

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.260 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District-
EASTCHAMPARAN(MOTIHARI)

=====

Kapildeo Sahni @ Kapil Sahni, son of Girja Sahni, resident of village Bariarpur,
P.S. Chhatauni, District East Champaran

.... Appellant

Versus

The State of Bihar

.... Respondent

=====

Appearance :

For the Appellant/s : Mr. Sandeep Kumar with Mr. Abhishek
Kumar, Advocates

For the Respondent/s : Mr. Bipin Kumar, APP

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 22-02-2018

Sole appellant stands convicted under Section 366A of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three years, including a fine of Rs.1000/- with default clause by the judgment dated 4.4.2003 and order dated 5.4.2003 passed by Sri Navin Kumar Sinha, the then Additional Sessions Judge, F.T.C.V, East Champaran, Motihari in Sessions Trial No. 426/96/11/02.

2. Prosecution case, in short, is that the informant Ramanand Rai (P.W.5) has lodged a written report before the Motihari Sadar Police Station on 5.7.1994 stating, inter alia, therein that his daughter Usha Kumari aged 15 years was living in his house and appellant enticed her away on 2.6.1994 and when he enquired about her from Ramadhin Sahni he told him that he would help him in bringing her



daughter on the condition that he would not cause any harm to her and thereafter the informant went to the house of appellant Kapildeo Sahani and enquired whereabouts of him and he was informed that appellant Kapildeo Sahni had fled away. Thereafter the present case has been lodged.

3. On the basis of the aforesaid written report, Kesaria P.S.Case No. 48 of 1994 was registered and police after investigation submitted charge sheet against the appellant and Ramadhin Sahni under Section 366A IPC. However, it appears that Ramadhin Sahni died and, as such, case against him was dropped. Finally the case was committed to the court of sessions, which ultimately came to file of Sri Navin Kumar Sinha, the then Additional Sessions Judge, F.T.C.V, East Champaran, Motihari for trial and disposal.

4. Charge under Section 366A IPC was framed against the appellant to which he has denied the charge and claims to be tried.

5. During course of trial altogether seven witnesses have been examined on behalf of prosecution, they are P.W.1 Ramawati Devi, who is sister of the victim girl, P.W.2 Tila Devi, who is mother of the victim girl, P.W.3 Ramashish Rai, who is co-villager, P.W.4 Bhikhari Rai, who is also co-villager, P.W.5 Ramanand Rai (informant), who is father of victim girl, P.W.6 Dr. Manjula Nath, who has examined the victim girl and P.W.7 Sheikh Sagir Hussain,



who is a formal witness and has proved the FIR.

6. It appears that neither the victim girl nor the I.O. has been examined in this case.

7. The defence of accused person as per trend of cross examination and statement under Section 313 Cr.P.C. is of false implication and innocence and from trend of cross examination it appears that defence has come with a case that the victim girl had gone herself out of her own sweet will and married the appellant.

8. Learned trial court has found the victim girl as minor at the time of occurrence and on such finding it was observed that her consent was no consent in the eye of law and convicted the appellant under Section 366A IPC.

9. Aggrieved by the above judgment, the present appeal has been filed.

10. Contention of learned counsel for the appellant is that the victim girl was major at the time of occurrence, which is evident from the statement of P.W.1, who is sister of the victim, and from the report of the Doctor and further the evidence of P.W.5 (informant) shows that she had gone out of her own sweet will with the appellant and married him but in spite of aforesaid evidence learned trial court has convicted the appellant under Section 366A IPC, which is erroneous in nature and not sustainable in the eye of law. It is submitted that



there is nothing on record to show that she was subjected to rape either by the appellant or anyone and the Doctor has not found any sign of rape upon her. Further submission is that there is delay of more than one month in lodging the FIR and for that no explanation has been given.

11. On the other hand, learned counsel for the State has defended the judgment on the ground that evidence of Doctor shows that she was minor at the time of occurrence and, as such, there is no infirmity in the impugned judgment.

12. Considering the rival contentions of both sides and from perusal of evidence of P.W.5 (informant) it appears that though he has supported the prosecution case that appellant enticed her away for the purpose of marriage but in his cross examination he has admitted in paragraph-5 of his evidence that she looks like a major at the age of 17-18 years and later on he also came to know that she had gone out of her own sweet will and married the appellant. Evidence of P.W.1, who is sister of the victim girl, shows that in her cross examination she had stated she was five years younger than the victim girl and she had mentioned her age as 35 years and if it is found true the age of the victim girl was 30 years at the time of her deposition. P.W.2 is mother of victim girl and also a hearsay witness as she has seen nothing on her own eyes. P.Ws. 3 and 4 are not the eye-witnesses to the



occurrence. So far evidence of P.W.5 (informant) is concerned, it appears that he has admitted in his evidence that her daughter looks like a girl aged about 17-18 years and she had gone with the appellant out of her own sweet will and married the appellant. Evidence of P.W.6, the Doctor, who has examined the victim girl, shows that she had examined the victim after one year of the alleged occurrence and at the time of her examination she was aged about 17-18 years. The Doctor has also stated in her cross examination that assessment of age may vary by 1-2 years. It further appears that the occurrence is of 2.6.1994 and FIR has been lodged on 5.7.1994 and, as such, it does not look probable that a person whose daughter was kidnapped/abducted will wait for more than one month in lodging the FIR and even not informing to the Panchayat or Choukidar about the occurrence for such a long time. So far finding of learned trial court that victim girl was a minor is concerned, it appears that according to evidence of P.W.1 she was aged about 22 years and Doctor has assessed her age at 17-18 years and informant (P.W.5) has also stated that she looks like a major aged 17-18 years.

13. In this regard Hon'ble Apex Court has held in several decisions that the assessment of age by Medical Board shall be subject to variable of 1-2 years and such view has also been upheld in the case of **Durga Ram alias Gunga vs. State of Rajasthan : (2015) 2**



SCC 775, wherein Hon'ble Apex Court has held in paragraph-17 of the judgment as follows :

“17. The general rule about age determination is that the age as determined can vary plus minus two years but the Board has in the case at hand spread over a period of six years and taken a mean to fix the age of the appellant at 33 years. We are not sure whether that is the correct way of estimating the age of the appellant. What reassures us about the estimate of age is the fact that the same is determined by a Medical Board comprising Professors of Anatomy, Radio diagnosis and Forensic Medicine whose opinion must get the respect it deserves. That apart, even if the age of the appellant was determined by the upper extremity limit i.e. 36 years the same would have been subject to variation of plus minus 2 years meaning thereby that he could as well be 34 years on the date of the examination. Taking his age as 34 years on the date of the examination he would have been 18 years, 2 months and 7 days on the date of the occurrence but such an estimate would be only an estimate and the appellant may be entitled to additional benefit of one year in terms of lowering his age by one year in terms of Rule 12(3)(b) (supra) which would then bring him to be 17 years and 2 months old, therefore, a juvenile.”

14. Similar view has been taken by Hon'ble Apex Court in the case of **Mukarrab and others vs. State of Uttar Pradesh : (2017) 2 SCC 210**. In the present case, her age was assessed by Doctor at 17-18 years and if variance of 1-2 years shall be considered, the age of the victim may be 16-20 years of age and accused is entitled for the age which is in his favour that shows that she was major at the time of occurrence but learned trial court has not



considered the aforesaid aspect of the matter and the victim girl was held to be a minor.

15. Apart from that, Hon'ble Apex Court in the case of **Mohd. Ali alias Guddu vs. State of Uttar Pradesh : (2015) 7 SCC 272** has considered the delay in lodging FIR in such type of cases and has held in paragraph-27 of the said judgment as follows :

“27. Be it clearly stated here that delay in lodging FIR in cases under section 376 IPC would depend upon facts of each case and this Court has given immense allowance to such delay, regard being had to the trauma suffered by the prosecutrix and various other factors, but a significant one, in the present case, it has to be appreciated from a different perspective. The prosecutrix was missing from home. In such a situation, it was a normal expectation that either the mother or the brother would have lodged a missing report at the police station. The same was not done. This action of PW 2 really throws a great challenge to common sense. No explanation has been offered for such delay. The learned trial Judge has adverted to this facet on an unacceptable backdrop by referring to the principle that prosecutrix suffered from trauma and the constraint of the social stigma. The prosecutrix at that time was nowhere on the scene. It is the mother who was required to inform the police about missing of her grown-up daughter. In the absence of any explanation, it gives rise to a sense of doubt.”

16. Apart from that, the victim girl has not been examined in this case and even I.O. has also not been examined. Evidence of one witness shows that the victim in her statement recorded under Section 164 Cr.P.C. has not supported the prosecution case, rather his evidence shows that victim had gone out of her own sweet will with



the appellant and in such a situation non-examination of I.O. has caused prejudice to the defence also. Learned trial court has also not appreciated the above fact.

17. Considering the entire aspects of the matter, the conviction of the appellant under Section 366A IPC does not inspire confidence and the same suffers from infirmities.

18. Accordingly, this appeal is allowed. The judgment iof conviction and order of sentence are set aside. As the appellant is on bail, he is directed to be discharged from the liabilities of his bail bond.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
CAV DATE	
Uploading Date	26.2.2018
Transmission Date	26.2.2018

