

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.573 of 2015

Arising Out of PS. Case No. -58 Year- 2002 Thana -BHORE District- Gopalganj

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1. Kanhaiya Bhagat son of Kali Bhagat
2. Subhawati Devi wife of Kanhaiya Bhagat.
Both residents of Village-Chafwa Bhagat Tola, P.S. - Bhorey, District
- Gopalganj.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Sanjay Kumar Pandey, Adv.
For the State : Mr. Sujeet Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 18-06-2018

Appellant Kanhaiya Bhagat has been found guilty for an offence punishable under Section 366A of the I.P.C and sentenced to undergo R.I for 7 years, under Section 376 of IPC and sentenced to undergo R.I for 10 years as well as to pay fine appertaining to Rs. 10,000/ in default thereof, to undergo R.I for 6 months additionally with further direction to run the sentences concurrently while appellant Subhawati Devi has been found guilty for an offence punishable under Section 363 of the IPC and sentenced to undergo R.I for 3 years vide judgment of conviction dated 04.06.2015 and order of sentence dated 06.06.2015 passed by 1st Additional Sessions Judge, Gopalganj in Sessions trial no. 92 of 2012.

2. Father of the victim, namely Banshi Kushwaha (PW-4) filed complaint petition no. 783/2002 against Kanhaiya Bhagat, Subhawati Devi and Nand Lal Bhagat disclosing the date of



occurrence to be 10.04.2002 divulging the fact that in the background of being co-villagers they enticed away his minor daughter (name withheld, PW-3) which was directed to be registered and investigated by the P.S. concerned resulting institution of Bhore P.S. Case No. 58/2002 and, as is evident during course of investigation, victim was traced out and further, after completing the investigation charge-sheet was submitted followed with conduction of trial meeting with the ultimate result, subject matter of instant appeal.

3. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C is that of complete denial. Furthermore, it has also been pleaded that on account of group rivalry as well as village politics appellants have been maliciously prosecuted. However neither oral nor documentary evidence has been adduced.

4. Learned counsel for the appellants has submitted that the case of the prosecution is not at all found to be duly substantiated irrespective of finding recorded by the learned lower court and for that, it has been submitted that I.O has not been examined and on account thereof, serious prejudice is caused to the appellants

5. Apart from this, it has also been submitted that independent witness PW-1 had not supported the case of the prosecution whereupon, was declared hostile.

6. PW-4 is the informant, PW-2 is the mother, PW-3 is



the victim so, no independent witness has been examined. PW-6 is the formal witness who has been examined in absence of I.O to facilitate exhibit of relevant document while PW-5 is the doctor, who had, as per her finding found the victim to be habituated to the sexual intercourse. Furthermore, it has also been submitted that doctor had estimated the age of the victim to be 15 to 16 years having fluctuation of 2 years so victim was very much at the verge of majority or was a major and in the aforesaid background, when the evidence of victim PW-3 has been gone through, it is apparent that she happens to be consenting party. That being so, it is a fit case wherein acquittal should be recorded.

7. In an alternative, it has also been submitted that in the background of the evidence of victim being consenting party, if the court finds some sort of laches at the end of the defence during cross-examination of PW-3, the victim over her status though from the evidence of PW-5, doctor same is found duly explained, then in that circumstance, having been under custody for four consecutive years, the sentence be directed to be saturated in terms thereof.

8. On the other hand, learned APP while refuting the submission made on behalf of the appellant has submitted that so far section 376 of the IPC is concerned, the minimum sentence prescribed therefor happens to be 7 years and that being so, no sentence could be passed less than 7 years. In likewise manner, it has also been submitted that though conduct of PW-3, the victim happens to be that of a consenting party however, the appellant should have taken precaution on that very score and would have



challenged the informant PW-4 as well as PW-2, mother along with victim PW-3 claiming the victim to be major. It has also been submitted that ossification is not the conclusive piece of evidence with regard to ascertainment of age of the victim and that happens to be reason behind that the Hon'ble Apex Court times without number has directed that for ascertainment of age the victim should not be put on medical test in usual manner, rather there should be an enquiry like so, prescribed for ascertainment of age of juvenile as has been held in **Jarnail Singh Vs. State of Haryana** reported in **2013 Cr.L.J. 3976** and in **State of Madhya Pradesh vs. Anoop Singh** reported in **(2015) 7 SCC 773**. That being so, the finding of the PW-5 that the victim happens to be in between 15 to 16 years and further affording an opportunity of $\pm$ 2 years will not available in favour of the appellant more particularly in the background of conclusive evidence of PWs that victim at the time of kidnapping and rape was minor that being so, instant appeal is fit to be dismissed.

9. Gone through the evidence available on the record. So far Section 366A of the IPC is concerned, it is applicable against those only who have kidnapped the victim in order to have her indulgence in sexual intercourse with others and not with he himself. In the present case, the victim was kidnapped with an intention to have sexual indulgence by the appellant himself and on account thereof, major ingredients for attracting Section 366A of the IPC is not at all made out whereupon, recording of conviction and sentence by the learned lower court to that extent against



appellant Kanhaiya Bhagat is not at all justifiable. However, it be mere a simple case of kidnapping attracting Section 363 IPC considering the status of the victim to be minor. In likewise manner, when the evidence of victim PW-3 has been gone through it is evident that manner whereunder she had disclosed the event of kidnapping, accompanying with appellant Kanhaiya Bhagat did not justify the recording of conviction and sentence against appellant Subhawati Devi whereupon, the same is also erased. Now coming to Section 376 of the IPC against appellant Kanhaiya is concerned, from the evidence of the victim PW-3, it is apparent that she happens to be or she had got some sort of inclination towards him but, the unfortunate part having at the end of the appellant is that she was not at all cross-examined on the score or even suggested that she was major or at the verge of majority during course of the commission of the occurrence. Had there been, her conduct would have suggested proper recognition of her consent in terms of section 90 of the IPC but, being minor which apart from complaint petition, the parents have claimed including she herself, did not allow her consent to be legally acknowledgeable. So far other aspect is concerned, victim had narrated that she was raped and on that very score, there happens to be no cross-examination with regard to evidence of the remaining witnesses that means to say PW-2 Kamlawati Devi and PW-4 Rajbanshi Bhagat, parents of victim. It is apparent that they have deposed what they had collected during course of search as well as after recovery of the victim and so, there status happens to be that of as recognized



under Section 6 of the evidence Act though, to some extent their evidences may fall under the category of hearsay. But they recorded soon after recovery of the victim.

10. Consequent thereupon, the judgment of conviction and sentence concerning appellant no. 2 Subhawati Devi is hereby set aside and to that extent appeal is allowed. The appeal is also allowed at the end of Kanhaiya Bhagat so far Section 366A of the IPC is concerned. However, considering the evidence available on the record as discussed hereinabove the conviction under Section 363 IPC is recorded sentencing R.I. for two years while sentence having inflicted against appellant Kanhaiya Bhagat under Section 376 of the IPC is reduced from 10 years to 7 years retaining the fine as well as default thereof, with a further direction to run the sentences concurrently.

11. Accordingly, appeal is partly allowed. Appellant Kanhaiya Bhagat is on bail, hence his bail bond is hereby cancelled directing him to surrender before learned lower court to serve out remaining part of sentences failing which, the learned lower court will be at liberty to proceed against him in accordance with law.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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