

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1925 of 2017**

Arising Out of PS. Case No.-234 Year-2012 Thana- BARHARA KOTHI District- Purnia

Md. Rizwan @ Fakir, son of Md. Hafiz Sah, Resident of Village- Murballa,
P.S. -B. Kothi, (Barahara), District Purnea.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv. Mr. Malay Chaudhary, Adv. Ms. Swati Sinha, Adv.
For the Respondent/s	:	Mr. Syed Ashfaq Ahmad, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date : 05-07-2019

1. Appellant, Md. Rizwan @ Fakir, vide judgment of conviction dated 19.04.2017 and order of sentence dated 24.04.2017 passed by the FTC-Ist, Purnea in connection with Sessions Trial No.304 of 2013 / 24 of 2017, has been found guilty for an offence punishable under Section 363 of the IPC and sentenced to undergo R.I. for 7 years as well as to pay fine appertaining to Rs.20,000/-, under Section 366 of the IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.20,000/-, under Section 376 IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.20,000/-, in default of payment of fine, to undergo S.I. for one year, additionally with a further direction to



run the sentences concurrently, with a further direction to the effect that the period having undergone during course of trial would be subject to set off in accordance with Section 428 of the Cr.P.C.

2. Anil Mandal, PW.8 filed written report on 16.12.2012 disclosing therein that victim (name withheld) happens to be his wife from whom he has got two sons, the elder one Rahul Kumar aged about 14-15 years and younger Ravi Kumar aged about 10-12 years, a daughter, Priti Kumari, aged about 5 years. It has also been disclosed that Md. Rizwan @ Fakir is a Mason and also works in his village. He used to visit his house in his absence and during course thereof, he actively engaged himself in alluring his wife. His wife had gone to her *Maika* for appearing in B.A. Part-I examination. After examination when he had gone to bring his wife, his father-in-law D.N. Rai and brother-in-law Praful Rai have said that after pooja she will be sent. Then thereafter, as his wife had not come so on 25.11.2012 he again gone to his Sasural for Bidai where his mother-in-law has disclosed that just after pooja she had sent his wife. They have accompanied her to Barhara. During course of search he came to know that Md. Rizwan had enticed away



his wife from Barhara along with his one son and daughter to Delhi.

3. On the basis of the aforesaid written report Barhara P.S. Case No.234/2012 was registered followed with an investigation as well as submission of charge sheet facilitating the trial meeting with the 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. In an alternative, it has also been pleaded that the victim, a major was a consenting party who, after changing her religion converted to Islam and then married with the accused. So, no offence has been committed at the end of the accused. However, nothing has been adduced in defence.

5. Altogether ten PWs have been examined on behalf of prosecution who are PW.1-Deo Narayan Rai, PW.2-Sudhir Mandal, PW.3-Jai Mala Devi, PW.4-Rahul Kumar, PW.5-Ravi Kumar, PW.6-Dr. Snigdha Priyadarshini, PW.7-Victim (name withheld), PW.8-Anil Mandal (informant), PW.9-Preeti Kumari, PW.10-Vijay Kumar (I.O). Side by side has also exhibited medical report Ext.-1, endorsement of Deputy



Superintendent, Sadar Hospital, Purnea over Ext.1 and Ext.1/1, Signature of victim over statement under Section 164 Cr.P.C. Ext.2, Signature of informant over written report-Ext.2/1, endorsement over written report-Ext.3, formal FIR-Ext.4. As stated above, nothing has been adduced on behalf of defence.

6. Heard learned counsel for the appellant, learned APP. Also gone through the evidence on record.

7. First of all, the credibility of medical evidence is being seen. It is needless to say that from the written report itself, the age of eldest children has been shown to be in between 14-15 years. Fortunately all the children have deposed in this case as PW.4, Rahul Kumar who has been examined 06.01.2014 and on that date he has shown his age as 15 years, PW.5, Ravi Kumar who has been examined on 24.06.2014 and his age has also been disclosed as 15 years, Preeti Kumari who has been examined on 16.05.2016 on which date she has disclosed her age as 10 years. The occurrence is of the year 2012 and so, PW.4 ought to have been aged about 12 years and in likewise manner status of PW.5 as well as PW.8 would be. Against that, the age of the victim has been estimated by the Medical Board as in between 18-19 years. Her examination was conducted on 05.01.2013 which ought not to be and so, the



aforesaid finding is sufficient to indicate in what manner the medical report has been issued. Moreover, the victim who was examined on 19.11.2015 as PW.7 has shown her age to be 34 years, that means to be say on the alleged date of examination she was very much in between 31-32 years. The aforesaid discussion happens to be relevant in order to appreciate the conduct of the victim inconsonance with the occurrence so alleged.

8. From the evidence, it is abundantly clear that PW.7 while was taken away by the appellant as alleged was not alone rather she was along with her second son Ravi Kumar (PW.5) and Preeti Kumar (PW.9) who remained with her till her presence before the police after having been released/escape from the clutch of the appellant Md. Rizwan @ Fakir. Furthermore, the another son PW.4 (eldest one) has been examined to connect the chain by having the victim along with two children brought to Barhara from where, the occurrence of kidnapping has been alleged while PW.8 is the husband. PW.1 and PW.3 are the father and mother of the victim. PW.2 is the co-villager of the informant PW.8 and PW.10 is the I.O.

9. From examination-in-chief of PW.10 the I.O. (Paragraph-3), it is evident that he had arrested the appellant



from a road at village-Gadhi on 26.12.2012. In likewise manner, from para-4 of his deposition, it is evident that on getting confidential information he had recovered the victim on 27.12.2012 near the office of the Superintendent of Police and then her statement was recorded under Section 164 Cr.P.C. on 28.12.2012 and then, she was medically examined. That means to say firstly accused was arrested and then, the victim was traced out on confidential information near the office of the S.P on the following day. In the aforesaid background first of all, the evidence of the victim PW.7 is to be seen.

10. PW.7 has deposed that the occurrence is about three years ago she was returning from her Maika along with her son Ravi Kumar and Preeti and was in a way to her Sasural. While she was awaiting for tempo at Barhara bus stand, Rizwan along with two unknown persons came and forcibly took her away along with her both children over Tata Magic and brought her to Purnea 'loot' mohalla where he took a house on rent and kept her along with both children. He kept her for two months. She has further stated that he used to rape everyday. After getting an opportunity she came to court. Then she met with S.P. who informed Barhara police station. Officer-in-charge of Barhara police station came, arrested Rizwan. Identified the



accused in dock. Exhibited her signature over 164 Cr.P.C statement. She got medically examined. During cross-examination at para-6, she has stated that at the time of marriage she was aged about 18 years. Marriage was solemnized in the year 1992. Then has disclosed the year of birth of all the children. In para-9 she has stated that when she was forced to sit in magic vehicle, at that very time her son aged about 12 years and daughter Preeti aged about 9 years were along with her. So many vehicles were parked there. Large numbers of persons were there but she had not raised alarm. Then has said that out of fear she had not raised alarm. Children also not raised alarm. She has further stated that so many passengers were inside the magic vehicle but, she had not asked for help from any of the passenger. She has further stated that neither her mouth nor hands, legs were tied. At para-10 she has further stated that she crossed about 50 K.M. therefrom to Purnea loot mohalla. At para-12 she has stated that Dhamdaha, Meerganj, Madhubani, K.Hat police station fell in between but, she had not raised alarm, even seeing the police, public. In para-13 she has further stated that during course of staying at Purnea Loot mohalla, she had occasion to talk with the family members of the landlord. She has further stated that she used to cook the



food. The accused after consuming food used to go to work. Then she denied suggestion that she has converted to Islam on her own. She denied that she after conversion, married with the accused. At para-14 she has stated that on account of fear she could not inform anybody regarding the occurrence. In para-15 she has stated that Rizwan was arrested in her presence. Police took her as well as Rizwan jointly to police station.

11. PW.9, a daughter, during her examination-in-chief has stated that Rizwan had released after three years while, during cross-examination at para-4 she has stated that their mouths were gagged, again corrected that they have raised alarm but no voice came out as mouth was gagged. She has further stated that Rizwan was driving vehicle, no other was present along with him, no passenger was present. While he was driving vehicle, even then they had not raised alarm. At para-5 she had stated that she is unable to say where she stayed at Purnea for three years.

12. PW.4 is the son who was also along with the victim and PW.9. He has stated that the same fact during examination-in-chief and further added that they were kept in a room by the Rizwan who was also residing in the same room along with them. Rizwan did not allow them to come outside



the room as, used to threatened that in case of coming out from the room, they will be murdered. They remained there for about a month and then thereafter, her mother telephonically informed the police. Police came, inquired. During cross-examination, at para-7 has stated that, PHC lies 10 feet away from the Barhara bus stand. Block is also there. At para-9 he has stated that the area remains so over crowded place. In para-11 he has stated that he is unable to disclose the place where Rizwan had kept at Purnea. They were kept in a dark room. They were not allowed to meet anybody. Getting a chance, they all came out after breaking the door. They came to Barhara P.S. on tempo. At para-13 he has stated that at Barhara police station, statement of his mother was recorded.

13. PW.1, PW.2, PW.3, PW.4 are the witness whose evidence is based upon disclosure having made by the victim. As, none of them are an eye witness to occurrence, so they stood within the category of hearsay.

14. PW.8, informant, as is evident since initial stage that means to say the written report having at his end, was not an eye witness to occurrence. If his conduct is taken together with the PW.1, PW.2, PW.3, PW.4, it is apparent that he could not be an eye witness to occurrence but, when his



evidence is being properly scrutinized, it is evident that though during course of examination-in-chief he shown his status to be not an eye witness to occurrence and further, the allegation whatsoever been at his end to be based upon information conveyed by his wife, the victim. However, when cross-examination has been gone through, at para-3 he has claimed to be an eye witness to occurrence by stating that he had seen accused Rizwan taking away his wife on a tempo. Then he stated that he had taken away from his house at 8:00 PM in night over a tempo. Again corrected that he himself had not seen as, at that very time he was working at Barhara Bazar under Ghanshayam Sao. Again corrected that he had not seen. He came to know that he (accused) had taken away over tempo. At para-4 he has stated that two children have also been kidnapped. He has denied the suggestion that his wife had gone on her own. In para-5 he has further stated that at the time of kidnapping neither his wife nor his children had raised alarm. In para-6 he has stated that just after occurrence he had instituted the case. Two months thereafter, victim was traced out. At para-11 he has admitted that his wife had gone on an allurement having at the end of the accused. When he inquired from his wife why not she resisted, she answered, that as the accused had



taken her away on allurement so she had not protested but, later on she protested but, he (accused) had not paid heed. Then there happens to be cross-examination where he admitted that he used to work under the Rizwan since before and on account thereof, they were on visiting term.

15. After having minute observation of the evidence having adduced on behalf of prosecution, it is abundantly clear that the theme of kidnapping is found suspicious one from the conduct of the prosecution witnesses itself and in likewise manner, the story of the rape as, had there been such kind of affair, right from Barhara, the victim as well as her two children should not have remained idle. Furthermore, there also happens to be inconsistency amongst the victim, her son and daughter over manner of transportation. On the other hand, there happens to be specific averments at the end of the victim that she had frequent talk with the landlord and his family members. That means to say, free access was already available. There happens to be an admission that she used to cook food and after taking meal, accused used to go to outside for menial work. There happens to be no disclosure at the end of the victim that during the intervening period/during absence of the accused she had taken any kind of positive step to get out.



Moreover, presence of victim has been after arrest of the appellant/accused by the police, away from Purnea Loot Tola. All the events, as admitted suggest different kind of picturization than as projected.

16. Accordingly, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	08.07.2019
Transmission Date	08.07.2019

