

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.593 of 2015

Arising Out of PS.Case No. -363 Year- 2013 Thana -KATIHAR District- KATIHAR

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1. Dilip Paswan Son of Bhothar Paswan @ Bharat Paswan Resident of Mohalla -
Shitala Asthan, Mirchaibari, P.S. Katihar, District - Katihar

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Vinay Ranjan, Advocate

For the State : Mr. S. Ashfaque Ahmad, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 22-05-2017

The sole appellant Dilip Paswan has been found guilty for an offence punishable under Section 366 IPC and sentenced to undergo rigorous imprisonment for 7 years, fine of Rs. 5,000/- and in default thereof, to undergo rigorous imprisonment for six months additionally, under Section 376 IPC directed to undergo rigorous imprisonment for 8 years, fine of Rs. 5,000/- and in default thereof, to undergo rigorous imprisonment for six months additionally, with a further direction to run the sentences concurrently by the Additional Sessions Judge- III, Katihar in S.T. No. 26 of 2014 vide judgment of conviction dated 29.06.2015 and order of sentence dated 30.06.2015.

2. P.W.-6 Sunil Kumar Bharti @ Guddu Kumar Paswan had filed a written report on 19.07.2013 disclosing therein that his younger sister Pinki Kumari, a student of class-Xth, aged about 15



years, had gone to purchase Chocolate and Biscuits for her niece but did not return back. He made hectic search but in vain. He shown suspicion against Dilip Paswan, Sanju Paswan and his brother-in-law, who used to loiter around his house even in night. The informant enquired the reason from them but they refused to answer. Furthermore, it has been narrated that Dilip Paswan had abused him several times on telephone bearing SIM No. 9852633855.

3. On the basis of the aforesaid written report, Town P.S. Case No. 363 of 2013 was registered under Sections 363 and 366-A of the Indian Penal Code and investigation was taken up. During the course thereof, the victim was recovered, her statement under Section 164 Cr.P.C. was recorded, she was medically examined and after collecting relevant materials, I.O. filed charge-sheet by way of concluding investigation facilitating the trial which ultimately concluded in conviction of the appellant, hence this 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 charges.

5. Furthermore, specific plea has been taken on behalf of the appellant that the victim entered into nuptial knot with the appellant out of free will and so, she happens to be his legally married wife. To substantiate the same, a letter (Exhibit-B) has been made as



exhibit on his behalf.

6. In order to substantiate its case, prosecution hasd examined altogether seven witnesses, out of whom, PW-1 is Dr. Laxmi Sen, PW-2 is Baleshwar Paswan, PW-3 is Sita Devi, PW-4 is Ravi Kumar, PW-5 is Pinki Kumari, PW-6 is the informant, Sunil Kumar Bharti and PW-7 is Shanku Tuddu.

7. Prosecution had also exhibited medical report as Exhibit-1, signature of victim on statement recorded under Section 164 Cr.P.C. as Exhibit-2, statement recorded under Section 164 Cr.P.C. as exhibit 2/1, Fardbeyan as Exhibit 3, formal F.I.R. as Exhibit-4, endorsement over the written report as Exhibit-5, registration of the case over written report as Exhibit-5/1. As stated above, the defence had also exhibited statement recorded under Section 164 Cr.P.C. as Exhibit-A and the letter having in the pen of victim as Exhibit-B, but not even a single witness has been examined.

8. Learned counsel for the appellant has submitted that the instant prosecution happens to be unwarranted in the background of the fact that the victim was the consenting party and she joined hands with appellant under her own sweet will without any coercion, allurement and enticement, threat which is itself apparent from her evidence. Furthermore, with regard to status of the victim, PW-5, it has been submitted that PW-1, Doctor had estimated her age in



between 18-19 years and on account thereof, on the alleged date of occurrence she was major. That being so, the appellant would not have been convicted and sentenced, with regard to the occurrence so alleged.

9. Further more, it has also been submitted that victim was very much conscious with regard to her own activity which, she controverted during the course of her evidence on the pressure mounted upon her by her family members and that happens to be reason behind, keeping mum with regard to a letter during her examination-in-chief, written by her addressed to her family members which PW-5 was confronted (Exhibit-B) whereupon, she disclosed that aforesaid letter was forcibly got written by the appellant while she was under captive. Therefore, considering the majority of the victim as well as being a consenting party, the judgment of conviction and sentence impugned is fit to be set aside.

10. In an alternative, it has also been submitted that though there happens to be some sort of lapses at the end of appellant while cross examining the victim, PW-5, with regard to her identity as major though, under Para-5 of cross examination, she was cross-examined on other aspect whereunder, she had disclosed her status as a student of class Xth. In the aforesaid background, even considering the fact that she was aged about 15 years approaching majority as per



prosecution version itself, and further perceiving conduct of the victim being submissive, whereupon a lenient view could be taken as for the last 2 years and 9 months appellant happens to be under custody.

11. On the other hand, while supporting the findings recorded by the learned trial court, it has been submitted by the learned Addl. P.P. that all aspects have been considered by the learned lower court while recording the finding of guilt against the appellant and for that he has rightly been sentenced, that being so, the judgment impugned does not require any sort of interference.

12. The prosecution still insist upon old methodology for ascertainment of the age irrespective of direction having been issued by the Hon'ble Apex Court repeatedly in the case of **Jarnail Singh Vs. State of Haryana** reported in **2013 Criminal Law Journal page 3976**, as well as in the case of **State of Madhya Pradesh Vs. Anoop Singh (2015) 7 SCC 773**. That being so, instead of asking for medical examination for the purpose of ascertainment of the age, the prosecution would have taken recourse to procure the date of birth having entered in the admission register of the school which, in the present case, has not been complied with. In the aforesaid background, it is evident that the prosecution acted in contravention of the direction having been given by the Hon'ble Apex Court. Now its



repercussion is to be seen in the background of finding of PW-1 who opined the age of the victim in between 18-19 years. From the evidence of all the witnesses including that of victim, it is evident that they are consistent over the status of the victim that at the time of occurrence she was student of class Xth. It is also apparent that parents of the victim, who have been examined as PW-2 (Baleshwar Paswan) and PW-3 (Sita Devi) have disclosed the victim to be aged about 15 years. It is further evident that neither victim, PW-5, has been cross examined with regard to her age nor she was suggested at the end of the appellant that she was major at the time of so alleged occurrence and further, joined hands with the appellant out of her own sweet will which, she was capable being a major and in likewise manner, age of victim having disclosed by the PW-2 as well as PW-3 (parents) having 15 years of age has also not been challenged and on that score, the estimation of age having made at the end of PW-1 who happens to be gynecologist could not conclusively be relied upon . That has got a bearing in the background of the fact that appellant, as is evident, remained under company of the victim for such duration and so, might have been aware with the age of the victim, which prevented the appellant to challenge the victim as well as her parents on that score. Had there been even by way of suggestion the estimation of age recorded by PW-1 would have nay hearing.



Therefore, the finding with regard to victim by PW-1, is not at all found of any relevance,

13. So far material part of evidence is concerned, other witnesses have stated that victim, PW-5 was taken away by the appellant, but they did not claim to be an eye witness. So, in the facts and circumstances of the case, it is PW-5, the victim who could be identified as sole witness of kidnapping and rape by the appellant so alleged. She during her examination-in-chief had categorically stated the event of kidnapping and rape by the appellant which she was under captive but from cross-examination it is very much clear that her movement along with appellant from place to place has been properly detailed during course of which she was raped but, having much more opportunity to raise an alarm to protect herself from clutches of the appellant, even having her presence at public places which she neither opted, in spite of the fact that there was no threat at the end of appellant indicates otherwise than whatever been alleged, and further suggest that she was at least a consenting party. However, such consent is to be seen in the background of status of victim, PW-5. As the finding recorded by PW-1 regarding her age has been negatived identifying the victim to be minor, then in that event her consent has got no identity in the eye of law, as perceived in Clause VI of Section 376 IPC as well as under Section 366-A of the IPC,



acknowledging the age as 18 years for that purpose.

14. That being so, the finding recorded by the learned lower court did not attract inference, more particularly, in the background of the fact that at para-32, during course of cross examination, the victim had disclosed that the appellant was married since before, and in the aforesaid background the activity of appellant was highly disastrous whereunder he ruined life of a minor overpowering her emotion, whereupon attracts no sympathetic approach relating to sentence, save and except modification of the finding from Section 366 IPC to under Section 366-A of the I.P.C maintaining the quantum of sentence so inflicted by the learned court under both heads.

15. Appeal is dismissed. Appellant is under custody. He will remain till saturation remaining part of his sentence.

(Aditya Kumar Trivedi, J)

sushma/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	
Transmission Date	

