

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.431 of 2015

Arising Out of PS.Case No. -171 Year- 2007 Thana -KATIHAR District- KATIHAR

Saukat @ Babloo Son of Md. Habib, Resident of Mohalla -Mirchaibari Near
Ambedkar Chowk, P.S. - Katihar Sahayak, District - Katihar.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

For the Appellant/s : Mr. Awadhesh Kr. Mishra, Adv.

Mrs. Sandhaya Sharma, Adv.

For the State : Mr. Syed Ashfaq Ahmad, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 23-03-2018

Appellant, Saukat @ Babloo has been found guilty for an offence punishable under Section 366A of the IPC and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.5000/- and in default thereof, to undergo R.I. for six month additionally, under Section 376 of the IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.10000/- and in default thereof, to undergo R.I. for six month with a further direction to run the sentences concurrently vide judgment of conviction dated 16.04.2015 and order of sentence dated 20.04.2015 passed by learned Third Addl. District & Sessions Judge, Katihar in Sessions Trial No.348 of 2007 arising out of Katihar town (Sahayak) P.S. Case No.171/2007.

2. For an occurrence allegedly committed on 03.04.2007, Lila Devi (PW.5) filed written report on 10.04.2007 putting an allegation that on 03.04.2007 at about 06:30 PM she has come to sale vegetable at Mirchai Bari along with her daughter (name withheld) victim aged about 15 years. During course thereof, she had



gone to meet nature's call. After return, she found her daughter missing. She began to search and during course thereof, she came to know that Saukat @ Babloo, son of Sk. Habib of mohalla- Mirchai Bari, P.S.-Sahayak took her away over auto rickshaw. She made hectic search but could not find whereupon, delay has been caused in making complaint. After registration of Katihar Town P.S. Case No.171 of 2007 investigation commenced and during course thereof, as is evident that from the lower court record victim was recovered, she was medically examined, her statement under Section 164 was recorded, other witnesses were also examined and then thereafter, completing the investigation charge sheet was submitted, basis for trial which ended in recording conviction and sentence against the appellant/accused as indicated hereinabove against which instant appeal has been preferred.

3. 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. Furthermore, it has also been pleaded that alleged victim after renouncing Hindu religion, converted to Mohammedanism and then, solemnized marriage with the appellant, led her marital life happily consequent thereupon, no offence as alleged has taken place. However, no ocular evidence has been adduced but documentary evidences have been made an exhibit in defence.

4. In order to substantiate its case, prosecution had examined altogether seven PWs, PW.1-Punai Mandal @ Turai Mandal, PW.2-Manoj Kumar Sah, PW.3-Victim, PW.4-Jabul Mandal, PW.5-Lilla Devi, PW.6-Dr. Laxmi Sen, PW.7-Shekhar Singh as well as had also exhibited Ext.1-Signature of victim over statement



recorded under Section 164 Cr.P.C., Ext.2-Signature of the informant, Ext.3-The injury report (wrongly numbered), Ext.4- Formal FIR (wrongly mentioned as Ext.3). On the other hand, though no ocular evidence has been adduced on behalf of defence but documentary evidence have been adduced Ext.A-Certified copy of order of matrimonial case no.61/2008, Ext.B-Certified copy of decree of matrimonial case no.61/2008, Ext.C-Certified copy of statement of victim under Section 164 Cr.P.C. relating to another case bearing G.R. No.1657/2007.

5. While assailing the judgment of conviction and sentence, the learned counsel for the appellant has submitted that no occurrence as alleged had taken place and that being so, the conviction and sentence recorded by the learned lower court happens to be illegal, perverse. In order to substantiate such plea, it has been submitted that there happens to be inordinate delay in institution of the instant case without having cogent explanation. Delay in institution of a case is fatal to the prosecution unless and until the delay is properly explained. In its continuity, it has also been submitted that non-examination of I.O. has caused prejudice to the appellant in the aforesaid background, apart from its overall impact during appreciation of the prosecution case.

6. It has further been submitted that from the written report itself, it is evident that at the time of occurrence none was present as, informant, mother of the victim was not at all present in the background of the fact that she had gone to meet natures call and no other family members were present. That being so, the evidence of PW.1, PW.4, PW.5 are not at all relevant on the score of kidnapping as well as rape. Furthermore, it has been urged that



when the evidence of victim is minutely scrutinized, it is apparent that she was a consenting party and that happens to be reason behind that doctor PW.6 while examining the victim had opined that she was accustomed to sexual intercourse since before. Apart from this, it has also been submitted that on the score of kidnapping, when evidence is seen, it is apparent that though she was not at all put under threat of life, even then she had not raised alarm during course of her allegedly been kidnapped as well as even during course of her presence at the court where affidavit was prepared. That being so, the version of the prosecution is found completely begrimed.

7. In its continuity, it has also been submitted that doctor had estimated age of the victim in between 15-16 years subject to variance of two years and the upper age leaning in favour of accused is to be accepted whereupon, victim happens to be major and so, the overall situation suggest her as a consenting party. On this very score, it has also been submitted that appellant did not sit idle rather when victim was overpowered at the end of her family members, filed matrimonial case no.61/2008 which was decided on 28.04.2009 whereby and whereunder a petition for restoration of conjugal right was allowed. In likewise manner, it has also been submitted that while she was captive of her family members an attempt was made at their end to sale her to broker whereupon she left and then, anyhow approached the Superintendent of Police where met with the Officer-in-charge of the concerned P.S. and then, on her statement Dhankhora P.S. Case No.62/2007 was registered wherein her statement under Section 164 Cr.P.C. was recorded and after going through the same, it is evident that she on her own disclosed that she had followed Muslim law and further, got herself



married with the appellant, enjoyed her marital life but, as case was instituted at the end of her mother, they came back whereupon, her husband Babloo/appellant gone to Jail while she remained with her parents where ultimately she faced the consequence. So, submitted that in the Mohammedan Law puberty is the age of marriage and as per Rule-251 (Mohammedan Law by Mullah) she was competent enough to give her consent and that being so, the judgment of conviction and sentence recorded by the learned lower court is not at all maintainable in the eye of law, hence be set aside.

8. On the other hand, the learned Additional Public Prosecutor while controverting the submission made on behalf of learned counsel for the appellant has submitted that from perusal of the judgment impugned, it is crystal clear that the finding recorded by the learned lower court is based upon proper appreciation of the material available on the record and that being so, did not attract interference.

9. After hearing the respective parties as well as going through the record, it is evident that victim PW.3 had during course of evidence and supported the case of prosecution over kidnapping as well as subjected to rape while was kept by the appellant at his house, while being cross-examined was not at all confronted with the subsequent event, having been brought up on record vide Ext. A,B,C and in likewise manner, she also not been suggested to be consenting party. Furthermore, her attention has not been drawn towards her previous statement including that of a statement recorded under Section 164 Cr.P.C. Furthermore, it is also evident that appellant had not pleaded nor suggested the victim that she renounced her faith and adopted Mohammedanism and then, got



herself married with the appellant rather the suggestion happens to be under para-18 of her cross-examination that she was in love with Babloo for quite long time. She had gone with Bablu out of free will. Because of the fact that on account of her aforesaid activity she faced stigma whereupon has deposed like so.

10. It is needless to say, that the fardebyan or FIR which ever may be, statement recorded under Section 161 Cr.P.C. or 164 Cr.P.C. are not substantial piece of evidence. It happens to be subject to corroboration or contradiction as provided under Section 162 of the Cr.P.C as well as Section 157 of the evidence Act that being so, unless and until the witness is confronted and further it found duly exposed by examination of the Magistrate or the Investigating Officer as the case may be, and so far FIR is concerned by the informant alone being maker of the document, whatever remains in the aforesaid statement would not be legally entertainable. Apart from this, any material fact unless and until having been confronted to the witness, could not be used against a witness because of the fact that witness has an opportunity to explain the same. That being so, whatever documents have been adduced by way of Ext.A,B,C, the same could not be taken into consideration as, the same has not been confronted to the victim PW.3. Moreover, when coming to the judgment (Ext.A), paragraph-2 thereof suggest that the Principal Judge, Family Court, Katihar had not considered the legal implication whether affidavit with regard to solemnization of marriage is entertainable in the eye of law or it has to be in accordance with personal law or under the Special Marriage Act. Detailed discussion on this very score is forbidden as, this court is not sitting in an appeal.



11. Now coming to another aspect which relates with regard to status of the victim PW.3. Her evidence inspires that she was a consenting party because of the fact that while she was lifted till the date of her presence, she had not resisted or taken recourse, effort in order to get herself rescued and on that very score, it looks pertinent to refer para-13 of her cross-examination that she came to Katihar court where she came before notary public, along with accused to get married on an affidavit. At the time when she was proceeding to notary public there were 1000/- advocates. Had there been, some sort of effort at her end, she might have been rescued.

However, during cross-examination, she was not at all tested, suggested that she was a major. Because of the fact that no suggestion has been given to her that she, was major and followed Mohammedanism after renouncing her earlier faith, on account thereof that chapter is found closed.

12. The doctor, PW.6 happens to be the Gynaecologist. Though she had estimated her age to be in between 15-16 years but from her evidence, it is evident that no medical board was constituted having presence of Gynaecologist, Orthopedic Radiologist and so, estimation of age at the end of Gynaecologist is one circumstance. Furthermore, the Hon'ble Apex Court in **Jarnail Singh Vs. State of Haryana** reported in **2013 Cr.L.J. 3976** and in **State of Madhya Pradesh vs. Anoop Singh** reported in **(2015) 7 SCC 773** has categorically observed that there should not be estimation of age of the victim primarily on the basis of medical evidence rather the age should be ascertained in a way the age of child in conflict with law is being estimated after conducting an inquiry as provided under Juvenile Justice (Care and Protection) Act



and so, the finding whatsoever been recorded at the end of the doctor PW.6 is not at all found legally recognizable.

13. At the present moment, the non-examination of the Investigating Officer should also be considered. It is not that in each and every case, the non-examination of Investigating Officer should be considered fatal to the prosecution case nor it could be held to be adverse to the interest of an accused rather the accused has to show that on account of non-examination of Investigating Officer, his interest has been prejudiced. From the record, it is evident that there happens to be no material contradiction visualizing from the evidences of the PWs. It is also evident that P.O. has not been controverted. As stated above from the suggestion given to the victim, the occurrence has been denied. In the aforesaid background, it could not be said that on account of non-examination of the Investigating Officer, the interest of the accused is found jeopardized.

14. In the background of aforesaid eventuality, the evidence of the victim PW.3 is to be taken note of on priority basis. During her examination-in-chief, PW.3 had stated that on the alleged date and time of occurrence she was alone at her shop. At that very time a tempo came, parked and then the person who was sitting inside directed her to give vegetable whereupon she had gone near tempo to hand over vegetable and during course thereof, she was lifted in the tempo and taken away to the house of Babloo @ Saukat where Babloo had committed rape on her. Then had stated that on the following day he accompanied her to court where got prepared affidavit relating to marriage. Then thereafter, she was taken to Kishanganj, at the place of his sister where she remained for a week. Babloo committed rape at every night. Subsequently thereof, police



came and took away both of them. Her statement was recorded. She was medically examined. Identified the accused in dock. During cross-examination at para-6 she had stated that she was knowing Babloo since before. Then had disclosed with regard to the activity relating to the fateful day. She had stated that while she was putting the onion, brinjal, potato, pumpkin in the tempo she was pulled and taken away. She had raised alarm. She had further stated that during midst of way she had seen so many persons but, had not raised alarm, nor asked for help. She was not assaulted. Then at para-10 stated that when she got down at the place of Saukat, she raised alarm. 20-30 persons of the locality came but she is unable to disclose their identity. Then had said at para-11 that she reached at the place of accused at 07:30 and at about 09:30 she was raped and then had detailed the event. Para-13 had (already been disclosed) regarding her activity at civil court. Under para-14 she had stated that her hands, mouth were not tied. She had not raised alarm while being lifted over tempo, at the Vakalatkhana or at any place including while traveling over train to Kishanganj. Then had stated that she had admitted in court that she had gone with Babloo.

15. The evidence of PW.1, 4 and 5 in the facts and circumstances of the case, appears to be mere corroborative and so, detailed discussion is forbidden. So, for evidence of PW.2 is concerned, he was declared hostile.

16. Considering the evidence on the record, it is evident that victim PW.3 was taken away by the Saukat @ Babloo (Appellant) himself and on account thereof, no offence under Section 366A of the IPC would be made out as, the aforesaid Section will be applicable only where there happens to be probability of indulgence



of victim under sexual activity with the other than the kidnapper. That being so, the conviction and sentence recorded under Section 366A of the IPC would not be maintainable and to that extent the finding of the learned lower court is set aside. So far the offence under Section 376 of the IPC is concerned, in the facts and circumstances of the case as well as taking into account the status of the victim to be minor, her consent lost its legal identity and that being so the finding recorded by the learned lower court to that extent is affirmed. Accordingly, appeal is dismissed. Appellant is under custody which he will remain till saturation of the period of the sentence.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	29.03.2018
Transmission Date	29.03.2018

