

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.317 of 2003

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

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Babloo Goswami, son of Bishwanth @ Bishnundeo Goswami, resident of village
Bansi, P.S. Bansi, District Banka

.... 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. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 25-06-2018

Sole appellant has preferred this appeal against the judgment and order dated 29.4.2003 passed by Sri Pradip Sah, the then 1st Additional Sessions Judge, Banka in Sessions Trial No. 376/97 by which he has been convicted under Section 366A of the Indian Penal Code and sentenced to undergo simple imprisonment for five years.

2. Prosecution case, in short, is that one Bharti Sushma @ Dezi Kumari, aged about 14 years, was traceless from 7 P.M. on 20.9.1996 and informant Sitaram Das (PW 1) had lodged a Sanha on 21.9.1996 with Bounsi Police Station. Thereafter informant came to know that Babloo Goswami, the appellant, and other accused had kidnapped his daughter and father of appellant Bishundeo Goswami was also involved in the occurrence of kidnapping. Thereafter written report was filed on 22.1.1996 with the aforesaid statement.



3. On the basis of aforesaid written report Bounsi P.S. Case No. 127 of 1996 was registered. Post investigation charge sheet has been submitted and after cognizance the case has been committed to the court of sessions which ultimately traveled to the file of Sri Pradip Sah, the then 1st Additional Sessions Judge, Banka for trial and disposal.

4. During trial charge has been framed under Section 366A IPC against the appellant and in order to prove the charge, six witnesses have been examined on behalf of prosecution, they are PW 1 Sitaram Das, the informant, PW 2 Sushma Bharti, victim girl, PW 3 Gita Devi, mother of victim girl, PW 4 Dinesh Pandey, PW 5 Awadesh Lal Singh and PW 6 Narayan Pandey. It appears that in this case I.O. has not been examined and victim has not been medically examined as no medical report is available on record nor the Doctor has been examined in this case.

5. It appears from the evidence of PWs 1, 2 and 3 that they have not been cross examined and their evidences remained intact. So far PWs 4 to 6 are concerned, they are hearsay witnesses and PW 4 has also not been cross examined.

6. Evidence of PW 1 shows that he has stated that on 20.9.1996 he had gone to Bhagalpur for medical treatment of his son and when he came back home, his wife told him that her daughter



Sushma Bharti was traceless since 11 A.M. He had further stated that on 21.9.1996 he lodged a Sanha and thereafter on 22.9.1996 he submitted written report about the occurrence and he has proved the same and marked as Ext.1. His evidence further disclosed that after checking the books of his daughter he got four letters in the books and he handed over the same to the I.O. which were marked as Exts. 2 to 2/3. It appears that the informant is not an eye-witness to the occurrence and from the letters recovered from the books of his daughter he suspects the hands of the appellant in the crime.

7. PW 2 the victim herself has stated that on 20.9.1996 at about 11 A.M. she was going to study to the coaching centre and when she reached on the road near a tree, the appellant was there and he asked her to accompany him but on her refusal he threatened her to do away with the life of her family members. Thereafter she was brought to Deoghar for the purpose of marriage but she did not agree and thereafter she was brought to Madhupur where she was kept in a room for 18 days and when she started crying for going home then the appellant had taken her to the Bus stand where her father and brother were already there and they have seen the appellant fleeing away and, as such, she was recovered. This witness has not been cross examined.

8. PW 3, the mother of the victim girl, has stated in her evidence that that her daughter had gone for tuition but she did not



return and her elder daughter informed her that the victim girl had not gone for coaching. She has further stated that her husband had gone to Bhagalpur for treatment of his son and when he came back home in the evening he started searching her. She further stated in her evidence that when the victim girl came back she told her that appellant had taken her away after having threatened her. She has also not been cross examined. As such, in this case evidences of PWs 1, 2, 3 and 4 were remained intact.

9. Learned trial court has convicted the appellant under Section 366A IPC and sentenced him as stated above.

10. Submission of learned amicus curiae is that the learned trial court has convicted the appellant only because PWs. 1, 2 and 3 have not been cross examined. However, he failed to consider the fact that for conviction under Section 366A IPC finding of court that the girl was minor is essential but there is no such iota of evidence available on record to show that she was minor, except that in the written report it was stated that she was aged about 14 years. It has also been submitted that prosecution has to prove its own case and cannot get advantage of lacuna in the defence. Further submission is the whole prosecution is based on four love letters which were recovered from the books of the victim girl and evidence of victim girl shows that she was not forced for taking her away while she was



recovered. In such a situation, the conviction under section 366A IPC is not sustainable in the eye of law as neither the victim girl was medically examined and there is no clinching evidence to show that she was minor nor there is any evidence that she was forced to go along with the appellant. Further submission is that Section 366A provides as follows :

**S.366A. Procuration of minor girl –
Whoever, by any means whatsoever, induces
any minor girl under the age of eighteen
years to go from any place or to do any act
with intent that such girl may be, or knowing
that it is likely that she will be, forced or
seduced to illicit intercourse with another
person shall be punishable with
imprisonment which may extend to ten
years, and shall also be liable to fine.**

On mere perusal of above, it appears that for constituting offence under Section 366A, prosecution has to prove that girl was minor and she was taken from any place or to do any act with intent that such girl may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person.

11. On the other hand, learned counsel for the State has supported the finding of guilt on the fact that PWs. 1, 2 and 3 have supported the prosecution case and PW 2 has narrated as to how she was taken to Deoghar by appellant and she was threatening and thereafter she was taken to Madhupur and she was kept in a room for



18 days and in such a situation the conviction of the appellant is just and proper.

12. Having heard both sides and from perusal of the evidence, as discussed above, it clearly appears that there is no clinching evidence available on record to show that she was minor at the time of occurrence except that the written report she was stated to be 14 years of age, which is not substantive piece of evidence. It further appears that she was going for coaching as such she was studying but no school leaving certificate or other document was produced to show that she was minor nor she was medically examined. Further evidence also shows that she was taken for the purpose of marriage and not for the purpose of seducing her for intercourse with other person and no force was used.

13. Learned trial court has failed to consider this aspect of the matter while convicting the appellant under Section 366A IPC. However, evidence is that she was taken by appellant from the custody of her guardian by deceitful means and taken her to different places and as such it appears that there was at least ingredient of Section 363 IPC in this case.

14. Accordingly, the conviction of the appellant is modified to Section 363 IPC from Section 366A IPC.

15. Further submission of learned amicus curiae is that the



matter is of the year 1996 and appellant has remained in custody for about one a half years and as such the aforesaid conviction may be reduced to the period already undergone by him in custody.

16. Hence, the appeal is disposed of with the modification in the judgment of conviction under Section 363 IPC in place of Section 366A IPC and sentence of five years S.I. is modified to the period already undergone by him in custody. As the appellant is on bail, he is directed to be discharged from the liabilities of his bail bond.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
CAV DATE	
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