

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.98 of 2015

Arising Out of PS.Case No. -24 Year- 2002 Thana -MEHANDIA District- JEHANABAD

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Md. Irfan Ansari, S/o Md. Khurshid Alam, resident of village - Nath Kharsha, P.S. Menhadiya, District - Arwal

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 113 of 2015

Arising Out of PS.Case No. -24 Year- 2002 Thana -MEHANDIA District- JEHANABAD

=====

Md. Jamshed Khan @ Jamshed Khan, S/o Hashin Khan, resident of village- Pura Khothi, P.S.- Kaler, District- Arwal

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

(In CR. APP (SJ) No.98 of 2015)

For the Appellant/s : Mr. Prabhakar Singh-Advocate
Mr. Rakesh M. Singh-Advocate

For the Respondent/s : Mr. Binod Bihari Singh-A.P.P.

(In CR. APP (SJ) No.113 of 2015)

For the Appellant/s : Mr. Arbind Kumar Singh-Advocate
Mr. Prativa Kumari-Advocate

For the Respondent/s : Mr. Bipin Kumar-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 20-02-2017

Cr. Appeal (S.J.) No.98 of 2015 wherein Md. Irfan Ansari is the appellant as well as Cr. Appeal (S.J.) No.113 of 2015 wherein Md. Jamshed Khan @ Jamshed Khan is the appellant commonly originate against the judgment of conviction dated



06.01.2015 whereby both the appellants have been found guilty for an offence punishable under Section 366/34 of the I.P.C. and order of sentence dated 08.01.2015, sentencing each of the appellants to serve rigorous imprisonment for 10 years as well as also slapped with fine appertaining to Rs.2,000/- and in default thereof, to undergo simple imprisonment for three months, additionally with a further direction that period already undergone during course of trial be set off in terms of Section 428 of the Cr.P.C. by the Adhoc Additional Sessions Judge-1st, Jehanabad in Sessions Trial No.128 of 2003/ 395 of 2013, on account thereof, have been heard together and are being disposed of by a common judgment.

2. PW-6, Karuna Kumari aged about 14 years gave her fard-bayan on 11.03.2002 at about 2.30 p.m. before O/c Mehendiya P. S. near Village-Semmua alleging inter alia that on the same day at about 9.30 a.m., she came to Jamuhari High School. At the time of Tiffin, Ram Babu Kumar, aged about 18 years, a Student of that school came to her and disclosed that Md. Irfan Ansari, Master is calling you, there happens to be an emergency. She proceeded and found one white colour car parked at some distance from the school gate. Just after coming out, Md. Irfan caught hold her, forcibly dragged her and pushed inside car. She began to cry whereupon her mouth was gagged by Md. Irfan Ansari, who also threatened that in case of disobedience, she would be murdered. Simultaneously, the



driver sped up the vehicle. Later on, the police and her family members followed the car along with other villagers and they succeeded to force the driver to stop the vehicle at Semmua where they apprehended the driver as well as Md. Irfan Ansari. On query, the driver disclosed his identity as Moh. Jamshed Khan @ Jamshed Khan. She had further stated that with malafide intention, accused persons abducted her over car bearing Registration No.DL-4C/8572. She had further stated that Ram Babu Kumar may have his hand. She had further disclosed that so many persons assembled there, who coming to know about the occurrence, assaulted the driver as well as Md. Irfan, however, were saved by the police anyhow. On the basis of the aforesaid fard-bayan, Mehendiya P. S. Case No.24 of 2002 was registered under Section 366/34 of the I.P.C. whereupon investigation commenced and concluded by way of submission of chargesheet. As the offence whereunder cognizance was taken, happened to be triable by the Court of Sessions, accordingly, case was committed to the Court of Sessions where the trial commenced and concluded in a manner, subject matter of instant appeal.

3. The defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial of the occurrence. The specific defence having taken by the appellant, Irfan Ansari is that while they were on pleasure trip, they were apprehended while at the end of Md. Jamshed



Khan @ Jamshed Khan, it has been pleaded that he runs the vehicle as Taxi and was hired by Irfan Ansari, Master. He has got no complicity with the alleged occurrence. Nothing has been paddled on behalf of appellant Irfan Ansari in his defence while on behalf of appellant Md. Jamshed Khan @ Jamshed Khan, one DW on that very score has been examined.

4. In order to substantiate its case, prosecution had examined altogether six PWs, out of whom, PW-1 Ram Naresh Singh, a School Teacher, PW-2 Ram Babu Kumar, a Student, PW-3 Radhe Shyam Sharma, PW-4 Bainkatesh Sharma, PW-5 Amrendra Kumar Sharma and PW-6 Karuna Kumari. Side by side, had also exhibited the documents as Exhibit-1 signature of witness Radhey Shyam on fard-bayan, Exhibit-2 signature of informant Karuna Kumari on fard-bayan, Exhibit-3 signature of witness Radhey Shyam on seizure list, Exhibit-4 signature of witness Amrendra Kumar on seizure list and Exhibit-5 signature of witness Bainkatesh Sharma on fard-bayan.

5. While assailing the judgment of conviction and sentence recorded by the learned lower Court, it has been jointly submitted by the respective learned counsels that the findings so recorded by the learned lower Court happens to be in mechanical manner and on account thereof, would not justify its prevalence. Furthermore, it has also been submitted that neither the victim was subjected to medical examination nor I.O. has been examined. On



account of presence of material having on the record, the victim appears to be minor on the alleged date and time of occurrence, consequent thereupon, the judgment of conviction and sentence recorded for an offence punishable under Section 366 of the I.P.C. is not at all permissible. In its continuity, it has also been submitted that had the victim been examined by the doctor, then in that event, her age would have properly been ascertained in the background of identifying her to be a consenting party in the background of the fact that none of the witnesses had ever deposed that they heard alarm of cry of the victim during course of offence as alleged and that being so, caused prejudice to the interest of the appellants.

6. In likewise manner, it has also been submitted that had there been examination of I.O., then in that event, the deficiency persisting in the investigation would have been exposed and in likewise manner, the intentional lapses on his part in properly identifying Md. Jamshed Khan @ Jamshed Khan to be driver of a taxi and further, the status of the victim coupled with the fact that she was a consenting party would have been exposed. Though, there happens to be absence of contradiction in the evidence of the PWs, even then on account of non-examination of the I.O., the defence found prejudiced and so, they should have been acquitted by the learned lower Court itself.

7. With regard to Md. Irfan Ansari, it has been



submitted on behalf of learned counsel for the appellant that admittedly, he was teaching the informant along with her younger brother and sister. Furthermore, there was complain against him and on account thereof, the aspersion having made against him was not at all tenable, even considering his presence with the alleged victim. Furthermore, it has been submitted that the victim on her own never tried to malign the appellant rather, it happens to be her family member, who going a step ahead had deposed that cloth of victim was torn which, the victim never deposed. As such, the evidence of PWs in its entirety did not inspire confidence and that being so, appellants deserve acquittal.

8. With regard to appellant Md. Jamshed Khan @ Jamshed Khan, it has been submitted that he happens to be driver of a taxi having no access within the inter se activity of the remaining appellant along with the victim and further, by D.W.-1, he had substantiated his plea, so in totality of the event, he should not have been convicted for an offence punishable under Section 366/34 of the I.P.C. Consequent thereupon, the judgment of conviction and sentence is fit to be set aside.

9. On the other hand, learned Additional Public Prosecutor while refuting the submission having made on behalf of respective appellants has submitted that both the appellants were apprehended along with the victim after covering sufficient distance



from the School wherefrom the victim was kidnapped and that indicates the conjoint criminal mind of the appellants. Moreover, due to confusion over the age in the background of oral evidence, it was safe for the learned lower Court to proceed with the trial under Section 366/34 of the I.P.C. and in the aforesaid background, the sentences have rightly been inflicted against each of the appellants. Accordingly, both the appeals are fit to be dismissed.

10. As stated above, the Investigating Officer has not been examined. On account of non-examination of the I.O., though the appellants tried to convince that they found their interest prejudiced, but when the evidence of each of the witnesses coupled with the mode of cross-examination have been gone through, it is apparent that they are not at all found prejudiced due to non-examination of the I.O. as, apart from absence of contradiction in the evidences of the PWs, they have not challenged the status of the prosecution witnesses, more particularly the seizure list witnesses as well as the victim that they were not at all arrested along with the victim from the car. Furthermore, they not even challenged the place of occurrence (school) as well as the place where appellants were forced to stop the vehicle. In likewise manner, victim also not been challenged putting by way of suggestion that on the alleged date, she had not attended the school. That being so, the non-examination of I.O. could not be found adverse to their interest. Apart from the fact



that only for argument sake, the aforesaid theme cannot be taken into consideration. For that purpose, the defence has to place by the circumstances that on account of non-examination of the I.O., their interest have been prejudiced over which there happens to be consistent judicial pronouncement in *Lahu Kamlakar Patil & Another v. State of Maharashtra reported in (2013) 6 SCC 417*.

11. In order to appreciate the rival submission first of all, evidence of victim is to be taken. Victim is the PW-6, she had stated that on the alleged date and time of occurrence while she was at school. She was informed by one Student that Md. Irfan Ansari is calling her. She came out from the school and then, saw Irfan Ansari, who was standing with white Ambassador Car, no sooner than Irfan Ansari caught hold her hand and dragged inside the vehicle. As soon as, she was pulled, the driver ignited the vehicle. When she tried to raise alarm, Irfan Ansari caught hold her hair, gagged her mouth and also threatened of dire consequence, in case she would resist. The driver proceeded the vehicle in Southern direction, however, after covering some distance, the police and his uncle and other persons succeeded in intercepting the vehicle and then thereafter, the driver and Irfan Ansari were caught. Police had recorded her fard-bayan at the spot itself in presence of witnesses. She had further disclosed that accused persons had kidnapped her with malafide intention. During cross-examination at Para-3, she had stated that Irfan Ansari happens to be her co-villager, who used to give tuition in village. She along



with her younger brother and sister were taking tuition. She had further stated that she is unaware with regard to his activity. In Para-4, she had stated that during Tiffin time, boys and girls came out from the school, they freely walk. Then had stated that vehicle was parked just near the gate. She had gone alone. At the time when she was dragged inside the vehicle, none was present. At that very time, it was in isolation. In Para-5, she had stated that the driver was sitting over driving seat. As soon as, Irfan Ansari forcibly dragged inside the vehicle, the vehicle proceeded towards Southern direction. Mehandiya Police Station lies during midst of way. None of the police officials at that very moment tried to stop the vehicle. At Para-6, she had stated that at Semmua, some persons including villagers and police officials had signalled to stop the vehicle. When she came out from the vehicle, she found her uncle Radhe Shayam, Mukhiya was also present. Police took all of them to Police Station. At Para-7, she had stated that accused was giving tuition since 4-5 months, she had got no complaint. She had denied the suggestion that she was not kidnapped by Irfan Ansari with malafide intention rather they were moving to take a trip, but her family members instituted this case under wrong notion.

12. PW-1 is the Teacher of the school, who had stated that on the alleged date and time of occurrence, he came out from the school building after hearing uproar along with other teachers, where



students had disclosed that Karuna Kumari has been taken away in a car. He immediately informed the police. On the same day at about 5.00 p.m., he received information regarding recovery of the girl as well as apprehension of the accused persons. During cross-examination, he had stated that neither he had seen the vehicle nor the accused.

13. PW-2 is Ram Babu Kumar. He had stated that the occurrence is about two and half years ago, it was 1.00 p.m. At that very time, he was at school. He was student of Class-10 and then, had stated that he had got no knowledge regarding the occurrence. I.O. had not taken his statement. On Court question also, he simply stated that he had got no knowledge regarding the occurrence, then his attention was drawn towards his previous statement.

14. PW-3 is Radhey Shyam Sharma. In the first part of examination-in-chief, he had stated that on the alleged date and time of occurrence, Karuna Kumari was studying at Raghunandan Singh High School wherefrom Irfan Ansari kidnapped her on the pretext of ailment of her mother. After coming to know about the same, the Headmaster of the School had informed the police. They have also come to know about the same whereupon followed over motorcycle and during midst of way, the police officials succeeded in apprehending the vehicle and recovered the victim along with Irfan Ansari as well as Md. Jamshed Khan. Statement of Karuna Kumari



was recorded in his presence over which he had also put his signature. Seizure list was also prepared over which he had also signed. During cross-examination, he had admitted that victim happens to be his niece. He had further stated that police had also followed. He had further stated that the vehicle belonged to Md. Jamshed Khan, but he has got no knowledge whether it is being plied as a Taxi or not. Furthermore, he denied the suggestion that no occurrence was committed.

15. PW-4 had stated that on the alleged date and time of occurrence, he came to know regarding kidnapping of Karuna Kumari by Irfan Ansari over a car bearing Registration No.DL-4C/8572 being driven by Md. Jamshed Khan. He along with other co-villagers proceeded. Police officials were also informed, with the help of Mehendiya, Haspura Police, the vehicle was intercepted and Irfan Ansari, Md. Jamshed Khan and Karuna Kumari were taken out from the vehicle. Karuna Kumari was kidnapped with malafide intention. At that very moment, police had recorded fard-bayan of Karuna Kumari over which she had also put his signature, he also put his signature over seizure list. During cross-examination, it is evident that he happens to be agnate of the victim. He had further disclosed the boundary of the P.O. where vehicle was intercepted. After arrest, all of them were taken to Mehendiya police station. His statement was recorded on the same day.



16. PW-5 had stated that on the alleged date and time of occurrence, Karuna Kumari, his niece was kidnapped by Irfan Ansari and Md. Jamshed Khan with bad intention from the school over a vehicle bearing Registration No.DL-4C-8572. He was informed by Gunjan, one of the classmate of Karuna Kumari whereupon they rushed over motorcycle firstly, to school then to police station and then, tracing out the direction of the car and after covering some distance, the Mehendiya Police with the help of Haspura Police succeeded in intercepting the car and recovered the victim as well as both the accused. Statement of Karuna Kumari was recorded at the spot itself. Seizure list relating to seizure of car was also made and then thereafter, all of them were taken to Mehendiya Police Station. During cross-examination, he had admitted that Irfan Ansari was giving tuition to Karuna Kumari. He was informed regarding kidnapping just after the occurrence. He had not gone inside the school. From school, he went to police station and from there, they were joined by the Officer-in-Charge. Car was intercepted, large number of persons assembled there. Police had taken his statement at the spot. He had further stated that the cloth of the victim was torn at some place. Irfan Ansari and victim were sitting at the rear while the driver was sitting at the front seat. He denied the suggestion that no such type of occurrence had taken place.

17. Considering the evidence available on the record,



as discussed above, it is crystal clear that defence could not be able to smash the prosecution version regarding kidnapping of the victim from the school over a car being driven by Md. Jamshed Khan by Irfan Ansari and further, covering some distance were intercepted by the police. Furthermore, from the evidence of PW-6, it is evident that neither cross-examination was made on behalf of defence over her status to be minor or major and in likewise manner, whether she was a consenting party. That being so, the Court on its own would not infer in favour of appellants that the victim was major as well as was a consenting party. That being so, kidnapping of a minor is found duly substantiated.

18. Now, coming to status of Md. Jamshed Khan, he had not adduced original owner-book to suggest that the vehicle was registered as a taxi and contrary to the spirit of M.V. Act whereunder the taxi has to bear a separate identity. In the aforesaid background, the version of the DW-5 could not be accepted. Even for a argument sake that it was a taxi, when he had seen that a minor girl was being kidnapped against her wish and will, then in that event, he should have shown his pious conduct by refusing to drive the vehicle or to inform the school administration that a minor student was lifted and is being confined in his car or while crossing the Mehendiya Police Station should have taken the vehicle to police station. Non-adopting of aforesaid activity, as indicated above, instead thereof, proceeding



ahead with the vehicle is indicative of the fact that he was also deeply involved during course of the occurrence. Consequent thereupon, the finding recorded by the learned lower Court arraying both the appellants guilty is found duly substantiated from the evidences available on the record.

19. Because of the fact that the victim remained completely silent that during midst of way the accused had constantly put her under threat nor she deposed with regard to untoward activity during the intervening stage at the end of the accused persons nay had disclosed that both the appellants were gossiping or making utterance pre-judicial to her interest on account thereof, conviction relating to the appellants under Section 366/34 of the I.P.C. is being recapitulate whereupon in the totality of the event is modified to the extent of Section 363/34 of the I.P.C. and in likewise manner, the sentence having inflicted by the learned lower Court to the extent of rigorous imprisonment for 10 years is modified and reduced to rigorous imprisonment for five years keeping the amount of fine intact and in likewise manner, the default clause. In similar way, the direction of the learned lower Court relating to set off in terms of Section 428 of the Cr.P.C. is also allowed to survive.

20. With the aforesaid modification, these two appeals are dismissed. Appellant Md. Irfan Ansari is under custody and is accordingly, directed to remain till saturation of the sentence. While



appellant Md. Jamshed Khan @ Jamshed Khan, who is on bail, his bail bond is hereby cancelled with a direction to surrender before the learned lower Court at an earliest, failing which the learned lower Court will take proper legal recourse in securing his presence in order to suffer the remaining part of the sentence.

(Aditya Kumar Trivedi, J)

Vikash/-

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