

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.439 of 2015

Arising Out of PS.Case No. -136 Year- 2006 Thana -BIHIYA District- BHOJPUR

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1. **Bablu Kumar @ Bablu**, aged about 35 years, Son of Ram Narayan Shah
2. **Narayan Shah @ Ram Narayan Shah**, aged about 85 years, Son of late Shiv Narayan Prasad, Both resident of Village: Jagdishpur, Police station-Jagdishpur, District- Bhojpur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Kumar Nikhil- Advocate
Mr. Kriti Singh- Advocate
Mr. Neerad Parashar- Advocate
For the Respondent/s : Mr. Abhay Kumar- A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 06-04-2018

Appellants Bablu Kumar @ Bablu and Narayan Shah @

Ram Narayan Shah have been found guilty for an offence punishable under Section 366A/ 34 of the I.P.C. and appellant Bablu Kumar @ Bablu has been sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo R.I. for one year, additionally, while appellant Narayan Shah @ Ram Narayan Shah has been sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo S.I. for six months, additionally, vide judgment of conviction dated 07.05.2015 and order of sentence dated 11.05.2015 passed by



the Adhoc Additional Sessions Judge-8th, Bhojpur at Ara in Sessions Trial No.227 of 2007.

2. Ashok Kumar (PW-4), father of the victim (PW-5 name withheld), filed written report on 16.08.2006 disclosing therein that the victim, his minor daughter aged about 15 years, had gone outside on account of some work on 11.08.2006, but did not return. When she had not returned even at the time of meal, they became suspicious, gone in search of the victim and during course thereof, they came to know that Bablu Kumar, son of Ram Narayan Shah of village-Jagdishpur was seen around his house at about 10.00 a.m. He had further disclosed that Bablu Kumar was engaged at his shop and he used to visit his house frequently. His family members had seen the victim in conversation with Bablu Kumar over mobile and for that, she was scolded. In the aforesaid background, he became confident regarding activity of Bablu to have enticed her away, whereupon he had gone to the house of Bablu Kumar and disclosed the event to his parents, whereupon his parents disclosed that they will also take effort to search him out and on getting any kind of information, they will inform. Accordingly, he was waiting for information having at their end. They again went to the place of Bablu as failed to get any information, made query, whereupon his parents became angry and said that we do not know anything to take proper recourse as he so



desires.

3. Bihiya P. S. Case No.136 of 2006 was registered followed with an investigation during course of which, victim was recovered, her statement under Section 164 Cr.P.C. was recorded, was medically examined and then thereafter, completing the investigation, chargesheet was submitted facilitating the trial meeting with ultimate result, subject matter of instant appeal.

4. 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 alleged victim was never enticed away. She happens to be major and out of her own sweet-will, she defied her family, took the appellant to Delhi, got married, enjoyed the marital life for months together and having been informed regarding investigation of the case, they returned back and during course thereof, she was taken away by the police from Ara Station. She was pregnant. Later on, the family members influenced her as a result of which, she became hostile, but the circumstances visualizing and did not justify the allegation and for that, though no ocular evidence has been adduced, statement of the victim recorded under Section 164 of the Cr.P.C. has been made an Exhibit-A.

5. In order to substantiate its case, prosecution had



examined altogether nine PWs, who are PW-1, Ishwar Dayal, PW-2, Vinay Kumar Rai, PW-3, Radhika Devi, PW-4, Ashok Kumar, PW-5, victim herself, PW-6, Rimpa Kumari @ Guria, PW-7, Dr. Smt. Kavita Singh, PW-8, Pawan Kumar and PW-9, Suresh Kumar Tutu. Side by side, had also exhibited as Exhibit-1, fard-bayan, Exhibit-2, medical report, Exhibit-3, endorsement over written report, Exhibit-4, formal F.I.R. As stated above, no ocular evidence has been adduced, however, statement of the victim recorded under Section 164 of the Cr.P.C. has been made as Exhibit-A in defence.

6. After perusal of the evidence, it is evident that though in the written report, there happens to be specific disclosure that the victim on the alleged date was aged about 15 years, but during course of evidence none had disclosed that the victim was minor. From the judgment impugned, the aforesaid event has been taken into consideration at Page No.-17, is found contrary to the settled principle of law as those formats were to be filled up before administering oath to the witness. That means to say, the aforesaid disclosure including that of age would not be taken into consideration. Now, coming to other aspect, the medical report disclosing the age of the victim in between 16-17 years and sticking firmly over the same also happens to be ridiculous in the background of the fact that the finding of the Radiologist happens to be subject to variance of two years either side



and the upper age limit leaning in favour of the accused is to be taken into consideration and that being so, the finding of the learned lower Court that the victim was minor, happens to be error of the record.

7. In the aforesaid background, when the evidences have been further scrutinized, it has been found that PW-1, PW-2, PW-3, PW-4 have not claimed themselves to be an eye witness to occurrence. The earlier part happens to be based upon belief in the background of activity of the alleged victim herself and the later part happens to be whatever been disclosed by the alleged victim. In the aforesaid background, the crucial evidence is that of victim (PW-5).

8. PW-5, during her examination-in-chief, had stated that on 11.08.2006, Bablu Kumar came to her shop and then, instructed her to come to his house, whereupon she had gone there, she met with his father Ram Narayan Shah. Her father had gone to his place and asked for his daughter. Ram Narayan Shah had not returned. She was threatened that in case of shouting, she will be murdered. Then thereafter, she was taken to Delhi from Rajendra Nagar Station where she was raped against her will. She was put under threat to be shot at, out of fear, she had made statement before the police, claimed identification of the accused. During cross-examination at Para-4, she had stated that her shop is situated in her residential house. She had further stated at Para-4 that she is not knowing how much amount was



being paid to Bablu Kumar in lieu of wages. She had further stated that she used to go to Jagdishpur for giving examination. In the aforesaid background, in her cross-examination under Para-3 is taken for consideration wherein she had stated that Bablu was engaged about eight months ago from the date of occurrence at her shop. She is not remembering how much prior to the date of occurrence, he indulged in conversation with her. He used to come to shop from his house. In Para-5, she had stated that she had not provided food to Bablu at her house. She is not knowing where Bablu took food during day time, Then had stated that two and half months after the institution of the case, she returned from Delhi with Bablu. Bablu remained along with her. Food was brought by Bablu, he paid for the same. In Para-6, she had stated that she was not knowing the name of the hotel, she was not knowing in whose building they were residing. She was not knowing the amount of rent. She was not knowing the mohalla. In Para-7, she had stated that so many police stations lie in between Jagdishpur to Delhi. She is not remembering the train by which she returned back from Delhi. She was taken to Patna from Jagdishpur on Bolero Jeep. She is not remembering by which train, gone from Rajendra Nagar to Delhi. She had further stated that at Ara Railway Platform, she sat over a Bench. In Para-8, she had stated that while she was sitting at Ara Platform, police came. She was



threatened that in case of raising of alarm, she will be murdered. Bablu used to stay along with her and so, she had not raised alarm. Then at Para-11, she had stated that she was medically examined. She was examined under Section 164 of the Cr.P.C. wherein she had disclosed her age as 19 years, but the same was incorrect (Exhibit-A). Then, there happens to be contradiction under Para-16. In Para-17, she had stated that she had disclosed to the police that she was pregnant of 2-2 ½ months. In Para-18, there happens to be also contradiction regarding her previous statement before the police. In Para-19, she had admitted that during course of statement recorded under Section 164 of the Cr.P.C. she had stated before the Magistrate that on 11.08.2006, she called on Bablu and then, from Bihiya Station, they both gone to Delhi where they both married. When they returned back on 24.10.2006, whereupon she was apprehended. She had further stated that they happen to be couple. She was not enticed away rather she married with him, out of her sweet-will. In Para-20, she had further admitted that during course of statement, she had shown her desire to stay with her husband. Then at Para-21, there happens to be cross-examination over topography of her house, shop. In Para-22, she had admitted that without informing her parents, she had accompanied Bablu. She arrived at the house of Bablu after an hour. While she was there, she had not raised alarm to meet with her father



as she was under pressure. She had further stated that she had not raised alarm during the intervening period as she was under pressure. In likewise at Para-23, she had stated that even during course of stay at Delhi, she had not got an opportunity to raise alarm. Then had denied the suggestion.

9. PW-6 is her sister, whose evidence is also in same line than that of PW-1, PW-2, PW-3 and PW-4 based upon disclosure allegedly made by PW-5.

10. PW-7 is the Gynaecologist, who had found the victim to be pregnant at the time of her examination. She had further stated that as per Radiologist report, victim was found to be aged in between 16-17 years. During cross-examination, nothing substantial is found.

11. PW-8 is the I.O. and the contradiction whatever been coming out from the evidence of PW-5 is found duly corroborated under Para-8.

12. PW-9 is the part I.O., who had conducted the initial part of investigation, visited the place of occurrence. Till his tenure, victim was not traced out.

13. From the nature of the evidence that too, of the victim (PW-5), it is crystal clear that she was a consenting party. Furthermore, the process of estimation of age of the victim, only by



way of medical examination is found contrary to the finding recorded by the Apex Court in ***Jarnail Singh vs. State of Haryana reported in 2013 CRI.L.J. 3976***, but as PW-1, PW-2, PW-3, PW-4 and PW-6 have not stated that victim was minor on the alleged date of occurrence during course of their evidence nor victim claimed herself to be minor, in the background of any other finding contrary thereto is not at all required.

14. Now, coming to other aspect ***Section 366A of the I.P.C.*** read as follows:-

“[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.]”

15. From plain reading of Section 366A of the I.P.C., it is evident that kidnapping of a minor should be by the kidnapper having a knowledge that she will be forced or seduced to illicit intercourse with another person. Here no other person is in picture rather kidnapper himself happens to be the person and so, the major ingredients relating thereto is found missing. Furthermore, there would have been applicability of ***Section 221 of the Cr.P.C.*** in order



to identify the culpability of the appellants, but considering the evidence of the victim, it will be a futile attempt.

16. That being so, the judgment of conviction and sentence recorded by the learned lower Court is hereby set aside. Appeal is allowed. Appellants are on bail, hence are discharged from its liability.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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