

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1441 of 2017

Arising Out of PS. Case No.-85 Year-2015 Thana- HARSIDHI District- East Champaran

Jaiky Kumar Son of Ramautar Sah, Resident of Village- Ghiwadhar, P.S.-
Harsidhi, District- East Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Bimlesh Pandey Advocate Mr. Vijay Shankar Shrivastava Advocate
For the Respondent/s	:	Mr. Zeyaul Hoda APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 18-08-2018

Heard the learned counsel for the appellant and the State.

2. The appellant stands convicted for the offences under Sections 365/34, 366/34 and 376 of the I.P.C. by judgement dated 02.03.2017 passed by the learned 2nd Additional District & Sessions Judge, Motihari, East Champaran in Sessions Trial No. 577 of 2015 / 211 of 2015 and by order dated 06.03.2017, he has been sentenced to undergo RI for five years, to pay a fine of Rs. 5,000 /- (five thousand) and in default of payment of fine, to suffer simple imprisonment for three months for



the offences under Section 365/34 I.P.C.; RI for seven years, fine of Rs. 10,000 /- (ten thousand) and in default of payment of fine, to further suffer simple imprisonment for six months for the offence under Section 366/34 of the I.P.C.; and RI for eight years, fine of Rs. 10,000 /- (ten thousand) and in default of payment of fine, to further suffer simple imprisonment for six months for the offence under Section 376 of the I.P.C. The sentences have been ordered to run concurrently.

3. The appellant is alleged to have abducted and raped the victim (P.W. 4).

4. The case of the prosecution is based on the F.I.R. lodged by the father of the victim, namely, Baidhnath Sah, who has been examined as P.W. 5. He has alleged that his daughter was forcibly abducted from his house on 22.02.2015 at about 02.30 A.M. in the wee hours, when she had come out of the house for attending to the call of nature. The act was committed by the appellant and four others. The aforesaid information was given to P.W. 5 by his wife (mother of the victim), who has been examined as P.W. 3 at the trial.

5. The written report was lodged on 27.02.2015.

6. On the basis of the aforesaid written report, Harsidhi P. S. Case No. 85 of 2015 dated 27.02.2015



was instituted for investigation under Sections 365/34 of the I.P.C.

7. The police, after investigation, submitted charge-sheet under Sections 365 and 366/34 of the I.P.C. and the case was committed to the Court of Sessions for trial.

8. The trial court vide order dated 11.12.2015 framed charges against the appellant under Sections 365, 366/34 of the I.P.C. Later, after the deposition of the victim (P.W. 4), the charge was altered on 13.06.2016 to one under Section 376 of the I.P.C. also.

9. The trial court, after examining eight witnesses on behalf of the prosecution and none on behalf of the defence, convicted and sentenced the appellant as aforesaid.

10. Mr. Bimlesh Pandey, learned advocate appearing for the appellant has sought to assail the judgement and order of conviction on the ground that there has been a delay of 5 days in registering the F.I.R. and the explanation for such delay is not plausible; the victim in her statement under Section 164 of the Cr.P.C., which has been exhibited as Exhibit – 1, has not spoken about any rape having been committed on her; the deposition of the witnesses are highly discrepant, thereby making the prosecution version suspect; the victim was a



married lady aged about 20 years and thus she understood the consequences of her act; the victim did not report the matter for about two and a half months that she remained with the appellant at Surat and this casts shadow of doubt over the prosecution version; and lastly the fact that the victim, after making good her escape from the clutches of the appellant did, not come to her father's house straightway but went to the house of her aunt, Maya Devi, who has been examined as P.W. 6 at the trial.

11. On the aforesaid grounds, it has been argued that the verdict of guilt is lop-sided as it does not take into account the acceptability / reliability of the deposition of the witnesses in that regard. It has been submitted that the narration of the events makes the prosecution version highly reproachable and the trial court ought to have been circumspect in blindly accepting the version of the prosecution, especially of P.W. 4.

12. In order to test the aforesaid contention, it would be necessary to briefly refer to the deposition of the witnesses.

13. Mantu Kumar, who is the brother of the victim, has been examined as P.W. 1. Though, he has supported the prosecution version but claims to have come to know about the occurrence through his mother who had



stayed back in his home when he along with others had gone to get his marriage performed in a different village. He has deposed before the trial court that the victim, who is a married lady, had come to attend his marriage. When the aforesaid witness came back after marrying on 22.02.2015, he learnt about the occurrence. Thereafter, a search was made for the victim and in the event of not finding her at any known place, a case was lodged with the Harsidhi Police Station by his father (P.W. 5).

14. Learned counsel for the appellant has submitted that P.W. 1 is a hearsay witness, who had not seen the occurrence and has stated only what was narrated to him by her mother in the first instance and, later, by the victim, when she came back to her house after about two and a half months of the occurrence.

15. In any view of the matter, the deposition of P.W. 1 clearly explains the reason for lodging of the case on 27.02.2015 when the occurrence had taken place in the night intervening between 21.02.2015 and 22.02.2015.

16. Similarly, Raghunath Sah / P.W. 2 has also supported the prosecution version, but claims to have learnt about the same through the father of the victim, namely P.W. 5. He has deposed that he had also gone in "barat" along with P.W.s 1 and 5. There, he was informed



by P.W. 5, who had been, in turn, telephonically informed that the victim has been kidnapped. However, in his deposition before the trial court, he has stated that after about a month of the occurrence, on the information provided by the victim, her uncle Lalan Sah (not examined) and nephew of P.W. 5, viz Ashok went to Surat to bring the victim back. This information was given to him by aforesaid Lalan. He has also stated that the victim had told him that she was rendered semi-conscious by making her smell something and thereafter was taken to Surat where she was subjected to rape.

17. Attention of this witness was drawn to his statement made during the course of the investigation and he has admitted that he had not stated before the Police that the appellant either assaulted the victim or had subjected her to rape.

18. The deposition of the aforesaid witnesses therefore is not without infirmity. Had he been told by the victim that she was assaulted and raped, he would surely have stated that before the Police. However, benefit of doubt can be given to him as his statement must have been recorded before the victim came back.

19. In any view of the matter, even his statement that Lalan and Ashok had gone to Surat to bring back the victim is not worth accepting as neither



Lalan nor Ashok have been examined at the trial and none of the prosecution witnesses have supported this part of his version.

20. This Court therefore gets no assistance from the deposition of P.W. 2.

21. The most important witness with respect to the kidnapping of the victim is her mother / Ramawati Devi who has been examined as P.W. 3. She has testified to the fact that on the day of occurrence, the victim was at her house and the other members of the family had gone to attend the marriage of her son. When the victim came out of the room for micturition, the appellant and two others forcibly took the victim away in a jeep. When she tried to intervene, she was pushed. The aforesaid witness has stated that she went to the house of the appellant, but found the door of the house locked. Thereafter, she informed her son (P.W. 1) on mobile regarding the abduction of her daughter. On the next day, when her husband and others returned from "barat", a search was made for the victim, but she was not to be found. Hence, her husband lodged the case against the appellant and others. After about two months, the Police had brought the victim. The victim had told her that the appellant had taken her to Surat and had subjected her to



rape. She had also disclosed that all her ornaments had been snatched at Surat.

22. The victim has been examined as P.W. 4. She has alleged that in the night of the occurrence, she was abducted by the appellant and three others after making her unconscious by making her smell some stupefying substance. In the following morning when she gained her consciousness, she found herself in a room at Arah. The victim was raped by the appellant at Arah. Thereafter, she was taken to Surat by train but only after making her unconscious / semi-conscious. She was kept at Surat by the appellant for about two and a half months. The other associates of the appellant were also present at Surat. One day, taking advantage of the absence of the appellant and others in the house, she, with the help of the neighbours sat on a train and reached Gopalganj to the house of her aunt, Maya Devi. She informed Maya Devi about the entire occurrence, who brought her to Balua at Motihari. She met the police party at Motihari and was taken to a Magistrate for recording of her statement under Section 164 of the Cr.P.C. (Exhibit -1). She has admitted in her cross-examination that she was earlier married to one Santosh Sah about two years ago and had stayed in her matrimonial home only for about five days. Thereafter, there was no relationship with her husband.



She has also stated that the house of the appellant is situated close-by to her house. She has testified to the fact that she was subjected to medical examination by the doctor.

23. Similar statement has been made by Baidhnath Sah (P.W.-5). He is also a hearsay witness to the abduction / kidnapping of the victim. Before the police, he did not make any statement regarding her being raped and the factum of rape was stated by him for the first time in the Court and that also on the information provided to him by his daughter.

24. Maya Devi, who is the aunt of the victim, has been examined as P.W. 6. She has testified to the fact that the victim was abducted / kidnapped by the appellant in the night of 22.02.2015. She had come to the house of her brother (P.W. 5) to participate in the marriage of her nephew (P.W. 1). The mother of the victim had informed her that the appellant had kidnapped the victim. On her advise, the mother of the victim had called her son and had informed about the occurrence on telephone. After about two and a half months of the occurrence, the victim came to her house at Gopalganj and narrated about the entire ordeal. While she was bringing the victim to Motihari, they met the police party at Balua.



25. Learned counsel for the appellant has submitted that P.W. 6 had been brought to the witness-box for the first time and her statement was never recorded by the Investigating Officer.

26. The IO of this case (P.W. 7) has also testified to the fact that the victim met the police party at Balua on 20.05.2015, whereafter her statement was recorded under Section 164 of the Cr.P.C. and she was also put to medical examination. The age of the victim was assessed to be 20 years by the medical board, of which P.W. 8 (doctor) was a part.

27. P.W. 8 has deposed that the report of the medical board only refers to the age of the victim and has not stated anything about the rape.

28. From the conspectus of the evidence adduced by the prosecution, the following facts emerge:

- (I) The informant (P.W. 5), his wife / P.W. 3 and other witnesses did not speak about the victim being raped in the first instance;
- (II) The police after investigation submitted charge-sheet under Sections 365 and 366/34 of the I.P.C., under which sections, charges were framed initially;
- (III) Only on the deposition of P.W. 4 (victim), the charge was altered and Section 376 of the I.P.C. was added; and



(IV) The victim in her statement under Section 164 of the Cr.P.C. has not spoken about her having been raped.

29. Under such circumstances, the allegation of rape against the appellant does not get established.

30. The veracity of the version of the prosecution that the victim was subjected to rape further gets weakened by the victim not stating in clear terms that she was put in confinement under any fear of bodily injury or death. For about two and a half months, if the victim was closeted in a room at a distant place, then, but for her being put under some kind of fear, she would not have kept quiet. Thus, it appears that the allegation of rape was only introduced later i.e. when the victim deposed before the trial court. Had it not been the case, this would have been first stated by her at the time of giving her statement under Section 164 of the Cr.P.C.

31. So far as the deposition of other witnesses are concerned, especially with respect to the victim being sexually assaulted, all are hearsay and their knowledge is based on the disclosure made by the victim herself. The medical board does not refer to any fact regarding the victim being physically violated. This, perhaps, may be, because till the time, she was examined by the medical board, she had not raised any allegation of rape. The



report of the medical board is only with respect to her age being 20 years at the time of her examination.

32. The law with regard to appreciation of evidence is too well concretized by now to be repeated. The proposition that conviction could be recorded on the sole testimony of the prosecutrix has stood the test of time but with the caveat that such testimony should be unimpeachable and beyond reproach. The Courts of law have to be rather cautious in dealing with the sole testimony of the victim as the responsibility of the Court in that case, is greater.

33. The fact that the victim was in the company of the appellant for two and a half months and she did not in that period complained to anybody, even a neighbour, raises doubts about the correctness of her version. She has also not spoken about her being under any fear for not interacting with anybody. The conduct of the victim in coming to Gopalganj and not to her home further raises eye-brows.

34. The last straw on the camel's back came when her statement was recorded under Section 164 of the Cr.P.C. where she did not state anything about her being physically / sexually assaulted.

35. Under such circumstances, it would be unsafe to accept the version of the victim as well as of the



other witnesses that the appellant had subjected her to rape.

36. Thus the conviction of the appellant under Section 376 of the I.P.C. cannot be allowed to stand in the eyes of law.

37. The conviction and sentence under Section 376 of the I.P.C. is, therefore, set aside and he is acquitted of the charge under Section 376 of the I.P.C.

38. The evidence of the witnesses but, are consistent with respect to the victim having been kidnapped in the night intervening 21.02.2015 and 22.02.2015. There is nothing in the deposition of either the victim herself or her mother (P.W. 3) to doubt their testimony with respect to the aforesaid act of kidnapping.

39. The other witnesses were promptly informed by P.W. 3 (mother of the victim) about the occurrence. The delay in lodging the F.I.R. has been properly explained. P.W. 1 and P.W. 5 came back home after the marriage on 22.02.2015. A search was made for the victim because the mother of the victim had seen the appellant and two others taking her away on a jeep. The house of the appellant was found locked. This explains for the delay of about four days in reporting the matter to the police. Had the intention of P.W. 5 or others been to falsely implicate the appellant, other charges also would



have been levelled in the F.I.R. only. The absence of the victim for two and a half months; the house of the appellant being found locked immediately after the occurrence; and the deposition of witnesses clearly establishes that the victim was taken away from the custody of her mother (P.W. 3) in the absence of P.W.s 1 and 5. The evidence is cogent and trustworthy so far as the allegation under Sections 365 and 366/34 of the I.P.C. is concerned.

40. Hence, the conviction under the aforesaid Sections, (365 and 366/34 of the I.P.C.) is affirmed and upheld.

41. However, looking at the circumstances of the case; the manner of occurrence; the victim not having been sexually exploited for all this while; and the appellant being a co-villager, this Court is of the view that interest of the justice would be sub-served if the sentence of the appellant under both the counts is reduced to a period of four years.

42. The appeal, thus, is partially allowed.

43. The appellant is acquitted of the charges under Section 376 of the I.P.C. However, his conviction under Sections 365 and 366/34 of the I.P.C. is upheld. The sentence imposed under both the counts is reduced to



the period of four years and fine as imposed by the trial court.

44. Both the sentences shall run concurrently.

A copy of the judgement be transmitted to the Superintendent of the concerned Jail for information and records.

(Ashutosh Kumar, J)

skm/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	22.08.2018
Transmission Date	22.08.2018

