

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.59 of 2014**

Arising Out of PS. Case No.-96 Year-1998 Thana- BARH District- Patna

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1. Binod Yadav @ Vinod Kumar, S/O Raghuveer Yadav
 2. Pannu Yadav S/O Harkhu Yadav
Both are residents of village- Mananchak, P.S.- Bind, District- Nalanda at Bihar Sharif

... .. Appellants

Versus

The State Of Bihar

... .. Respondent

Appearance :

For the Appellants : Shri Manish Kumar No. 2, Advocate
For the Respondent/State: Shri Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 05-08-2019

1. Two appellants have preferred the present appeal under Section 374(2) of the Code Of Criminal Procedure, 1973 [hereinafter referred to as the “Cr.P.C.”] against judgment of their conviction and sentence. By judgment dated 04.12.2013 both the appellants were convicted for the offence under Section 364(A) of the Indian Penal Code, 1860 [hereinafter referred to as the “I.P.C.”] and by order dated 07.12.2013 both were directed to undergo imprisonment for life and to pay a fine of Rs. 1,000/- each. In case of default in payment of fine, they were directed to further undergo simple



imprisonment for fifteen days. The judgment of conviction and sentence was passed in Sessions Trial No. 1141 of 2003 by Shri Ashok Kumar Srivastava, learned Additional District & Sessions Judge Adhoc No. 2 , Barh (Patna) [hereinafter referred to as the 'Trial Judge'].

2. The case has been initiated on the basis of *fardbyan* of one Bhagwat Narain Singh [died without his evidence in the present case]. His *fardbyan* was recorded by Inspector- cum- Officer -in-charge namely Shri Ashok Kumar of Barh Police Station. It was recorded on 18.04.1998 at 11.45 Hours at the house of informant -Bhagwat Narain Singh. In the *fardbyan* informant disclosed that on the same day i.e. 18.04.1998 in morning at 8.00 A.M. while he was at his home, his co-villager: Gyani Yadav [not examined] came at his door and informed that motorcycle of his son -Rajeev Kumar Saxena bearing Registration No. BRQ/7256 was lying beneath a Mango tree about 50 meters away from Kaal Baba place on Southern *Bandh* and Rajeev Kumar Saxena was not present there. After getting this information the informant with apprehension went to the said place along with Gyani Yadav [not examined], Chakradhari Prasad [not examined], Sambhu



Prasad [not examined] and Kamakhya Narain Singh [P.W. 1] and other villagers. While he reached there he saw that motorcycle was lying there and his son was not there. Thereafter, he returned back to his house in village- Dhelwa Gossai where his son- Rajeev Kumar Saxena was residing with his family and he got information from wife of his son that Rajeev had not returned. The informant further stated that his son -Rajeev Kumar Saxena on 17.04.1998 had come to his house in village- *Soiya* and in evening at about 6.00 P.M. he proceeded for his village on motorcycle and he had not returned thereafter. Initially he thought that his son might had returned to his house and his wife was having feeling that her husband had remained at his village home in *Soiya*. In this confusion he did not search his son but in morning after getting such information he sent information to Police whereupon Police with staff (armed forces) arrived there and recorded his *fardbyan*. The informant claimed that Rajeev Kumar Saxena was kidnapped however he categorically stated that he was not having any animosity with anyone but there was some dispute with some villagers and he raised suspicion that his son might had been kidnapped for killing or ransom.



The said *fardbyan* was read over to him and after finding it correct in presence of witnesses he put his signature. As a witness to the *fardbyan* Krishna Kumar Singh [P.W. 2] also put his signature on the *fardbyan*.

3. On the basis of said *fardbyan* on 18/4/1998 at about 19.00 Hours [7.00 P.M.] a formal F.I.R. vide Barh P.S. Case No. 96 of 1998 was registered for the offence under Section 364(A) of the I.P.C. against unknown. After registration of F.I.R. immediately an information was received that victim had fled away from the clutches of the accused persons. During investigation involvement of altogether eight accused persons had come to fore and as such, on 8/7/1998 charge- sheet was submitted against eight (8) accused persons which includes the two appellants however in the charge-sheet both the appellants were shown absconder. After submission of charge- sheet, on 13.07.1998 learned Additional Chief Judicial Magistrate, Barh took cognizance of offence, however since appearance of both appellants was not secured, case of both the appellants remained in the court of Magistrate itself and finally, it was noticed that appellants were in custody in an another case and as such, on 18.10.2001



appellant no. 1 - Binod Yadav @ Vinod Kumar was remanded in the present case and subsequently, on 20.02.2002 appellant no. 2 -Pannu Yadav was remanded. Finally, on 18/07/2003 case of both the appellants was committed to the Court Of Sessions and it was numbered as Sessions Trial No. 1141 of 2003. On 06.08.2004 charge under Section 364A of the I.P.C. was framed against both the appellants which was denied by them and they claimed to be tried.

4. During the trial to establish its case on behalf of the prosecution altogether eight witnesses were examined. Out of eight witnesses, P.W. 3 - Rajeev Kumar Saxena is the victim and he is the sole witness who has claimed to identify all the accused persons including both the appellants. P.W. 5 - Anandi Paswan is a resident of Mananchak who has stated that victim after fleeing away from the clutches of accused persons firstly took shelter in the house of Kishori Mahto [P.W. 6] and he was the person i.e. Anandi Paswan who gave information to Police regarding escape of the victim from the clutches of accused persons. P.W. 6 - Kishori Mahto though has been declared hostile but in initial version he supported the case of prosecution regarding kidnapping of Rajeev



Kumar Saxena. P.W. 1 - Kamakhya Narain Singh is a formal witness who has put his signature on the seizure list prepared regarding seizure of the motorcycle of the victim near Kaal Baba temple. P.W. 2 - Krishna Kumar Singh is another formal witness and brother of the victim who deposed that in the evening of 17.04.1998 his brother -Rajeev Kumar on his motorcycle had gone from village *Soiya* to village- Dhelwa Gossai to his own house and in the next morning while this witness was with his father in Khalihan, co-villager Gyani Yadav came on cycle and gave information regarding lying of the motorcycle of the victim near Kaal Baba temple beneath Mango tree. Thereafter, he, his father and others went there and noticed the motorcycle. In his presence his father gave information to Police and in presence of this witness Police had recovered the motorcycle and prepared seizure list on which he and Kamakhya Narain Singh / P.W. 1 had put their signature. In paragraph 3 of his evidence he further stated that on the same day he heard rumor that his brother -Rajeev Kumar Saxena had fled away from the clutches of kidnappers. Evidence of this witness was also recorded in Sessions Trial No. 981 of 1998 as stated in paragraph 4 of his examination-



in -chief. At this juncture it is necessary to be indicated that case of other six accused persons who were charge- sheeted along with the appellants had proceeded earlier since their appearance was complete and another trial vide Sessions Trial No. 981 1998 had commenced and during the said trial the co-accused were held guilty under Section 364A of the I.P.C. and also sentenced. Their appeal against conviction is also pending before this court. P.W. 4 -Ram Mohan Prasad did not support the case and as such he was declared hostile.

5. It is case of prosecution that victim was assaulted by accused persons and he was having injuries on his person and as such, after victim came out from the clutches of the accused persons his injuries were got examined by Dr. Nagina Paswan (P.W. 7). The Investigating Officer of the case Shri Ashok Kumar has been examined as P.W. 8. It is evident that since both the appellants remained absconder, there is possibility that they were not put on T.I. Parade since charge-sheet in the case was already submitted in the year 1998 showing both the appellants as absconder. In respect of other set of accused persons whose appearance was earlier secured, their trial has already been concluded and belatedly after



securing attendance of both appellants the present trial had proceeded and as such, much delay has taken in examining the prosecution witnesses.

6. After completion of prosecution evidence, on 26/04/2011 appellants were explained regarding evidences and circumstances collected against them and their statement under Section 313 of the Cr.P.C. was recorded on 26.04.2011. Learned trial Judge on the basis of evidence on record has passed impugned judgment of conviction and sentence which has been assailed in the present appeal

7. Shri Manish Kumar No. 2 , learned counsel for the appellants by way of referring to evidence on record has argued that prosecution has not been able to establish its case beyond all reasonable doubts. He submits that recording of *fardbyan* at the door of the informant itself appears to be doubtful due to the reason that P.W. 2 - Krishna Kumar Singh, who is own brother of the victim in categorical term in paragraph 6 of his cross- examination has stated that after recovery of motorcycle they went to Police Station and their statement was recorded however, he has not disputed the fact that victim has taken name of both the appellants as well as



identified the appellants in dock. Shri Kumar submits that of-course victim has identified the appellants and P.W. 4 had corroborated the fact, but fact remains that prosecution has miserably failed to establish the case of ransom. He submits that during entire evidence nothing has been brought on record to show that after kidnapping either family members of the victim were approached or any demand of ransom was made. Nor it was a case of prosecution that victim was kidnapped with a view to pressurize anyone to abstain from doing any act. Only vague statement was made by the victim regarding ransom and in absence of basic ingredients of demand of ransom, the learned trial judge has committed serious error in convicting both the appellants under Section 364(A) of the I.P.C. He submits that hardly it can be a case under Section 365 of the I.P.C. Both appellants, according to Shri Kumar, have already remained in custody for near about seven years and maximum sentence as prescribed under Section 365 of the I.P.C. is seven years imprisonment. Accordingly, alternatively it has been argued that appeal can be decided by way of altering conviction from Section 364(A) to Section 365 of the I.P.C. and purpose can be served if the



period of sentence is reduced to the period already undergone in custody.

8. Shri Ajay Mishra, learned Additional Public Prosecutor has opposed the appeal. However, he too has not disputed the fact regarding absence of basic ingredients of demand of ransom.

9. Besides hearing, learned counsel for the parties, we have minutely examined entire evidence on record. In the evidence of victim it has come that while he was moving to his village he was intercepted by 10-12 accused persons and his eyes were wrapped by *gamcha* and he was forced to travel for about three (3) hours and thereafter, he was confined in a room where his both hands and legs were tied. Subsequently, in morning time he got opportunity to untie and thereafter, he by way of scaling the wall, which was of the height of about 6 feet, fled away and after his escape he took shelter in the house of P.W. 6 – Kishori Mahto and he explained all those facts. At the house of Kishori Mahto [P.W. 6], P.W. 5 - Anandi Paswan also came and Anandi Paswan (P.W. 5) came to Police to give information regarding the escape of the victim. Of-course during trial P.W. 6 – Kishori Mahto to some extent has



not supported the prosecution case but in initial version he has proved that victim was kidnapped and he fled away from the clutches of the accused persons. This has also been corroborated by P.W. 5 – Anandi Paswan. Besides this, the victim was immediately got examined by Medical Officer on 18.04.1998 by Dr. Nagina Paswan (P.W.7) and he noticed number of injuries on the person of the victim. The Investigating Officer (P.W. 8) during investigation recorded re-statement of the informant and also statement of other witnesses. He visited the place of occurrence. In the case there are two place of occurrence. First place of occurrence i.e. beneath the mango tree near Kaal Baba temple and 2nd place of occurrence is the room where victim was confined however on examination of entire evidence it is not clear as to whether either of the family members of the victim were approached or given intimation regarding demand of ransom or not.

10. The court is in agreement with the submission of Shri Manish Kuamr No. 2 , learned counsel for the appellant that prosecution has not been able to establish the main ingredients for application of Section 364(A) of the I.P.C. i.e. demand of ransom or a case of kidnapping for pressurizing



any one to abstain from doing any act and as such, we are of opinion that impugned judgment of conviction is required to be interfered only to the extent of altering conviction from the offence under Section 364(A) to 365 of the I.P.C. So far illegal confinement, torture and assault is concerned, those facts are evident from evidence of victim / P.W. 3.

11. In view of facts and circumstances, we are of considered opinion that prosecution has miserably failed to establish its case for application of provision under Section 364(A) of the I.P.C. Accordingly, the judgment of conviction under Section 364(A) of the I.P.C. is hereby set aside and same is substituted by Section 365 of the I.P.C.

12. Now the question is what sentence would suffice the purpose. Both the appellants during the trial have remained in custody for some period and after judgment of conviction and sentence i.e. from the month of December, 2013 both appellants are continuously in custody and almost they are completing about seven years of custody. Section 365 prescribes maximum sentence of imprisonment for seven years, and as such, we are of opinion that if sentence is reduced to the period already undergone in custody, purpose



would be served. Accordingly sentence is reduced to the period already undergone in custody. Accordingly, the appeal is dismissed and since sentence has already been reduced to the period already undergone in custody, both the appellants: Binod Yadav @ Vinod Kumar and Pannu Yadav are directed to be released forthwith, if not wanted in any other case.

(Rakesh Kumar, J)

(Anjani Kumar Sharan, J)

praful/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	09-08-2019
Transmission Date	09-08-2019

