

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.514 of 1994

**Arising out of the judgment dated 18.08.1994 passed by 8th Addl.
Sessions Judge, Arrah (Bhojpur) in S.T. No. 473 of 1991.**

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Ashok Kumar, S/o Khaderan Ram, resident of Village Laxumanpur Both P.S.
Mehandia, Distt. Jahanabad

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance:

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

For the Respondent/s : Mr. (A.P.P.)

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE RAJEEV RANJAN PRASAD)

Date: 15-02-2018

The sole appellant has preferred this Criminal Appeal for setting aside the judgment of the learned 8th Additional Sessions Judge, Arrah (Bhojpur) dated 18.08.1994 by which the appellant has been convicted U/S 363, 365 and 376 I.P.C. and ordered to undergo a sentence of imprisonment for five years U/S 363 IPC, seven years U/S 365 IPC and life imprisonment U/S 376 IPC. All the punishments are rigorous and to run concurrently.

2. The facts revealed from the records would show that on 09.05.1991 one Rajendra Prasad Singh, a resident of Mohalla Katira, P.S. Nawada, District Arrah submitted a written complaint to the



Superintendent of Police, Bhojpur, Arrah alleging that his youngest daughter Kumari Sunita, aged about 12 years 9 months, has been kidnapped and is missing since 1:00 P.M. from 10.04.1991. It was further alleged in the written report that on enquiry made he had come to know that one Ashok Kumar, S/o Khaderan Ram, resident of Village Bathe, P.O. Kamta, P.S. Mehandiya, District Jehanabad (the appellant) allured the daughter of the informant and took her away. In the written report the informant also disclosed that the accused Ashok Kumar was serving in the house of the informant for last five years and when he had come to serve him as domestic help he was aged about 15 years and presently he was about 20 years old. The informant raised doubt over his conduct and claimed that he had removed said Ashok Kumar from his house on 28.03.1991. It was also alleged that the said accused Ashok Kumar had taken away the daughter of this informant to the Dak Bungalow near the canal of Daudnagar where the brother-in-law (Bahnoi) of the accused Ashok Kumar was working as a Meith (Head of a group of workmen) and had retired recently. The informant regretted the delay in submitting information with regard to the alleged occurrence.

3. In view of the complaint received from the informant, a formal F.I.R. giving rise to Ara Nawada P.S. Case No. 118/91 dated 09.05.1991 U/S 363/366(A) IPC was registered. After investigation



police submitted a charge sheet bearing no. 90/1991 dated 13.08.1991. The charge sheet was submitted U/S 363/366(A)/376/342/120B IPC. The present appellant as well as the brother-in-law (Bahnoi) Krishna Prasad Gupta were sent up for trial in the charge sheet. After cognizance as the case was session triable the learned Chief Judicial Magistrate, Ara committed the case on 17.09.1991 to the court of sessions. On 24.07.1993 learned Additional Sessions Judge VI, Nawada ordered for framing charge against the present appellant U/S 363, 365 & 376 IPC whereas against accused Krishna Prasad Gupta charge was framed U/S 368 read with Section 365 and Section 120B read with Section 376 IPC. Both the accused pleaded not guilty and claimed to be tried.

4. Learned trial court, as stated above, passed the impugned judgment convicting the accused Ashok Kumar but acquitted the accused Krishan Prasad Gupta giving him benefit of doubt. On behalf of prosecution, PW1, PW2, & PW3, who are sons of the informant (PW4) deposed, who have stated that they learnt from their father on the date of occurrence about the kidnapping of Sunita Kumari. They have admitted that the accused Ashok Kumar had been working as a domestic servant in their house and was ousted about few days ago due to his suspicious conduct. PW4, who is the informant, has stated that he was at the relevant time Principal at Ara



Town High School; on 10.04.1991 when he came home from school at about 6:00 P.M. he came to know that somebody had taken away her daughter Sunita Kumari. He came to know that the accused Ashok Kumar had taken away his daughter, this was told to him by his wife. This informant and his family members are said to have gone to the railway station to search out the victim girl but could not find her. He also went to Kolkatta, Luchiana, Bhatinda, Delhi and other places. He has proved his written complaint submitted to the Superintendent of Police, Bhojpur giving rise to the present case as Ext. 1. This witness has thereafter stated about the recovery of Sunita Kumar from Delhi and then she was handed over to the informant.

5. PW5 is the victim girl Sunita Kumari, who has in her deposition stated that at the time of alleged occurrence she had gone to Ara Station for bringing some articles / goods. She met with Ashok Kumar at the eastern gate of Jain College. She has stated that Ashok asked her to come with him and threatened that if she would not come he will kill her parents. This witness has thereafter stated that she got afraid of and followed the accused Ashok Kumar. She was taken to the bus stand through railway line and from the said bus stand she was taken to Daudnagar. Thereafter she has narrated that she was taken to Aurangabad and from there Ashok took her to Delhi by train. She was there at the Delhi railway platform for the whole night. She was



brought to Gudmandi where in one room she was kept for three months and during this period she was raped twice against her will. She has thereafter stated that the accused was not showing any mercy on her and was being ill-treated.

6. In her cross-examination the victim girl (PW5) has admitted in Paragraph 5 that while she was going to the bus stand with Ashok, on the way thousands of people met. In answer to most of the questions she stated that she did not remember. She admitted to have boarded the train but did not remember in which train she had gone to Delhi and whether anybody had come to check in the train. She has denied that she was in love with Ashok. She has stated that on way to Delhi she did not talk to any male or female on the train. She had also stayed at Delhi platform for one day and night. She has stated that in Delhi she was getting food and tea also.

7. PW6 is Sidheshwar Prasad, the Investigating Officer, he had gone to Delhi and had recovered Sunita, who was later on handed over to the informant by Delhi Civil Court. PW6 has proved the seizure list (Ext. 3) containing photographs of Sunita and two song books. He has also proved Ext. 4 which is the medical report in the writing of Dr. Urmila (PW8) and Dr. Vijay Laxmi (PW7). The medical report (Ext. 4) has corroborated the intercourse. During medical check-up the doctor found her breast developed, vagina



admitting two fingers, no external injury present, brownish discharge present and uterus enlarged having about 8 weeks' pregnancy size; total number of her teeth being $14 + 14 = 28$, aged below 16 years. Pelvic examination revealed that Sunita was habituated to intercourse. Ext. 5 is the medical report in writing of Dr. Ramadhar Sharma of Patna Medical College and Hospital where Sunita had gone to Radiology Department for ultrasonography in order to ascertain pregnancy. There is, however, no evidence as to what happened to the foetus of about 8 weeks.

8. On behalf of defence, a love letter marked as Ext. 'A' has been brought on the record showing that the victim girl Sunita had herself fallen in love with the accused Ashok Kumar.

9. Learned trial court rejected the contention of the defence that there had been several vital infirmities such as not lodging the F.I.R. in time and non-examination of Dinesh Kumar, Krishna Kumar, Vijay Kumar and Laichy Devi, the wife of the informant, inasmuch as these witnesses are said to have given the information to the informant about the alleged occurrence. The wife of the informant was also not examined. The trial court was of the view that the infirmities pointed out by the defence cannot be allowed to disprove the fact that the offence of kidnapping was committed. Relying upon the statement of the accused made U/S 313 Cr.P.C. the



trial court held that the very statement of the accused U/S 313 Cr.P.C. that he carried the girl but with the consent of the mother of the victim is also a corroborative piece of evidence to the prosecution. The trial court attributed two months' pregnancy to the minor victim to the accused Ashok Kumar. The age of the victim girl was taken as below 16 years and therefore she was out and out a minor.

10. The love letter (Ext. A) has not been believed by the learned trial court. The trial court took a view that "Ext. 'A' (love letter) has been written by the victim girl in the state of great emotion and one line in the said letter "सुमन (Victim की बहन) कहती है कि इस बार पकड़ी जाओगी तो बाबूजी से कहकर अशोक को" indicates that accused had unsocial activities in her family from much before the alleged occurrence and the family members were sleeping, ignoring the state of affairs to go ahead, they were negligent, not properly conscious and the faithful servant, who is an accused, found opportunity to persuade the girl." It was also the case of defence that the victim girl was not medically examined immediately.

11. In Paragraph 12 of the trial court's judgment it has come as under:-

"The defence has tried to bring all these circumstances in order to exonerate the offence by a pressurized and compelled tender aged 17 years boy, the accused. But in no view of the matter, offence is heinous one, and has



been further aggravated in that, the same was committed by a domestic servant regarded as a faithful member of the family”

12. In appeal before us Smt. Soni Shrivastava, learned advocate (*Amicus Curiae*) has relied upon the observations of the learned trial court in Paragraph 12 of the impugned judgment wherein the learned trial court has taken note of the defence case based on the age of the victim boy at the time of the alleged occurrence but the learned trial court failed to consider that the victim boy was a juvenile on the alleged date of occurrence. Learned counsel points out that the accused Ashok Kumar was a juvenile as he was below 18 years of age and this fact was specifically pleaded by way of defence before the learned trial court. She has drawn our attention towards the statement made by Dilip Kumar (PW1), who is none-else but own brother of the victim girl Sunita Kumari.

13. In course of his cross-examination, he (PW1) has stated repeatedly in Paragraphs 6 & 8 of his deposition that the accused Ashok had come to his house at the age about 12-13 years and had worked for about 3 – 3½ years, therefore, it is the submission of the learned *Amicus Curiae* that the accused was a juvenile on the alleged date of occurrence, therefore, he could have been tried under the provisions of the Juvenile Justice Act, 1986. She submits that the



whole trial in the present case shall stand vitiated because of the fact that the juvenile accused could not have been tried before the learned Sessions Court and his trial should have been conducted only before the juvenile courts as envisaged U/S 5 of the Juvenile Justice Act, 1986.

14. Learned counsel for the appellant has relied upon the judgment of the Hon'ble Supreme Court in the case of **Hari Ram Vs. State of Rajasthan & Anr.**, reported in 2009 (13) SCC 211, particularly Paragraphs 28 & 29 of the said judgment wherein it has been held that the claim of juvenility may be raised before any court which shall be recognized at any stage even after final disposal of the case and such claim shall be determined in terms of the provisions contained in the Act and the Rules made thereunder. It is the specific submission of the learned counsel representing the appellant that **Hari Ram** (Supra) made clear the effect of the new Juvenile Justice Act, 2000 as amended by Act No. 33 of 2006 had widened the scope of the new Juvenile Justice Act, 2000. In the light of amending Act No. 33 of 2006, the Hon'ble Supreme Court in the case of **Hari Ram** (Supra) viewed the applicability of new Juvenile Justice Act, 2000 to the juveniles who have committed the offence when they were below 16 years but have subsequently crossed their 18 years of age on or before 01.04.2001.



15. Learned counsel also submits that in the present case there is no compliance with the provision of Section 313 Cr.P.C. as it would appear from the questions which were posed to the accused that his attention was not drawn towards the incriminating materials which had transpired in course of trial and were the materials against the accused, therefore, if those materials were not pointed out to the accused, the mandatory provision of Section 313 Cr.P.C. has not been followed. In support of her submissions learned *Amicus Curiae* has relied upon a judgment of the Hon'ble Supreme Court in the case of **Sukhjit Singh Vs. State of Punjab**, reported in [(2014) 10 SCC 270].

16. On the other hand, learned A.P.P. representing the State submits that there is no illegality or infirmity in the impugned judgment of the learned trial court. Learned A.P.P. has supported the judgment and submitted that the victim in the present case was admittedly a minor girl who had been taken away by this accused and then she was raped.

17. We have heard learned counsel (*Amicus Curiae*) representing the appellant and learned A.P.P. for the State as also we have perused the trial court's records.

Consideration

18. We are constrained to hold in the facts of the present



case that the trial court has completely missed out on a very important aspect of the matter. From the deposition of the witnesses and the pattern of cross-examination of those witnesses it would be crystal clear that the defence was always pointing out that when the alleged occurrence took place this appellant was also a minor and juvenile and that it was a case where both the victim girl as well as the accused appellant were minor / juvenile. In this regard, the brother (PW1) of the victim girl in his cross-examination has admitted that when this appellant had come to work in the house he was about 12-13 years old. He has also stated that this appellant had worked for about 3 – 3½ years, therefore, PW1 has been admitting the case of the defence that the accused appellant was below 18 years of age at the time of the alleged occurrence. The second brother (PW2) of the victim girl has also admitted that the accused had worked in the house for about 3½ years, therefore, the statement of PW1 and PW2 that the accused appellant was working in the house for 3 – 3½ years are corroborating each other.

19. The trial court has not appreciated the case of the defence that in this case the mother of the victim girl was an important witness but she was not examined by police. The informant has admitted in the written complaint (Ext. 1) that his wife had informed him on the same day that his daughter Sunita had been taken away by



the accused appellant, it is the case of the defence that the mother of the victim had consented to going of the victim with the accused and therefore the examination of the mother of the victim was required. Non-examination of the mother of the victim has definitely prejudiced the case of the defence. Further in order to explain the delay of about one month in lodging of the F.I.R. the informant took a plea that in search of his daughter he had gone to several places like Ludhiana, Kolkata, Delhi etc. but no evidence could be brought on record to show that he had undertaken the journey to these places. The cumulative effect of non-examination of the wife of the informant and the stand of the accused in his 313 Cr.P.C. statement that the mother had consented to the going of victim with the accused would cause a reasonable doubt in the mind of this Court that the informant (PW4) on coming to know the facts of eloping of his daughter allegedly with the accused-appellant did not take any immediate step to find out the victim girl.

20. The manner in which the victim Sunita is said to have travelled with the accused appellant from Jain College to Railway Station and then to the Bus Stand and her statement that she never talked to any male or female on the train while going to Delhi would show that the case of the defence that she was in love with the accused appellant who was also of juvenile age seems to be correct.



21. The Medical report certified that the victim was habituated to intercourse and was carrying pregnancy of 8 weeks but no DNA test was conducted to prove that this accused-appellant had established physical relationship and the victim was carrying the pregnancy through this accused – appellant. The doctors did not find any sign of external injury. Thus the allegation of rape could not be proved by a clinching evidence. Here it is to be noticed that the victim girl when recovered at Delhi and was handed over to the informant she had occasion to be tutored. In the opinion of this Court, by not conducting a D.N.A. test of the victim and the accused – appellant the prosecution has only damaged its' case.

22. On perusal of the statement U/S 313 Cr.P.C. of the accused this court would find that in fact in this case there is no compliance with the provision of Section 313 Cr.P.C. None of the incriminating materials which have transpired in course of evidence as against the accused appellant was brought to his notice. The relevant part of the questions and answers recorded in the statement U/S 313 Cr.P.C. are quoted hereunder for a ready reference:

“प्रश्न – आपके खिलाफ साक्ष्य है कि 10-4-91 से 13 July 91 तक सुनिता को अपने कब्जा में रखा व उसे भगाकर ले गए थे ?

उत्तर – गलत है।

प्रश्न – क्या आपने उसे rap किया ?

उत्तर – नहीं किया।



प्रश्न — क्या लड़की वह आपके साथ दिल्ली में बरामद हुई।

उत्तर — नहीं, पकड़ा है।

प्रश्न — सफाई में क्या कहना है ?

उत्तर — वह लड़की ने ही मुझे मजबूर करके अपनी माँ की राजी से, तब मैं उसके साथ बाहर गया था। वह मुझसे प्यार करती थी।”

23. In course of argument learned *Amicus Curiae* has relied upon the judgment of the Hon’ble Supreme Court in the case of **Sukhjit Singh** (Supra) and has submitted that the Hon’ble Supreme Court has times and again given emphasis that the very object of Section 313 Cr.P.C. is to afford the accused a fair and proper opportunity of explaining the circumstances which appear against him. We would quote Paragraphs 11, 12 & 13 of the judgment of the Hon’ble Supreme Court hereunder for a ready reference:-

“11. In this context, we may profitably refer to a four-Judge Bench decision in *Tara Singh v. The State* wherein, Bose, J. explaining the significance of the faithful and fair compliance of Section 342 of the Code as it stood then, opined thus:

"30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is



misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them.

He must be questioned separately about each material circumstance which is intended to 1 (2009) 6 SCC 595 2 AIR 1951 SC 441 be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question.

Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether



prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

12. In *Hate Singh Bhagat Singh v. State of Madhaya Bharat*, Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the code expressed thus:-

"8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal P.C. are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused, person is not allowed to enter the box and speak 3 AIR 1953 SC 468 8 Page 9 on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box."

13. The aforesaid principle has been reiterated in *Ajay Singh v. State of Maharashtra* following terms:

"14. The word "generally" in sub-section (1)(b) does not limit the nature of the questioning to one or more



questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed.

The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

In our considered opinion, in the manner in which only certain questions were posed to the accused while recording his statement U/S 313 Cr.P.C., there is no compliance with the requirement of Section 313 Cr.P.C.

24. On consideration of the submission of the learned counsel representing the appellant in the light of the judgment in the



case of **Hari Ram** (Supra), we are of the view that in **Hari Ram** (Supra) it was held that if the juvenile, in conflict with law, was below 18 years when the offence was committed and subsequently he had crossed 18 years, may be before 01.04.2001 or even on that date, still the juvenility can be claimed. The new Juvenile Justice Act, 2000, as amended by Act No. 33 of 2006, has a retrospective operation to the offences committed before 01.04.2001 and, therefore, it covers the cases under the old Juvenile Justice Act of 1986. It is well settled that the question as to juvenility may be claimed at any stage and in any proceeding, therefore, the submission raised by learned counsel for the appellant on the ground of juvenility has got force and we are in agreement that on the face of the evidences available on the record the plea of juvenility of the appellant is fit to be accepted.

25. We have also been informed by the learned advocate (*Amicus Curiae*) that in this case the accused has served about 4½ years of sentence. We agree with the submission that in the present case not only the trial before the regular court stood vitiated because of non-observance of the provisions of the Juvenile Justice Act, 1986 but also the fact that in course of trial by the regular court the accused appellant was not given a proper opportunity to defend himself as required U/S 313 Cr.P.C. and the trial court could not appreciate the vital discrepancies in the prosecution evidences, the judgment under



appeal is liable to be set aside.

26. We, for the reasons discussed here-in-above, take a view that the whole trial in the present case stood vitiated because the case of the defence that the accused appellant was a juvenile / minor at the time of the alleged occurrence was not at all considered by the trial court. Even the opportunity as envisaged U/S 313 Cr.P.C. was not granted to the accused appellant and, in any case, the accused appellant has already remained imprisoned for about 4½ years, as informed to this Court, we set aside the impugned judgment and acquit the sole appellant, giving him benefit of doubt.

27. The accused appellant is on bail, he is discharged from the liability of bail bonds.

28. The Appeal is allowed accordingly.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Dilip, AR

AFR/NAFR	AFR
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