

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.283 of 2003

- =====
1. Dilip Kumar Mandal @ Dilip Mandal , Son of Late Fakir Mandal, Resident of Village – Jonia, P.S. – Barari, District – Katihar.
 2. Ram Deo Mandal, Son of Prithvi Mandal, Resident of Village – Jarlahi, P.S. – Barari, District - Katihar.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mrs. Rina Sinha, *Amicus Curiae*

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 19-03-2018

This appeal is directed against the judgment of conviction dated 04.04.2003 and order of sentence dated 09.04.2003, passed by Sri Bhagwan Prasad Singh, the then Presiding Officer, Additional Court No – II, Katihar, in Sessions Trial No. 155/2001, 134/92, by which the appellant, namely, Dilip Kumar Mandal stood convicted under Section 366A of the Indian Penal Code (hereinafter referred to as the “IPC”) and was sentenced to undergo R.I. for 10 years and appellant Ramdeo Mandal stood convicted under Section 366A read with Section 120B of the IPC and was sentenced to undergo R.I. for 07 years.

2. Prosecution case as per the fardbeyan of Mukti Kumar Yadav (P.W. 8) in short is that on 15.02.92, his daughters, namely, Anita Kumari and Sunita Kumari had gone to Barari Girls High School for



appearing in the examination. When his daughter Sunita Kumari aged about 14 years was not found in the school, Anita Kumari searched her but she could not be found. Anita Kumari returned to her home but Sunita Kumari did not come to house. On which, informant and others began to search Sunita Kumari but she could not be found. Informant also gone to the house of appellant Dilip Kumar Mandal but he was also not found in his house. It is alleged that prior to occurrence, appellant Dilip Kumar Mandal used to tease her daughter. Informant also came to know that appellant Dilip Kumar Mandal and his companion appellant Ramdeo Mandal was seen going towards Barari. Informant suspected that appellants and other accused kidnapped his daughter for wrongful purposes.

3. On the basis of the above fardbeyan of informant F.I.R under Section 363, 366A and 120B IPC was registered against unknown persons.

4. Police after investigation submitted charge-sheet against the above named two appellants. Cognizance of the offence was taken and as the case was triable by the Court of Sessions, the case was committed to the court of Sessions, which ultimately came to the file of Shri Bhagwan Prasad Singh, the then Presiding Officer, Additional Court No – II, Katihar, for trial and disposal.

5. In order to substantiate the charges, prosecution examined altogether ten witnesses, they are; P.W. 1 – Manoj Kumar Yadav,



brother of victim girl, P.W. 2 – Sanjay Yadav brother of victim girl, P.W. 3 – Laxmi Narain Yadav, P.W. 4 – Upendra Thakur, claimed to have seen the appellants going towards Barari, P.W. 5 – Nanda Devi, mother of victim girl, P.W. 6 – Anita Kumari, sister of victim girl, P.W. 7 – Rajendra Choudhary, a hearsay witness, P.W. 8 – Mukti Kumar Yadav, informant and father of victim girl, P.W. 9 – Sunit Kumar, the victim girl and P.W. 10 – Nilam Manish, the Doctor, who examined victim girl Sunita Kumari.

6. Apart from that following documents have been brought on record and marked as Ext. 1 – Written statement, Ext. 2 – Signature of Sunita Kumari on statement under Section 164 Cr.P.C and Ext. 3 – Medical report of Sunita Kumari.

7. On behalf of defence also, two witnesses have been examined, they are; D.W. 1 – Bachchi Yadav, who has proved a letter purported to have been written by the victim Sunita Kumari marked as Ext. A and D.W. 2 – Rajdhar Choudhary, he has proved an affidavit showing marriage as Ext. B.

8. Defence of the accused person is of innocence and they have not committed any offence. They have falsely been implicated in this case. No occurrence, as alleged, ever took place. Case of the defence as per Ext. A and Ext. B is also of love affair between appellant Dilip Kumar Mandal and Sunita Kumari and they married before Notary public.



9. Post trial, learned Trial Court, convicted the appellant Dilip Kumar Mandal under Section 366A of IPC and convicted appellant Ramdeo Mandal under Section 366A read with Section 120B of the IPC and sentenced them in the manner as stated above.

10. Being aggrieved, the appellants preferred the present appeal.

11. learned *Amicus Curiae* has assailed the judgment of trial court on the ground that so far evidence of prosecution witnesses except evidence of P.W. 9, the victim girl are concerned, they only suspected the hands of these two appellants in the occurrence. No doubt evidence of P.W. 1 shows that he went to Padrauna and brought his sister back, but except that there is nothing in his evidence. It has also been contended that so far evidence of P.W. 9 (the victim girl) is concerned, from perusal of her evidence, it appears that there is nothing to show that she was induced and was forced or seduced to illicit intercourse with another person. Further submission is that the medical report also does not support the prosecution story of rape, as no sign of recent sexual intercourse was found on the person of the victim girl and her age in the medical examination was assessed as 15 to 16 years and if that be considered on principle of plus minus two years, that shows that the girl was not minor at the time of alleged occurrence, therefore, there is no application of Section 366A in the facts of the present case. Learned *Amicus Curiae* also referred a decision reported in **2005 (9) SCC 426** in the case of **Sajjan Kapar v.**



State of Bihar and has submitted that there is no evidence that she was induced or seduced to have illicit intercourse with another person or she was induced to go at any place so that she will be likely to be forced or seduced to have illicit intercourse with another person as such no case under Section 366A is made out. Further contention of learned *Amicus Curiae* is that so far appellant no. 2, namely, Ramdeo Mandal is concerned, there is absolutely nothing except that he called the victim girl on the plea that his brother was calling her. Further contention of learned *Amicus Curiae* is that and that evidence is not sufficient to constitute an offence under Section 366A read with Section 120B of the IPC and the trial court without appreciating all these facts has convicted the appellant Dilip Kumar Mandal under Section 366A of the IPC and appellant Randeo Mandal under Section 366A read with Section 120B of the IPC, which is out and out perverse and not sustainable in the eye of law.

12. On the other hand, learned counsel for the respondent- State has defended the impugned judgment of Trial Court and submitted that the evidence of victim girl categorically shows that she was taken away by the appellants to village Padrauna, U.P., from where, she was recovered by P.W. 1 Manoj Kumar Yadav and she was also a minor, as such, a case under Section 366A and under Section 366A read with Section 120B of the IPC is made out and, therefore, there is no infirmity in the judgment of Trial Court and the same is just and



proper.

13. In the background of the contentions of the parties, on perusal of prosecution evidence, it appears that P.W. 8 is the informant in this case but he is not the eye witness of the case and he only suspected the hand of appellants in the occurrence. So far other witnesses are concerned, it appears that they are also not the eye witness of the occurrence. At best P.W. 3 and P.W. 4 have stated that they saw the appellants going towards Barari but their evidence did not disclose as to whether they were going along with the victim girl. Evidence of P.W. 1 shows that he brought the victim girl from village Padrauna U.P. but his evidence also does not show that the victim girl was kept in the said village forcibly.

14. P.W. 9 is the victim girl and P.W. 10 is the Doctor. Evidence of P.W. 9 disclosed that when she came out to purchase the pen lid, appellant Ramdeo Mandal called her on the plea that his brother was calling her and, thereafter, she was forcibly taken away by the appellants. Her evidence further disclosed that she was taken to village Padrauna U.P. and she has been recovered from there after six to seven days but it appears that informant and others came to know about her missing on 15.02.92 and also came to know about the hands of appellants in the abduction/kidnapping of his daughter but he did not inform the police about the occurrence on the same day rather he gave his written report on 16.02.92. Further it also appears that the



victim girl has nowhere stated that she was forcibly kept at Padrauna and there is nothing available on record to show that she made any protest or sought for help to get herself freed from the clutches of the appellants.

15. Appellant Dilip Kumar Mandal has been convicted under Section 366A of the IPC and appellant Ramdeo Mandal has been convicted under Section 366A read with Section 120B of the IPC and from perusal of judgment cited by learned *Amicus Curiae* in the case of Sajjan Kapar vs. State of Bihar (supra), it appears that the Hon'ble Apex Court has dealt with application of Section 366A IPC and held in para – 3 as follows:-

“3. There is no serious dispute about the age of PW 6. She was about 14 years of age at the relevant time. In this background, first we would consider the charge against the appellant for offence under Section 366-A. The said provision provides that 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 the 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. We have gone through the evidence of PW 6 and other witnesses as also the judgment under appeal. It is evident that the ingredients of Section 366-A have not been proved against the appellant. There is no evidence at all to establish that PW 6 was induced to go to any place with the intent that she may be or likely to be forced or seduced to illicit intercourse with another person. On the contrary, the evidence shows that PW 6 was well treated at the house of the brother of the appellant. The medical evidence also does not show any kind of sexual harassment or any attempt or likelihood in that direction. In fact, there is no such finding against the appellant. In view of this, learned counsel appearing for the respondent State has fairly and rightly not supported the impugned judgment insofar as it upholds the offence under Section 366-A IPC. Thus, the impugned judgment



of the High Court confirming that of the Court of Session in convicting the appellant for offence under Section 366-A is set aside. The said charge has not been proved against the appellant. He is accordingly acquitted of offence under Section 366-A of the Indian Penal Code.”

16. In the present case, the evidence shows that the victim girl was taken away by the appellants to Padrauna U.P. and she was kept there to six to seven days but she has not raised any hulla and has also not sought for any help and except her evidence that she was forcibly taken away by the appellants, there was no allegation that appellants induced her or forced to take her to other place and there is also no evidence that she was subjected to rape. So far Section 366A is concerned, for establishing a case under Section 366A of the IPC, prosecution has to prove that the girl was under 18 years of age, that the girl was induced to go or to do any act, that the accused knowing that such girl may be or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. In the present case, No doubt the evidence shows that the girl was taken away to village Padrauna U.P. by the appellants but so far age of victim girl is concerned, prosecution evidence shows that she was aged about 14 years, whereas, the evidence of Doctor shows that she was aged about 15 to 16 years and it is well settled that assessment of age by the Medical Board is done in the ratio of plus minus two years and benefit will always go to the defence in assessment of age. Hon’ble Apex Court in the case of Darga Ram Alias Gunga v. State of



Rajasthan Reported in 2015 (2) SCC 775 held in para 17 as follows.

“17. 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 correct way of estimating the age of the appellant. What reassures us about the estimate of age is that 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 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. In the present case also as per the law laid down by the Hon’ble Apex Court, the age of victim if assessed with plus two years, then she was aged about 18 years at the time of occurrence and as such, the victim girl was major at the time of occurrence. Further, the evidence discussed above, does not show that she was taken away with an intent that she will be knowing or that she will likely be forced or seduced to illicit intercourse with another person as the aforesaid evidence is missing in this case. Further, in this case, there is delay of 24 hours in lodging the fardbeyan in spite of the fact that the informant knew that his daughter was missing and also suspected the hands of appellants in the occurrence but he did not inform the police on same day. Hon’ble Supreme Court has considered almost similar



factual matrix in the case of **Md. Ali @ Guddu vs. State of U.P.**
reported in **2015(7) SCC 272** and held in para 29 and 30 as under:-

29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon.

30. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unimpeachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same.”



18. The learned Trial Court has not considered the aforesaid infirmities in the prosecution and appears to have swayed away by the seriousness of allegation.
19. Accordingly, this appeal is allowed. Judgment of conviction dated 04.04.2003 and order of sentence dated 09.04.2003, passed by Sri Bhagwan Prasad Singh, the then Presiding Officer, Additional Court No – II, Katihar, in Sessions Trial No. 155/2001, 134/92, is set aside.
20. As the appellants are on bail, they are discharged from liabilities of bail bonds.

(Vinod Kumar Sinha, J)

sunil/-

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