

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.583 of 2002

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

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1. Badri Mehta son of Sakhilal Mehta 2. Ram Kumar Mehta son of Laxmi Mehta Both of village- Bhaghanpur P.S. Ratanpura, District Supaul	 Appellants
Versus	
State of Bihar	 Respondent

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Appearance :

For the Appellants : Mr. Arun Kumar, Adv.
For the Respondent : Mr. Binod Bihari Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 05-01-2018

Both the appellants stand convicted under Section 366A/120B of the Indian Penal Code (hereinafter to be referred as ‘the I.P.C.’) and had been sentenced to undergo R.I. for 10 years under Section 366A and R.I. for six months under Section 120B of the I.P.C. Both the sentences were said to run concurrently.

2. The prosecution story enumerated from the FIR is that the daughter of the informant (P.W.3) went to the tube well to wash the plates and since then she is traceless and in spite of search, she could not be traced out. Further prosecution case is that in the morning, Ramesh Mehta and Bhola Mehta P.W.1 and P.W.2 respectively came and narrated him that they had seen the accused persons lifting Pinki Kumari at about 9.00 P.M. and carrying her forcibly towards *Bandh* and they had also covered the mouth of Pinki Kumari and they have also stated that they could not utter anything



out of fear. Further prosecution case is that they searched the victim girl to the nearby places but they could not traced her out. It is also prosecution case that due to previous enmity, Sattan Mehta had earlier threatened that he would kidnap his daughter and they in conspiracy with other accused persons have kidnapped her daughter and conceal her to some other place.

3. The aforesaid fardbeyan led to registration of Ratanpura P.S.Case No.07 of 2000 under Section 366 A and 120B I.P.C. and the appellants as well as one Sattan Mehta and Upendra Mehta later on under Section 376 of the IPC were added. It appears from the records that the police after investigation submitted charge sheet against Sattan Mehta and against the appellants under Section 366A and 120B of the IPC and the investigation continued against another co-accused Upendra Mehta as he was absconding.

4. The cognizance was taken and thereafter the charges were framed against the accused persons including the appellants under Section 366A and 120B of the IPC. It further appears that during the trial accused Sattan Mehta died, as such the proceeding against him was dropped, vide order dated 10.09.2002.

5. During the trial altogether six witnesses have been examined on behalf of the prosecution. They are, P.W.1 Ramesh Mehta, P.W.2, Bhola Mehta, who has been declared hostile as he had not supported the prosecution case, P.W.3 Sitaram Sinha father of the



victim girl and the informant, P.W.4 Anpurana Devi mother of the victim girl, P.W.5 Dr. Poonam Singh, who has examined the victim girl and P.W.6 Pinki Kumar, so called victim girl. It appears that the I.O. has not been examined in this case. P.W.5 Doctor Poonam Singh has not confirmed commission of rape upon her and she has assessed her age as 16 to 17 years and furthermore the victim girl has stated her aged as 19 ½ years at the time of occurrence and it is well settled by various judgments of this Court.

6. The defence of the accused persons is that the victim lady had love affair with Upendra Mehta and it was not liked by her father, as such he has implicated the appellants and the other accused persons in false and concocted case. In support of their contention, they have examined D.W.1 Shankar Poddar.

7. The learned trial court after conclusion of the trial convicted the appellants under Section 366A/120B of the IPC and sentenced them as stated above.

8. The learned counsel for the appellants has assailed the impugned judgment on the ground that in this case, there is absolutely no evidence against the appellants that they have kidnapped the victim girl and P.Ws. 3 and 4 are father and mother of the victim but they are not eye witnesses of the case and whatever they have stated are hearsay of P.Ws.1 and 2 whereas P.W.2 has been declared hostile. Apart from that the victim lady has not supported



the prosecution case and stated in her evidence that she married with accused Upendra Mehta and she is living with him but in spite of the aforesaid evidence, conviction of the appellants solely on the basis of the evidence of P.W.1 does not inspire the evidence especially when P.W.1 claims to have identified the accused persons taking away the girl in the night at 09:00 P.M. but the source of identification (light) has been disclosed. It is further submitted that none examination of the I.O. is also fatal as it is alleged that she has been recovered from *Bandh* along with accused persons and had the I.O. been examined, he would have thrown light on the recovery and as to who were arrested along with her, hence conviction of the appellants solely on the evidence of P.W.1 does not inspire confidence and not sustainable in the eye of law.

9. On the other hand, the learned counsel for the State has submitted that P.W.1 is the eye witness of the occurrence of kidnapping and further the Medical Board has found the victim aged between 16 and 17 years, as such she is minor and the evidence of P.W.1 has further been corroborated by the evidence of P.W.3 and 4, though they are not eye witnesses of kidnapping by appellants but they had supported the factum of victim being traceless on that fateful night, hence conviction of the appellants under Section 366 A of the IPC as well as under Section 120B of the IPC is just and proper and it does not require any interference by this Court.



10. In this case as stated above, P.W.3 is the informant and his evidence clearly shows that he is not eye witness of the kidnapping of the victim girl by the accused persons rather he claims the source of information from P.W.1 and P.W.2 as they disclosed that the accused persons including Upendra Mehta were forcibly taking the victim girl towards *Bandh* and he has stated in his evidence that Darogajee recovered her from *Purabi Bandh* near Koshi River. However, in her cross examination in para 13 he has stated that after her recovery, she again fled away from the house of her husband in Nepal and the same was informed by her husband to him but in that case none from his family has been examined. He has also denied a suggestion that the accused Upendra Mehta has love affair with her and also denied suggestion that as he was not ready to marry her daughter with Upendra Mehta, this false and concocted case has been lodged. Similar is the evidence of P.Ws. 4 also. Her evidence also discloses that she got information that her daughter has been kidnapped by the accused persons and she is traceless. She has also denied the suggestion that her daughter herself had fled away with Upendra Mehta and married with him. Attention of her earlier statement before the police has also been drawn.

11. P.W.1 is Ramesh Mehta and according to the prosecution he appears to be key witness as he has stated that in his evidence that he saw Upendra Mehta, Badri Mehta and Ram Kumar



Mehta taking Puman Kumar forcibly and out of fear he did not raised *hulla*, thereafter came to his village and he came to know about her kidnapping. In para 8 of his cross examination, he has himself admitted that it was dark night and some peoples were coming from the Bandh and in para 9 he has also stated that Pinki Kumari was moving on foot. However, his evidence is silent as to how he identified the victim and accused persons in dark night. This conduct of not informing the informant immediately creates doubt about testimony as it is natural conduct that he would have informed the informant (P.W.3) at once. He has also admitted that Sattan Mehta, Badri Mehta and Ram Kumar Mehta used to go to the house of Mukhiya (P.W.3) also.

12. P.W.2 who claims to have disclosed about kidnapping of the victim by the accused persons including the appellants but in court, he has not supported the prosecution case, rather he has stated that there was *hulla* that the appellant Upendra Mehta has fled away with Pinki Kumari and thereafter this witness has been declared hostile and attention has been drawn towards his previous statement before police, however, the I.O. could not be confronted with earlier statement made before him, due to his non-examination.

13. P.W.6 is Pinki Kumari is victim girl, she has also not supported the prosecution case and her evidence discloses that no



such occurrence has taken place and she was brought by her husband to depose in this case and thereafter her attention has been drawn towards the previous statement before the police. Her evidence further shows that she was aged about 22 years at the time of recording her evidence in the year, 2002 and date of occurrence is 2000, as such according to her she was 20 years of age at the time of occurrence. I.O. also could not be confronted about her previous statement before the police and as such it can not be held that she has been gained over by defence.

13. P.W.5 is the Doctor, who has examined the victim and her evidence also discloses that there is no affirmation of rape in this case and she has also stated the age of the victim was assessed to be 16 to 17 years.

14. On consideration of the entire prosecution evidence it appears that P.W.3 and 4 are not eye witness, this evidence disclosed that Uepndra Mehta was going to their house from before and P.W.3 was also shown photocopies of the letters purported to be written by her daughter but he has denied handwriting of her daughter on those letters. P.W.2 has also been declared hostile. P.W.6, who is victim has also not supported the prosecution case so the whole case is based on the evidence of P.W.1 who has claimed to have seen forcibly taking away Pinki Kumar, however, as discussed above, according to the evidence of P.W.1, it was dark night and he



has not disclosed about the source of identification in this case and his conduct of not informing the informant (P.W.3) and his family members immediately creates doubt about his claim that he had been appellant and others forcibly taking the victim (P.W.6). In this case the age of the girl has been assessed as 16 to 17 years whereas the victim has shown her age as 22 years at the time of recording of her evidence. D.W. 1 was examined on behalf of the defence, has also stated that there was love affair between the victim and the accused Upendra Mehta, which was not liked by P.W.3, as such the present false and concocted case has been lodged. If the aforesaid evidence is taken for consideration in totality, it appears that though there is evidence of P.W.1 who claims to be eye witness of the kidnapping but his evidence is not free from reasonable doubt. Evidence of D.W.1 shows that there was love affair between the victim and accused Upendra Mehta. Victim Pinki Kumari (P.W.6), though had been declared hostile, but she has also not supported the prosecution case, rather her evidence shows that she married one of the accused Upendra Mehta and living with him. It is well settled that by declaring a witness hostile, his whole evidence can not be effaced from the record. There is evidence of prosecution also that she was recovered from *Bandh*, however, the I.O. has not been examined as such there is absolutely nothing except the ocular evidence of recovery of victim girl from *Bandh* along with the accused persons.



None examination of the I.O. has also caused prejudiced, as he could not be confronted with the previous statements of P.W.2 and P.W.6 before him.

15. Hon'ble Supreme Court in a recent case of *Arjun and Anr. Vrs. State of Chhattisgarh* reported in (2017)3 SCC 247 has considered the essence value of hostile witness and held in para 15 and 16 of the judgment as follows :-

15. Though the eye witnesses PWs 1, 2, 7 and 8 were treated as hostile by the prosecution, their testimony insofar as the place of occurrence and presence of accused in the place of the incident and their questioning as to the cutting of the trees and two accused surrounding the deceased with weapons is not disputed. The trial court as well as the High Court rightly relied upon the evidence of PWs 1, 2, 7 and 8 to the above said extent of corroborating the evidence of PW-6 Shivprasad. Merely because the witnesses have turned hostile in part their evidence cannot be rejected in toto. The evidence of such witnesses cannot be treated as effaced altogether but the same can be accepted to the extent that their version is found to be dependable and the court shall examine more cautiously to find out as to what extent he has supported the case of the prosecution.

16. In Paramjeet Singh {(2010) 10 SCC 439}, it was held as under(SCC PP. 448-49, Paras 16-20) :-

“16. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with



a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony (vide State of Rajasthan- V. Bhawani).

17. This Court while deciding the issue in Radha Mohan Singh v. State of U.P. (2006) 2 SCC 450 observed as under: (SCC p. 457, para 7)

“7. ... It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.”

18. In Mahesh v. State of Maharashtra this Court considered the value of the deposition of a hostile witness and held as under: (SCC p. 289, para 49)

“49. ... If PW 1 the maker of the complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness for no plausible and tenable reasons pointed out on record, will give rise to doubt the testimony of the investigating officer who had sincerely and honestly conducted the entire investigation of the case. In these circumstances, we are of the view that PW 1 has tried to conceal the material truth from the Court with the sole purpose of shielding and protecting the appellant for reasons best known to the witness and therefore, no benefit could be given to the appellant for unfavourable conduct of this witness to



the prosecution.”

19. In Rajendra v. State of U.P. this Court observed that merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. This Court reiterated a similar view in Govindappa v. State of Karnataka observing that the deposition of a hostile witness can be relied upon at least up to the extent he supported the case of the prosecution.

20. In view of the above, it is evident that the evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.”

The same view is reiterated in Mrinal Das and Ors. vs. State of Tripura in para (67) and also in Khachar Dipu V. State of Gujarat.

16. So far assessment of age by the Medical Board is concerned finding the girl to be aged between 16 to 17 years. After assessment of age, the learned trial court relied and found the girl minor is concerned, it has been held in catena of the decision, whereas the girl has disclosed her age as 22 years in the court while giving deposition, from which she appears to be major at the time of occurrence has already observed. The Hon'ble Apex Court in the case of ***Darga Ram- Vrs. State of Rajasthan*** reported in (2015)2 SCC 775 has held in para 16 and 17 as follows :

“15. The medical opinion given by the duly constituted Board comprising Professors of



Anatomy, Radiodiagnosis and Forensic Medicine has determined his age to be "about" 33 years on the date of the examination. The Board has not been able to give the exact age of the appellant on medical examination no matter advances made in that field. That being so in terms of Rule 12 (3) (b) the appellant may even be entitled to benefit of fixing his age on the lower side within a margin of one year in case the Court considers it necessary to do so in the facts and circumstances of the case. The need for any such statutory concession may not however arise because even if the estimated age as determined by the Medical Board is taken as the correct/true age of the appellant he was just about 17 years and 2 months old on the date of the occurrence and thus a juvenile within the meaning of that expression as used in the Act aforementioned. Having said that we cannot help observing that we have not felt very comfortable with the Medical Board estimating the age of the appellant in a range of 30 to 36 years as on the date of the medical examination.

16. 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, Radiodiagnosis 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.



17. Considering the aforesaid settled principle of law, it can not be held that she was major at the time of occurrence. The learned trial court ought to have considered the above settled principle of law, while considering the age of victim.

18. The learned trial court has not considered the infirmities as pointed out as above and convicted the appellants under Section 366A and 220 fo the IPC, which does not appear to be sustainable in the eye of law.

19. Accordingly, this application is allowed as both the appellants are on bail, as such they are discharged from the liabilities from their bail bonds.

(Vinod Kumar Sinha, J)

chn/-

AFR/NAFR	05.01.2018
CAV DATE	NA
Uploading Date	
Transmission Date	

