

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.307 of 2003

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

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Praveen Kumar Mandal @ Prabin Kumar Mandal @ Gajua, son of Suresh Chandra
Mandal, resident of village Bawanganj Binjee, P.S. Korha, District Katihar

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Rajesh Kumar Sharma (amicus curiae)

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 19-06-2018

The sole appellant has been convicted under Sections 363, 366A and 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years under Section 363 IPC, sentenced for five years under Section 366A IPC and sentenced for seven years under Section 376 IPC and all the sentences were directed to run concurrently by the judgment and order dated 9.5.2003 and 17.5.2003 respectively passed by Sri Yogendra Prasad, the then 1st Additional Sessions Judge, Katihar in Sessions Trial No. 202 of 2001.

2. Prosecution case, in short, is that the informant Jawaharlal Mehta (not examined) has lodged written report on 13.9.2000 stating, inter alia, therein that on 11.9.2000 the informant couple had left for their field at about 10 A.M. leaving behind her daughter Sunita Kumari aged about 14 years at home and in the evening at about 5



P.M. when they returned home, they did not find Sunita Kumari in the house. When search was made for her till 8 P.M. and not found her the matter was conveyed to the neighbouring people and in the process thereof it could be learnt from PW 3, Motilal Mehta that the accused appellant was seen going towards Semapur Station along with the victim Sunita Kumari. Thereafter informant went to the house of Suresh Chandra Mandal, father of the appellant and the appellant was not found there nor the victim girl. Thereafter search was made by the co-villagers for the girl. It is further alleged that the appellant, who along with 2-3 friends, enticed her away for the purpose of being married.

3. On the basis of the aforesaid written report Korha P.S.Case No. 180 of 2000 was registered under Sections 363, 366A/34 IPC.

4. Post investigation charge sheet has been submitted against the appellant and cognizance of the offence has been taken and after commitment the case ultimately traveled to the file of Sri Yogendra Prasad, the then 1st Additional Sessions Judge for trial and disposal.

5. During trial charges were framed under Sections 363, 366A and 376 IPC against the sole appellant.

6. In order to establish its case, the prosecution has examined altogether eight witnesses, they are PW 1 Anil Kumar, PW 2 Sunita



Kumari (victim), PW 3 Motilal Mehta, PW 4 Sudhir Kumar Mehta, PW 5 Balram Prasad, PW 6 Dr. Mini Rani, who examined the victim girl, PW 7 Sunil Kumar Mehta, who has been declared hostile and PW 8 is the Investigating Officer of this case, who has also proved the exhibits.

7. On behalf of defence two witnesses have been examined, they are Dharmendra Sah, DW 1 and Meghnath Sah @ Rupesh Kumar.

8. The defence of the accused as per statement under Section 313 Cr.P.C. and also from the trend of cross examination is of false implication and of innocence. Further defence, which appears from the evidence adduced on behalf of defence, is that victim wanted to marry appellant and as he is not ready, he has been implicated in this case.

9. In this case it appears that informant, who is father of the victim girl, has not been examined and from the evidence of PW 5 and DW 1 it appears that he died.

10. Learned trial court after conclusion of trial has convicted the appellant under Sections 363, 366A and 376 IPC and sentenced him as stated above.

11. Learned amicus curiae has assailed the judgment on the ground that there is delay of two days in lodging the information to



the police though informant came to know about the fact that she had gone along with the appellant. Further submission is that evidence of PW 2 clearly disclosed that she was taken to different places and even traveled by train but she did not raise any alarm and remained with the appellant for three days. In cross examination her evidence further disclosed that on the day of kidnapping and next day, i.e., 11.9.2000 and 12.9.2000 in the night she was taken by the appellant at Kharik Railway Station and they came to the house of the appellant, which clearly suggests that she came to the house of appellant on 13.9.2000 from where she was recovered at 12.10 P.M. Evidence of PW 3 disclosed that the house of the appellant is 500-600 yards away from the house of the victim and in such a situation not raising any alarm nor trying to inform her family members creates a serious doubt about the conduct of the victim and also creates doubt about the evidence of PW 2, the victim that she was ravished in the night after returning from Kharik Railway Station. In view of the evidence of PW 2 the whole prosecution case appears to be doubtful and in such view of the matter, the evidence of PW 2 has not inspire any confidence. It has also been submitted that even the Doctor, who has examined the victim, has not found any sign of rape as no spermatozoa was found on microscopic examination and there is no mark of violence over PW 2. Doctor has also found her age as 15 to 16 years and considering the



general rule for determination of age as per established principle it may vary +/- two years and if the same is considered she was found aged about 18 years and as such she was major. It has been submitted that in such view of the matter, the conviction of the appellant under Sections 363, 366A and 376 IPC is not sustainable in the eye of law.

12. On the other hand, learned counsel for the State has supported the judgment of guilt stating that PW 2 has supported the prosecution story in her evidence and Doctor has also found her age in between 15-16 years and PW 8, the I.O., and evidence of PWs 1 and 4 clearly disclosed that she was recovered from the house of the appellant. It has also been submitted that even if it is assumed that she was minor and she was a consenting party, consent of minor is no consent. Hence, no interference is required in the impugned judgment and order.

13. On a consideration of the materials available on record in the background of the submission of both the parties, it appears that father of the victim has also not been examined and evidence of PW 5 and DW 1 shows that he died. However, even mother or any other family member of the victim has not been examined and PW 2, the prosecutrix, is the sole witness to the case as other witnesses are either on the point of recovery or hearsay or has been declared hostile. PW 2 has disclosed her age in court as 16 years, whereas the court has



assessed her age at 16-17 years. On the other hand, from the evidence of Doctor (PW 6) it appears that her age was assessed at 15-16 years on the basis of Radiological and Ossification test.

14. On scrutiny of evidence in chief of PW 2 it appears that at 12 noon she went to Semapur and appellant came there and gave her some sweets. Thereafter appellant accompanied by 2-3 persons has taken her Semapur Railway Station, boarded her on a train and she was taken to Kharik Railway Station and from there she was taken to Bharwan where appellant forcibly put 'Sindoor' on her head in Shiva temple. Thereafter they passed night at Kharik Railway Station and second day she came to the village and remained in the house of the appellant, who forcibly committed rape upon her. Thereafter police came and recovered her from the house of the appellant. This witness has been cross examined at length and from her cross examination it appears that Semapur Railway Station is two and a half kilometers from her house and her mother asked her to purchase soap, for that she had gone alone at 'Chowk'. No such story that she was asked to purchase soap appears from the written report as written report simply disclosed that she was not found in the evening when the informant and his wife returned to the house. Her evidence in cross examination in paragraph 10 also disclosed that she had been given sweets by the appellant and thereafter she was forcibly taken.



Her evidence also disclosed that appellant was carrying some arms but her evidence in cross examination in paragraph 12 further shows that there were passerby at that time but appellant was threatening her. Her evidence in cross examination in paragraph 12 further disclosed that the Railway Station was crowded at that time and it became night when she reached Kharik Railway Station. Her evidence also disclosed that she attended the call of nature at village Bharwan which is 14 kilometers away from Kharik Railway Station. Thereafter she went to Shiva temple and later on she returned to Kharik Railway Station in the evening and remained there in the night. Next day at 8 P.M. they reached at Semapur by train from where she was taken to the house of the appellant. Her evidence also disclosed that she was subjected to physical intercourse and she felt pain and blood also oozed out. PW 2 disclosed that she was taken by appellant who was accompanied by 2-3 persons. On the other hand, evidence of PW 3 disclosed that he saw the victim along with the appellant going to Semapur Railway Station but he has not stated about presence of other persons and on the basis of disclosure of PW 3, in the written report it came to light about going of the victim-prosecutrix along with the appellant. The evidence of PW 3 further disclosed that house of the appellant is 500-600 yards away from the house of the prosecutrix and that disclosed that both the appellant and prosecutrix are co-villagers.



15. PW 1, PW 4 and PW 5 appear to be hearsay witnesses on the point of kidnapping and PWs 1 and 4 are witnesses on the point of recovery on the seizure list and PW 5 also supported the recovery of prosecutrix from the house of the appellant. However, none of those witnesses has stated that PW 2 had disclosed about commission of rape upon her. So far PW 7 is concerned, he has been declared hostile in this case.

16. From the evidence of I.O. (PW 8) it appears that victim was recovered from the house of the appellant and his cross examination revealed that at the time of raid the prosecutrix was found sitting in the house of the appellant. Hence, recovery of victim from the house of the appellant is concerned, the evidence of I.O. is corroborated by PW 1 and PW 4 as well as by evidence of PW 5 and further corroborated by seizure list (Ext.3).

17. Considering the evidence discussed above it appears that the prosecutrix is the sole eye-witness to the occurrence of kidnapping as well as commission of rape and on a plain reading of evidence of PW 2 it appears that she had supported the prosecution story of kidnapping and rape. However, PW 6, who is Doctor and had examined her, disclosed in her evidence that she had not found any mark of violence on her body and her evidence further disclosed that on microscopic examination of vaginal swab, no spermatozoa was



found and she appears to be habituated in sexual intercourse. Evidence of PW 6 further disclosed that on Radiological test and Ossification test her age was found to be 15-16 years, whereas in cross examination PW 6 has stated that her age was assessed at in between 16-17 years.

18. Submission of learned counsel for the State is that even if it is assumed that she is consensual party, she was minor as such her consent has no legal value and further submitted that so far delay of two days in lodging the information is concerned, it is insignificant because they have suffered trauma, agony and anguish.

19. In the present case, no doubt there is delay of two days in lodging written report as even though it appears from the written report that he came to know about the fact that prosecutrix was kidnapped by the appellant, in spite of that he waited for two days as it appears that written report has been filed on 13.9.2000 on the day itself when prosecutrix was recovered and evidence of PW 2 also suggests that she came in the morning of 13.9.2000 in the village which clearly suggests that only after coming to know that she has returned with the appellant the present case has been lodged and as such the delay in giving information to police gave rise to a sense of doubt about whole prosecution case.

20. Doctor has found her age as 15-16 years which prima



facie shows that she was minor. However, the determination of age of on medical test can vary ± 2 years and it is well established that accused is entitled for the above benefit which is in his favour.

21. Learned trial court has not considered this aspect of the matter and held her to be minor though on the basis of the above principle if two years is added to the age of 16 years she appears to be major at the time of occurrence.

22. Leaving apart, even if she is minor and the evidence of prosecutrix has to be tested to see whether it is unimpeaching or beyond reproaching before conviction of the appellant. In the present case, learned trial court has found that she was minor and thereafter believing the evidence of PW 2 conviction of the appellant without testing the evidence of PW 2 who is the sole witness as to whether it is free from embellishment and whether her evidence is worthy of credence.

23. In the present case, as discussed above, the evidence disclosed that she was taken by appellant to Semapur Railway Station, from where they went to Kharik Railway Station, remained in the night at Kharik Railway Station, next day in the village Bharwan, which is 14 kilometers away from the Kharik Railway Station, she was forcibly married, they returned to Kharik Railway Station and passed that night at Kharik Railway Station, thereafter came to



Semapur and to his village. As such, it is not so that she was confined to one place, rather she was taken from one place to other. She has admitted the passerby and thereafter she was taken by appellant after giving some sweets. She remained in Kharik Railway Station for two days and went to village Bharwan and in spite of the fact that she had traveled from place to place and there is no evidence that she ever raised any alarm or tried to escape. The only explanation given is that the appellant was threatening and he had some arms with him. But it is very difficult to believe that in such a situation the prosecutrix did not get a chance to raise alarm.

24. She has also stated that she was ravished in the night before recovery at the house of the appellant. On the other hand, her evidence disclosed that she had reached the village of the appellant on 13.9.2000 and she being ravished in the night does not inspire confidence specially on the background that Doctor has not found any mark of violence or any spermatozoa on her person.

25. In the above background, none examination of mother and other family members of the victim also raises question mark or doubt about the prosecution case.

26. No doubt, the testimony of prosecutrix can be accepted without any corroboration and it has to be placed at higher pedestal of injured witness but on close scrutiny of the evidence, as discussed



above, this Court finds it difficult to accept the evidence of prosecutrix and for that some direct or circumstantial evidence is required to led credence to her testimony. But in this case Doctor has not found any sign of rape. Her evidence disclosed that her evidence is not free from reasonable doubt. Learned trial court has failed to consider the aforesaid infirmities and inconsistencies and erroneously convicted the appellant. Hence, the impugned judgment is not free from above infirmities, as such appellant is at least entitled for benefit of doubt.

27. Considering the entire discussions made above, the judgment and order do not appear to be sustainable in the eye of law. Hence, the appeal is allowed and the impugned judgment and order 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/-

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