

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.337 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- BANKA

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Laxuman Rai S/O Late Baldeo Rai, Resident of village- Inarabaran, Police Station
Fullidumar (Amarpur) District Banka.

.... Appellant

Versus

State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Sunil Prasad, Adv.

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 23-03-2018

This appellant stands convicted under Section 364 of the
Indian Penal Code and sentenced to undergo R.I. for five years.

2. The prosecution case as stands on the fardbeyan of
Lakhan Kora recorded by S.I. R.N.Roy of Fullidumar Police Station,
District Banka on 28.8.1995 in short is that wife of his son Radhe
Kora had illicit relation with appellant Laxuman Rai, for which she
was subjected to “मार-पीट” and due to that she fled away to the house
of Laxuman Rai and after two days she went to her *Maike*. It is also
the case that when his son went to brought her back, he was asked to
bring his guardian with him. On 16.6.1995, Laxuman Rai came to his
house and asked his son Radhe Kora to come along with him and he
will brought his wife back and thereafter Radhe Kora went along with
appellant Laxuman Rai. After 3-4 days, Laxuman Rai returned but



Radhe Kora did not return and when he enquired about him, he refused to say anything and when he enquired from the *Maik*e of his daughter-in-law, it was told that Radhe Kora had not reached there. It is also the case that the conduct of his daughter-in-law was not good and she has physical relation with Laxuman Rai and due to that his son was killed and he claims that Laxuman Rai had killed his son.

3. On the basis of the aforesaid fardbeyan, Fullidumar P.S.Case No.139 of 1996 was registered. Post investigation, the charge-sheet has been submitted against the sole appellant under Section 364 of the IPC, cognizance of the offence has been taken and the case has been committed to the court of sessions which ultimately came to the file of Sri Pradip Sah, Ist Additional Sessions Judge, Banka, for trial and disposal. The appellant Laxuman Rai has been charged under Section 364 of the IPC for abduction of Radhe Kora in order that he might be murdered.

4. In support of his contention, the prosecution has examined following witnesses, they are : P.W.1 Raudari Kora, P.W.2 Mungia Devi, P.W.3 Dilip Kumar Kora, P.W.4 Jeva Kora, P.W.5 Deni Devi and P.W.6 Kabiya Devi. The informant and the I.O. have not been examined in this case.

5. No any ocular or documentary evidence has been adduced on behalf of the defence.



6. As per the trend of the cross examination and from Section 313 of the Indian Evidence Act, the case is of innocence and false implication.

7. The learned trial court on conclusion of the trial has convicted the appellant under Section 364 of the IPC for abducting Radhe Kora in order that he might be murdered.

8. The aforesaid murder has been assailed by the learned counsel for the appellant on the ground that there is absolutely nothing against the appellant except suspicion, as prosecution evidence shows that Radhe Kora had gone along with the appellant and he did not return. It has further been submitted that Radhe Kora had not gone with the appellant. It has also been submitted that in this case prosecution has failed to prove fardbeyan as neither the informant nor the I.O. has been examined in this case, however, the learned trial court has convicted the appellant under Section 364 IPC only on the sole evidence of last seen.

9. On the other hand the learned counsel for the State has defended the judgment on the ground that it is the appellant who has taken Radhe Kora along with him on the plea that they will go and bring his wife, thereafter he returned after three days but Radhe Kora has not returned and on enquiry he simply stated that Radhe Kora had not gone along with him and no explanation has been given by the



appellant as to the fact that Radhe Kora was traceless and he was last seen going along with him, as such the learned trial court has rightly convicted the appellant as Radhe Kora was traceless from more than seven years and there is also presumption under Section 106 of the Indian Evidence Act and it provides burden of proving fact especially within knowledge. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon the appellant but that burden of proof has not been discharged by the appellant. As such he has rightly been convicted under Section 364 of the IPC.

10. On the background of the contention of the parties, on scrutiny of the evidence, it appears that the informant has not been examined in this case but witnesses examined in this case have supported the prosecution case.

11. The evidence of P.W.1 (Raudari Kora) discloses that 20 months prior he had seen Laxuman Rai and Radhe Kora going together and after three days Laxuman returned alone and when he enquired about Radhe Kora he had simply stated that he had not gone with him and so far other evidence is concerned, Laxuman Rai had illicit relation with the wife of Radhe Kora. This witness appears to be hearsay witness. In spite of cross examination, there is nothing in his evidence to doubt his testimony rather he has stated in para 4 of his cross examination that at that time he was at the Darwaza and Lakhan



Kora, sister of Lakhan Kora and his wife Harni Devi were present and they saw the accused appellat going along with Radhe Kora.

12. P.W.2 is the wife of Lakhan Kora (informant in this case) and her evidence also discloses that at 10:00 P.M. she came back and saw Laxuman Rai along with her daughter-in-law, for which his son has chided her and thereafter her daughter-in-law went to her *Naihar* and when her son went to bring her back she did not come and Laxuman Rai came and proposed that he along with her son will go and bring her back and thereafter they had gone to bring her back. After three days, Laxuman Rai returned but Radhe Kora did not return and on enquiry he could not give satisfactory answer about the whereabouts of Radhe Kora. This witness has also been cross examined and on cross examination, there does not appear anything to doubt her testimony in his chief.

13. P.W.3 (Dilip Kumar Kora), who is son of Radhe Kora stated in his evidence in court that Laxuman Rai had physical relation with his mother, for which his father had chided her and his mother went to the house of Laxuman Rai and from there she went to her *Maike*, even in spite of Radhe Kora went to call her, she did not come back and Laxuman Rai came to his house and asked his father to come along with him and he will get *Bidagri* thereafter his father went alongwith Laxmun Rai and after three days Laxuman Rai



returned back but his father did not come and on enquiry, Laxuman Rai told that he had not gone along with him. He has also stated that thereafter he searched his father and when he did not come to know about his whereabouts, he believed that his father has been murdered by Laxuman Rai. This witness has also been cross examined but there is nothing in his cross examination to doubt his testimony rather in his cross examination in para 7 also he has stated that Laxuman Rai had told his father to come and he will get *Bidagri* done and his evidence further discloses that his father had gone along with Laxuman Rai.

14. Evidence of P.W.4 in para 4 also discloses that two years three months prior at about 7.00 A.M. in the morning he was sitting at Kedia Chowk, he saw Laxuman Rai going along with Radhe Kora on cycle and thereafter Radhe Kora did not return. From his cross examination, it appears that he is not related to Radhe Kora and he appears to be independent witness and even in his cross examination, there is nothing to doubt his testimony.

15. Evidence of P.W.5 (Deni Devi) also discloses that Radhe Kora and Laxuman Kora both had gone to Radhe Kora's *Sasural* to bring his wife back and after three days, Laxuman Rai returned back but Radhe Kora did not return and on enquiry from Laxuman Rai told that Radhe Kora had gone to earn his livelihood and till today Radhe Kora has not returned and that is why there is



suspicion that Laxuman Rai has killed him as Laxuman Rai had illicit relation with the wife of Radhe Kora.

16. P.W.6 (Kabiya Devi) has supported the prosecution case stating that Laxuman Rai and Radhe Kora had gone to the *Sasural* of Radhe Kora to bring his wife and after three days Laxuman Rai returned back and told that Radhe Kora has gone to Delhi and in spite of search, Radhe Kora is still traceless. Her evidence even in spite of cross examination remained unrebutted.

17. From the entire discussions of the evidence available on the record, it appears that there is consistent prosecution evidence that appellant Laxuman Rai had taken Radhe Kora on the plea that he will bring his wife back and they had gone to the *Sasural* of Radhe Kora but after three days he returned back but Radhe Kora has not returned and on enquiry he had stated that he had not gone along with him though one witness has also stated that he had gone to earn livelihood but no satisfactory answer has been given by the appellant.

18. The occurrence is of the year, 1995 as such the learned trial court considering Section 108 of the Indian Evidence Act has held that as nothing has been heard about Radhe Kora for more than seven years. The presumption is that he died and burden of proving that person is alive who has not been heard of for seven years is on the person who claimed the same. Finding of the learned trial court



appears to be just and proper as Section 108 of the Indian Evidence Act provides as follows : -

108. Burden of proving that person is alive who has not been heard of for seven years.—
1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it.”

19. It further appears that circumstances clearly shows that Laxuman Rai had illicit relation with the wife of Radhe Kora and for that Radhe Kora had chided his wife and for that she fled away and further specific case is that Laxuman Rai had taken Radhe Kora on the plea that he will bring her back and Radhe Kora had gone with Laxuman Rai. There is consistent evidence regarding that Laxman Kora had gone with Radhe Kora. The evidence further shows that Laxuman Rai returned after three days but Radhe Kora did not return and he is still traceless and Laxuman Rai has not given any satisfactory explanation about Radhe Kora being traceless. His evidence clearly shows that Radhe Kora was last seen along with Laxuman Rai. Section 106 of the Indian Evidence provides as follows : -

106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”



20. As stated above, Radhe Kora had gone along with Laxuman Kora as such the facts of whereabouts of Radhe Kora is within the knowledge of Laxmun Rai and as such burden of proving fact is upon Laxuman Rai and non-explanation of the same is strong circumstances against the appellant in this case. Even in his statement under Section 313 of the Cr.P.C. he has stated that Radhe Kora had gone along with him nor he has killed him but the evidence is consistent that Radhe Kora was gone along with Laxuman Rai and even in spite of the cross examination that evidence remained un rebutted.

21. Learned counsel for the appellant has also submitted that there is delay of more than 03 months in lodging the FIR and the informant and the I.O. has not been examined as such FIR has not been proved as such prosecution has failed to prove the initial story itself and on that ground whole prosecution case can not stand credible. However, the witnesses have supported the prosecution case as stated in the FIR and as such even in absence of examination of the informant, the prosecution case can not be disbelieved for not proving FIR. So far non-examination of the I.O. is concerned, it appears that there is no vital contradiction in the evidence of witnesses from their earlier statement and the place of occurrence is also well established by prosecution evidence as such non-



examination of the I.O. has not caused any prejudice to the defence.

22. On consideration of the entire facts and circumstances, it appears that there is consistent evidence available on the record that Radhe Kora was taken by Laxuman Rai and since then he is traceless and even more than seven years have passed but whereabouts of Radhe Kora has not been proved. There is also cogent prosecution evidence that appellant had illicit relationship with wife of Radhe Kora and for Radhe Kora chided her and for that she fled away. Further prosecution evidence shows that Radhe Kora was but seen with the appellant and as such whereabouts of Radhe Kora was within his knowledge, but he had not given any satisfactory answer.

23. On the facts and circumstances as discussed above, conviction of the appellant under Section 364 IPC appears to be just and proper and affirmed. Submission of the learned counsel for the appellant is that the case is also of the year, 1995 and the appellant has remained in custody for three months, as such a lenient view may be taken and the sentence be reduced to the period already undergone, however, considering the facts that the case is under Section 364 of the IPC for which the sentence is of life imprisonment and also considering that the occurrence is of the year, 1995, sentence is reduced to the R.I. for a period of five years and the



appellant shall also be entitled set off in accordance with law for the period already undergone in custody.

24. With the aforesaid modification in sentence, this appeal is dismissed.

(Vinod Kumar Sinha, J)

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