

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.119 of 2013

Arising Out of PS.Case No. -146 Year- 2010 Thana -SHUBHGANJ District- BANKA

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Bhontu Das @ Bichhu Das, son of Late Suro Das, resident of Village Chamelichak
(Kasba), Police Station Shambhuganj, District Banka. Appellant.

Versus

The State of Bihar. Respondent.

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Appearance :

For the Appellant : Md. Najmul Hoda, Advocate.

For the Respondent : Mr. Binod Bihari Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT

Date: 10-10-2018

Heard learned counsel for the appellant as well as
learned APP for the State on this Criminal Appeal.

2. This criminal appeal has been preferred against the judgment and order of conviction dated 19.12.2012 and order of sentence dated 21.12.2012 passed by the *Ad hoc* Additional Sessions Judge-IV, Banka in Sessions Trial No. 121 of 2011, arising out of Shambhuganj P.S. Case No.146 of 2010, whereby the learned trial Court convicted the accused Bhontu Das alias Bichhu Das under Sections 366-A and 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for 7 years and also slapped him with a fine of Rs.5,000/- and in case of default of payment of fine to further undergo R.I. for six months under Section 366-A IPC and also sentenced him to undergo R.I. for 10 years and slapped him with a fine of Rs.10,000/- and in case of default



of payment of fine to further undergo R.I. for one year under Section 376 IPC.

3. The factual matrix of the case is that Shambhuganj P.S. Case No.146 of 2010 was instituted under Section 366-A/34 of the IPC against Nand Kishore Das and Bhontu Das on the basis of written report of one Gena Das with the allegation in succinct that he resides in Delhi in connection with his work. On 29.10.2010 at 8 PM his wife informed him on his mobile that his daughter, Kajal Kumari aged about 13 years was missing since 6 PM on the said date. On the said information, he arrived at his house on 01.11.2010 and made search of his daughter. In course of search, Shashi Kumar Singh, Navin Prasad Singh and others divulged him that they had seen Nand Kishore Das and Bhontu Das taking his daughter, Kajal Kumari on 29.10.2010 at 6 PM. He also learnt that his daughter has been kidnapped by the aforesaid persons with intent to perform marriage showing the accused.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the accused Bhontu Das under Sections 366-A and 376 of the Indian Penal Code showing the accused Nand Kishore Das as not sent up.



5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence against the accused and committed the case to the Court of Sessions and on transfer finally the case came in seisin of the *Ad hoc* Additional Sessions Judge-IV, Banka for trial.

6. Charge against the accused Bhontu Das was framed under Sections 366-A and 376 of the Indian Penal Code. Charge was read over and explained to the accused by the Court to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether seven prosecution witnesses, namely, Navin Prasad Singh as P.W.-1, Shashi Kumar Singh as P.W.-2, Jitendra Kumar Das as P.W.-3, Manorma Devi @ Dhaniya Devi as P.W.-4, victim Kajal Kumari as P.W.-5, informant Gena Das as P.W.-6 and Dr. Indu Bala Prasad, who has examined the victim, as P.W.-7. Out of the aforesaid witnesses P.Ws.1 & 2 turned hostile. In documentary evidence the prosecution has filed and proved some documents including the statement of the victim recorded under Section 164 Cr.P.C.



8. The statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. The accused has neither adduced any ocular nor documentary evidence in buttress of his case.

9. After hearing the parties and perusing the record, the learned trial Court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict has preferred the present Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by the learned counsel for the appellant that the learned Trial Court while recording the statement of the victim has assessed her age as 18 years which goes to suggest that the victim was major at the time of occurrence. It is further submitted that victim was major and she had herself eloped with the appellant and lived with him



out of her sweet will. It is a case of love affair. It is further submitted that as per the account of the victim she was kept by the appellant in the house of Shambhu Das but the said Shambhu Das has not been examined by the prosecution. It is also submitted that as per the prosecution case the informant got knowledge of kidnapping of his daughter from Navin Prasad Singh and Shashi Kumar Singh and others but the said Navin Prasad Singh and Shashi Kumar Singh examined by the prosecution in this case as P.W.1 and P.W.2 respectively have turned hostile and no other person has been examined by the prosecution in corroboration of the aforesaid case. It is further submitted that as per the account of Jitendra Kumar Das (P.W.3) he got knowledge of the kidnapping of his sister from Nageshwar Das but the aforesaid Nageshwar Das has not been examined by the prosecution. Jitendra Kumar Das (P.W.3), Manorma Devi @ Dhaniya Devi (P.W.4) and the informant Gena Das (P.W.5), father of the victim are not the eye witnesses of the kidnapping of the victim by the appellant. Dr. Indu Bala Prasad (P.W.7) who has examined the victim has not found any sign of rape and spermatozoa in the vaginal swab of the victim. Hence, the ocular evidence does not stand corroborated by the medical evidence. Thus, the prosecution



has utterly and miserably failed to substantiate the prosecution case by adducing consistent, trustworthy and reliable ocular and documentary evidence. Hence, the aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted of the charge levelled against him.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence, submitted that the victim in her statement under Section 164 Cr.P.C. and the statement given before the trial Court has substantiated the offence of kidnapping by the appellant and committing rape against her by him for 14 days. Other witnesses, namely, P.Ws.2, 3, 4 and 6 have also corroborated the occurrence of kidnapping of the victim by the appellant and the learned trial Court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order of conviction and sentence, which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears that to substantiate its case the prosecution has examined 6 material witnesses in the case. Out of the aforesaid witnesses



Navin Prasad Singh (P.W.1) and Shashi Kumar Singh (P.W.2) have turned hostile, while P.W.3-Jitendra Kumar Das happens to be brother, Manorma Devi @ Dhaniya Devi (P.W.4) happens to be mother, the informant Gena Das (P.W.6) happens to be father of the victim and P.W.5-Kajal Kumari is the victim herself.

15. Jitendra Kumar Das-P.W.3 has stated in his examination-in-chief that at the time of occurrence, he was in field along with his mother while his sister, Kajal Kumari was cooking food inside the house and when they regressed to the house they did not find Kajal in the house. During the course of search after half an hour, he learnt that Nand Kishore Das and Bhontu Das (appellant) have kidnapped his sister with an intent to perform marriage with her. In para-4 of his cross-examination, he has stated that he had not seen his sister proceeding with the accused persons rather Nagehswar Das had divulged him the factum of witnessing the girl proceeding with Nand Kishore Das and Bhontu Das 10 minutes earlier. The aforesaid statement of P.W.3 indicates that he does not happen to be eye witness of kidnapping of the victim rather has given statement on the premise of the disclosure of the aforesaid occurrence of kidnapping of victim by the appellant



to him by Nageshwar Das. But the aforesaid Nageshwar Das has not been examined by the prosecution in corroboration of the aforesaid statement of P.W.3. Thus the aforesaid statement of P.W.3 remains uncorroborated and for want of corroboration aforesaid statement of P.W.-3 is not admissible in evidence even as hearsay witness of the case.

16. Manorma Devi @ Dhaniya Devi-P.W.4 has stated in her examination-in-chief that at the time of occurrence she had gone to the field and when she regressed from the field she did not find her daughter in the house. During course of search she learnt that Nand Kishore Das and Bhontu Das had kidnapped her daughter to perform marriage with her. In para-4 of her cross-examination, she has stated that she learnt about kidnapping of her daughter by the accused persons 4-5 days later. But she has not disclosed the name and identity of the source of information. From perusal of the aforesaid testimony of P.W.4, it appears that she also does not happen to be eye witness of the kidnapping of the victim by the appellant.

17. Gena Das-P.W.6, who happens to be informant of the case, also does not happen to be eye witness of kidnapping of his daughter. As in para-1 of his examination-



in-chief he has stated that he learnt about kidnapping of his daughter by the accused persons during course of search from the people of Jagatpur but barring P.Ws.1 & 2 none else has been examined by the prosecution in corroboration of the aforesaid statement of the informant and moreover P.Ws.1 & 2 have turned hostile. Thus for want of corroboration aforesaid statement of the informant is not admissible in evidence even as a hearsay witness.

18. From perusal of the testimony of the aforesaid three witnesses, it appears that they also do not happen to be eye witnesses of committing rape against the victim by the appellant. Thus, the only witness left to be examined is victim Kajal Kumari-P.W.5. From perusal of testimony of P.W.-5 it appears that she has stated in her examination-in-chief that on the date of occurrence she was in her house and Nand Kishore Das and Bhontu Das arrived at her house at around 7 PM and asked her to accompany them to Sultanganj to receive her father who had arrived there from Delhi and took her to Bairiya Diyara and they kept her there for 14 days and Bhontu Das committed rape against her forcibly for 14 days and after 14 days her father went there and took her to P.S. Shahkund and from there to P.S. Shambhuganj and from there she went



to the Banka Court where her statement was recorded. Thereafter, she went to the hospital at Banka. In para-3 of her examination-in-chief, she has further stated that Bhontu Das had committed rape against her. In para-5 of her cross-examination she has stated that Nand Kishore Das had left them at Bairiya Diyara. In para-5 of her cross-examination, she has further stated that Bhontu Das is her brother in relation so she had accompanied him. He used to pay visit to her house oftenly since two years before the occurrence. In Diyara he had kept her in the house of Shambhu Das. The victim was subjected to cross-examination but nothing convincing and cogent have been elicited in her cross-examination having potential to rule out or create any doubt about the sanctity of the aforesaid testimony of the victim. Thus the aforesaid testimony of victim appears to be wholly reliable and unblemished.

19. From perusal of the statement of the victim recorded under Section 164 Cr.P.C., marked as Ext.1, it appears that the aforesaid testimony of the victim also stand corroborated by the aforesaid statement recorded under Section 164 Cr.P.C. as in the said statement she has stated that only Bhontu Das took her to Bairiya Diyara forcibly. Her



mother had gone to field at the time of occurrence. Bhontu Das came to her and asked her to accompany him to receive her father to Sultanganj who had arrived from Delhi. He took her from her house on 29.10.2010 and kept her with him for 14 days and established sexual cohabitation with her during the aforesaid period. Thus from perusal of the testimony of the victim it appears that she was taken away by the appellant on the pretext of receiving her father at Sultangaj who had arrived there from Delhi on the date of occurrence and he took her to Bairiya Diyara and kept her there for 14 days and committed rape against her during the aforesaid period.

20. From perusal of the medical examination report and evidence of Dr. Indu Bala Prasad-P.W.7, it appears that on examination of person of the victim the doctor has found her hymen old ruptured. The aforesaid testimony and statement of the victim recorded under Section 164 Cr.P.C. and the medical evidence conjointly goes to substantiate the case of kidnapping of the victim and committing rape against her by the appellant.

21. From perusal of the record, it appears that the Trial Court, while recording statement of the victim during the course of trial, has assessed her age as 18 years but the



aforesaid statement of the victim was recorded on 17.10.2011 while the occurrence is of around one year back i.e. of 29.10.2010. Hence, as per the aforesaid statement itself the victim appears to be minor at the time of occurrence. Moreover, the learned Magistrate, while recording the statement of victim under Section 164 Cr.P.C. has assessed her age as 13 years on 20.11.2010 and the doctor who has examined the victim on 18.11.2010, has assessed the age of the victim below 18 years. The aforesaid evidence of the prosecution cumulatively indicates that the victim was minor at the time of occurrence.

22. Though the said Shambhu Das in whose house the victim was kept by the appellant for 14 days has not been examined by the prosecution, but, in view of the aforesaid ocular and documentary evidence of the prosecution, non examination of the said Shambhu Das in the case, in my considered opinion, is not going to shatter the prosecution case by any stretch of imagination.

23. Though the doctor has not found any spermatozoa in the vaginal swab of the victim but the said aspect of the case, in my considered opinion, is not going to affect the merit of the case and having potential to rule out the



committing of rape against the victim as as per the victims account the appellant had kidnapped the victim on 29.10.2010 and kept her with him for 14 days i.e. till 11.11.2010 and the victim was recovered and examined on 18.11.2010 i.e. after seven days, so the possibility of spermatozoa in the vaginal swab of the victim is very bleak as by that time the semen etc. might have been washed out from the body by urination.

24. As the victim was minor and she was not kidnapped by the appellant knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, no case under Section 366-A IPC is made out. However, as the victim was minor and was taken away from lawful guardianship of her mother by the appellant, without consent of her guardian, the offence under Section 363 IPC is made out against him.

25. In view of the aforesaid facts and circumstances of the case I find and hold that the prosecution has succeeded to substantiate the offence of kidnapping of minor daughter of the appellant and committing rape against her by the informant by adducing consistent, trustworthy and reliable evidence. Hence, the appellant is convicted under Section 363 IPC instead of 366-A IPC besides 376 IPC.



26. As the occurrence is of 2010 and the appellant has been facing the rigor of trial for a considerable period of 8 years and victim has been given marriage and is residing at Kolkata happily and the appellant happens to be aged about 23 years at the time of occurrence, hence considering the facts and circumstances of the case, the sentence of the appellant under Section 376 IPC is reduced to seven years.

27. Accordingly this appeal is dismissed with the aforesaid modification in Section under which the appellant has been convicted and the sentence as detailed hereinabove.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

AFR/NAFR	AFR
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