

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.78 of 2003**

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Md. Azhar, Son of Late Md. Yusuf

Md. Shamim Son of Late Md. Yusuf.

Both residents of Village – Pokharia, P.S. – Balia, District – Begusarai.

.... .... Appellants

Versus

State of Bihar

.... .... Respondent

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**Appearance :**

For the Appellant/s : Mr. Mohit Srivastava , Amicus Curiae

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

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**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**

**ORAL JUDGMENT**

**Date: 23-04-2018**

Nobody appears on behalf of the appellants in spite of repeated calls and it appears that the case is of the year 2003, I deem it appropriate to appoint Mr. Mohit Srivastava, learned Advocate present in the court, as *Amicus Curiae* to assist the court.

2. This appeal is directed against the judgment of conviction and order of sentence dated 05.02-2003, passed by Shri Ramesh Kumar Rateriya, 4<sup>th</sup> Additional District & Sessions Judge, Begusarai in Sessions Trial No. 525/93, by which the appellants, above named, were convicted under Section 364 of the Indian Penal Code (in short the “IPC”) and were sentenced to undergo R.I. for ten years. By the said judgment, the appellants were acquitted from the charge under Section 384 of the IPC.



3. Prosecution case as per the fardbeyan of informant Bibi Akhtari, in short is that on the alleged date of occurrence eight to ten persons variously armed, entered into her house, where she, her elder son Shami and younger son Hasib were there and accused asked for her another son Nashim, on which his elder son replied that he did not know as to where the Nashim was. On which, the accused persons assaulted him and took him with themselves saying that Nashim has taken Rs. 13,700/- from them. Informant claimed that out of the said ten persons, she identified two persons, who are the appellants in the present case.

4. On the basis of the aforesaid fardbeyan of informant, Nayagaon P.S. Case No. 17/91 was registered. Post investigation, police submitted charge-sheet and cognizance of the offence was taken and the case was committed to the court of sessions for trial and disposal.

5. During trial, altogether five witnesses have been examined. They are: P.W. 1 – Suryashekhar Jha, a formal witness, who proved the formal F.I.R, P.W. 2 Gita Jha, who is also a formal witness of the case, Md. Usman, husband of the informant, P.W. 4 - Md Hasib, son of the informant and P.W. 5 – Md Badruddin, declared hostile by the prosecution. Informant, Investigating Officer and the victim boy has not been examined in this case.

6. Defence of the appellants is of false implication and of innocence.

7. On conclusion of trial, the Trial Court, has convicted the



appellants under Section 364 of the IPC and sentenced them in the manner aforesaid.

8. Being aggrieved, the appellants preferred the present appeal.

9. Learned *Amicus Curiae* has assailed the judgment of Trial Court on the ground that the learned Trial Court has failed to appreciate the fact that in this case material witnesses viz. informant, victim boy and the Investigating Officer has not been examined and in absence of their examination conviction of the appellants only on the basis of testimony of P.W. 3 and P.W. 4 does not appear to be sustainable in the eye of law. It has also been submitted that though P.W. 3 has supported the prosecution case, however, he has stated in his evidence in para -15 that he has not seen anything from his eyes, the occurrence was disclosed to him later on and further the evidence of P.W. 4 disclosed that at the time of occurrence, he was aged about only ten years and, therefore, his evidence is not free from reasonable doubts and the trial court without considering all these facts has convicted the appellants under Section 364 of the IPC, which is out and out perverse and not sustainable in the eye of law.

10. On the other hand, learned counsel appearing on behalf of respondent – State supported the finding of guilt recorded by the learned Trial Court and has submitted that learned Trial Court has found the evidence of P.W. 4 consistent with regard to abduction of victim boy and in spite of his cross-examination, there is nothing to discredit the evidence of this witness. Further the evidence of P.W. 3



also disclosed that though he had not seen the accused persons snatching the money but he had seen the appellants and others taking away the victim boy.

11. In the background of above submission of the parties, on examination of witnesses, it appears that the conviction of the appellants has been based on the evidence of only two witnesses viz. P.W. 3 and P.W. 4 and one witness P.W. 5 has been declared hostile and others are formal witnesses. It appears that in this case neither informant, nor victim boy have been examined. P.W. 4 happened to be the younger son of the informant as well as younger brother of the victim boy, who at the time of alleged occurrence was aged about ten years. So far evidence of P.W. 3 is concerned, he has stated in his evidence in para 15 that he has not seen anything from his eyes and the occurrence was disclosed to him later on. This witness in para – 16 of his evidence stated that he had stated what he saw and as he had not seen the accused persons snatching the money, a suggestion has been given to this witness that he has been deposing falsely. It further appears that no independent witness has supported the case of prosecution and P.W. 3 does not appear to be eye witness of the case and so far P.W. 4 is concerned, at the time of alleged occurrence, he was a minor and a related witness and evidence of P.W. 3 is not free from reasonable doubt, as such, in absence of examination of informant, victim boy, who are the competent witness in a case of kidnapping/abduction, the prosecution has not been able to prove the



manner of occurrence and genesis of occurrence. Further as stated above, the Investigating Officer has not been examined in this case and had he been examined he would have exert light on the point of recovery of victim boy and his statement before the police. However, the trial court has not appreciated all these facts while convicting the appellants. Learned Trial Court has failed to consider that on the basis of the above evidence, the appellants are at least entitled for benefit of doubt.

12. Accordingly, this appeal is allowed. Judgment of conviction and order of sentence dated 05.02-2003, passed by Shri Ramesh Kumar Rateriya, 4<sup>th</sup> Additional District & Sessions Judge, Begusarai in Sessions Trial No. 525/93.

13. As the appellants are on bail, they are discharged from the liabilities of bail bonds.

**(Vinod Kumar Sinha, J)**

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