire discussions made above, so far conviction and sentence of the appellants under Section 372 IPC is concerned, the same is set aside.

30. So far conviction of appellants under Section 363 IPC is concerned, considering the discussions made above, the same is affirmed and conviction under Section 376 IPC of the appellant Ramu Rai is affirmed.

31. All the appellants have been sentenced to undergo R.I. for seven years under Section 363 IPC and fine of Rs.5000/- but considering the fact that allegation against appellant Pradeep Rai is only to assist them in kidnapping and there is no allegation he has lifted the girl from the place of occurrence and further from perusal of the judgment it appears that age of appellant Rajendra Rai at the time of judgment was aged 70 years and Kakru Rai was 65 years and the

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judgment is of the year 2013 and considering that they must be by now aged about 74 years and 69 years respectively. In such view of the matter, so far appellants Rajendra Rai, Kakru Rai and Pradeep Rai they appear to have remained in custody as under trial prisoners and as convicts for about four and a half years, their sentences are modified to the period already undergone by them in custody.

32. So far appellant Ramu Rai is concerned, in the facts and circumstances of the case, his conviction and sentence under Sections 363 and 376 IPC remains intact. So far sentence of fine against the appellants under Sections 363 and 372 IPC is concerned, the same will remain intact.

33. With the above modification in the judgment of conviction and order of sentence, all the four appeals are partly allowed.

(Vinod Kumar Sinha, J)

spal/-

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