

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1249 of 2017

Arising Out of PS. Case No.-87 Year-2013 Thana- SAHARSA District- Saharsa

1. Heera Devi, Wife of Domi Srivastva
2. Akhilesh Srivastava @ Akhilesh Kumar Srivastva @ Ashish, Son of Domi Srivastva Resident of Village- Milki, PS- Maranga, District- Purnea.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 1288 of 2017

Arising Out of PS. Case No.-87 Year-2013 Thana- SAHARSA District- Saharsa

Angad Kumar Yadav, son of Birendra Prasad Yadav, resident of village-Oli Tola, Police Station-Maranga, District-Purnea.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 1249 of 2017)

For the Appellant/s : Mr. Diwakar Prasad Singh, Adv.

Mr. Om Prakash Singh, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

(In CRIMINAL APPEAL (SJ) No. 1288 of 2017)

For the Appellant/s : Mr. Vivekanand Jha, Adv.

For the Respondent/s : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 22-08-2019

1. Cr. Appeal (SJ) No.1249 of 2017 wherein Heera Devi as well as Akhilesh Srivastava @ Akhilesh Kumar Srivastva @ Ashish are the appellants, Cr. Appeal (SJ) No.1288 of 2017 wherein Angad Kumar Yadav is the appellant commonly originate against the judgment of conviction dated 28.02.2017 and order of sentence dated 06.03.2017 relating to Sessions Trial No.188/2013



arising out of Saharsa P.S. Case No.87/2013 on account thereof, have been heard together and are being disposed of by a common judgment.

2. Appellant, Akhilesh Srivastava @ Akhilesh Kumar Srivastva @ Ashish has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.5000/- in default thereof, to undergo S.I. for three months under Section 376 IPC as well as under Section 366 of the IPC respectively, along with to undergo R.I. for one year as well as to pay fine appertaining to Rs.1000/- in default thereof, to undergo S.I. for one month, under Section 342 IPC and sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.1000/- in default thereof to undergo S.I. for one month under Section 506 of the IPC while, appellants Hira Devi and Angad Kumar Yadav have been sentenced to undergo R.I. for one year as well as to pay fine appertaining to Rs.1000/- in default thereof, to undergo S.I. for one month under Section 342 IPC to undergo R.I. for two years as well as to pay fine appertaining to Rs.1000/-in default thereof to undergo S.I. for one month under Section 506 of the IPC, to undergo R.I. for seven years as well as to pay fine appertaining to Rs.3000/- in default thereof to undergo S.I. for two months under Section 366/34 IPC with a further direction that all the sentences



will run concurrently, with a further direction that the period having undergone during trial will be set off in accordance with Section 428 of the IPC by the First Additional Sessions Judge-cum-Special Judge, Saharsa in Sessions Trial No.188/2017.

3. Mahadev Rishidev, PW.9 filed written report on 24.02.2013 disclosing therein that his wife Rambha Devi (PW.5) happens to be in service at Purnea being employed in Polytechnic School. Earlier, they were living at mohalla Ram Nagar at Purnea town as a tenant in the house of Vijay Gupta. About a month ago they have come to Saharsa and were residing in their own house along with his daughter (name withheld PW.3) aged about seventeen years, son (PW.1), daughter-in-law (PW.4) and opened a grocery shop to maintain their livelihood. On 19.02.2013 he along with his son has gone outside. When they returned back about 11:00 AM. They came to know that the victim is missing since 3-4 hours. On account thereof, they gone in search of the victim and during course thereof, he came to know that Akhilesh Srivastava @ Akhilesh Kumar Srivastva @ Ashish, Son of Domi Srivastva of Village- Milki Tola, PS- Maranga, District- Purnea along with the victim has gone towards Tiwary Tola over motorcycle bearing registration no.BR-11G/5343. After sometime, he received a call from mobile no.9570701636 wherefrom he was informed that



victim has been kidnapped by Akhilesh Srivastava @ Akhilesh Kumar Srivastva @ Ashish with the help of his friend Angad Kumar Yadav, Nanku Yadav who has taken her away towards Purnea. Then thereafter, they gone in search and during course thereof visited Madhepura, Singheshwar and other place, and then came to Purnea and during course thereof, they came to know that Akhilesh Kumar Srivastava, Jyoti Kumari (friend of the victim), Angad Kumar Yadav, Hira Devi, Nanku Kumar have enticed away the victim. He also came to know that the kidnapping has been either for the purpose of marriage or to sale.

4. After registration of Sadar P.S. Case No.87/2013 investigation commenced and after concluding the same charge sheet has been submitted during midst thereof, the victim has been recovered, her statement under Section 164 Cr.P.C. was recorded. She was medically examined and during course thereof, she has been found pregnant. It is further evident from the record, that charge sheet was filed in two stages, however after framing of charge and before commencement of examination of witnesses, both the sessions trial have been amalgamated.

5. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C, so far appellant Angad Yadav is concerned, complete



denial of the occurrence and further, being friend of Akhilesh Kumar Srivastava he has been falsely implicated and, so far appellant Akhilesh Kumar Srivastava and Hira Devi are concerned, apart from complete denial of occurrence, it has also been pleaded that victim, a major who fallen in love with the Akhilesh, out of own volition accompanied him and then got herself married and declared herself to be his wife. In support thereof, two Dws have also been examined.

6. Altogether nine PWs have been examined in order to support its case at the end of the prosecution who are PW.1-Ajay Kumar, PW.2-Nawal Kishore Nawal, PW.3-Victim, PW.4-Ruby Kumari, PW.5-Rambha Devi, PW.6-Dr. Poonam Singh, PW.7-Anil Kumar, PW.8-Manju Devi, PW.9-Mahadev Rishidev. Side-by-side also exhibited, Ext.1-Signature of victim over statement under Section 164 Cr.P.C., Ext.2-Signature of the victim over an undertaking, Ext.3-Injury Report, Ext.4-Written Report. Side-by-side two DWs have also been examined, DW.1-Raj Kumar Thakur and DW.2-Mistwer Alam and has also exhibited Ext.A-Registration card of the victim issued by Bihar School Examination Board and Ext.B-Marksheet issued by Bihar School Examination Board relating to Secondary School Examination 2010. Mark Ext.'X' is a script over a plain paper allegedly in the



pen of the victim acknowledging herself to be wife of Ashish Kumar on account of marriage having solemnized on 19.02.2013.

7. It has been pleaded at the end of the learned counsel for the appellant representing appellant Angad Kumar Yadav that the finding recorded by the learned lower court relating to him happens to be contrary to the spirit of law because of the fact that even accepting the version of prosecution, appellant's presence happens to be from the place of the kidnapping to Purnea near Kajhakothi where victim remained which is found cackled if there happens to be proper appreciation of the cross-examination having been made at the end of the appellant. It is abundantly clear that there would not be any occasion for appellant to be present. That happens to be reason behind absence of appellant at the initial prosecution version whereunder there happens too be specific disclosure that victim along with Akhilesh has been going towards Tiwary Tola over motorcycle. That being so, the improbability, infirmity, unreliability of the evidence of the PW.3, victim did not justify the conviction and sentence.

8. The learned counsel representing the appellant Hira Devi and Akhilesh Kumar Srivastava have submitted that the finding recorded by the learned lower court is not at all maintainable whereupon, is fit to be set aside. In order to justify



the same, it has been submitted that victim was major which she has herself admitted by way of disclosing the date of birth as 15.10.1994. Also submitted that manner whereunder she joined and remained in company of appellant Akhilesh Kumar Srivastava till the date of her apprehension without any hitch and hindrance is indicative of the fact that she was a consenting party, whereupon on her own volition she entered into wedlock with the appellant Akhilesh Kumar Yadav on 19-02-2013 and acknowledged herself to be wife enjoyed marital life. It is the stage when she tutored, whereupon fallen under grip of her parents, she has deposed against the appellant, and so, the circumstances visualizing from her evidence is sufficient to erase the finding recorded by the learned lower court. Furthermore, it has also been pleaded that manner whereunder appellant Hira Devi has been introduced did not justify, hence her case should be dealt with differently.

9. The learned APP on the other hand, has submitted that after meticulous examination of the materials having on the record, the learned lower court formed an opinion whereupon, needs no interference.

10. None is an eyewitness of occurrence and that being so, victim alone is the witness of her kidnapping as well as over



rape although, during her medical examination after recovery by PW.6, Dr. Punam Singh she has been found pregnant, carrying pregnancy of eleven weeks plus-minus seven days old. The occurrence is of dated 19.02.2013 while she was examined on 28.04.2013 that means to say, more or less happens to be within the specified period.

11. During course of examination, PW.3, (victim) has deposed that in routine manner she gone in morning walk on 19.02.2013 at about 05:00 AM. After covering some distance Akhilesh Kumar Srivastava and Angad Kumar Yadav came over bike, forcibly lifted her over bike and then, put a handkerchief over her face as a result of which, she became unconscious. At that very moment, Akhilesh Kumar Yadav was driving the motorcycle, she was in the middle and Angad Kumar Yadav was behind her. They came in a village near Kajhakothi at Purnea wherefrom Angad Kumar Yadav returned back. Then thereafter, she had not seen him. She was kept in thatched house at the village and in the night, Ashish had raped her. Ashish has got alias name Akhilesh. She was kept there for 3-4 days and on each day she was raped twice at least. After two days, mother of Akhilesh came whom she disclosed that she wants to go to house but, Akhilesh and his mummy took her to Bhagalpur on bus where



they confined her in a room and then, his mummy returned back. She remained at that room for 8-10 days. Their also Akhilesh Kumar Srivastava committed rape on each night and further, threatened that in case she will insist for going to her house then, in that circumstance, her brother will be murdered and, her mummy modesty not only outraged in public view rather she will be also raped whereupon she became very much apprehensive. Then she stated that after ten days, Akhilesh Kumar Srivastava took her to Purnea on train, again corrected by bus and then from Purnea to Kishanganj by train where she was kept in a hut. She stayed there for 15-20 days and during midst thereof, she was raped regularly. Then thereafter, she was brought back to Purnea where again, she was kept in a hut for 3-4 days and raped. Then she was taken to Madhepura by bus and during course of stay, he got photo, signature over blank paper with an assurance that now she being will be let of. Then thereafter, she was taken to Purnea by bus and during midst thereof they both were apprehended by the police at Murliganj. Police brought both of them from Murliganj to Saharsa and then to Police Station. She was sent to Sadar hospital for medical examination. Thereafter, her statement was recorded before the Magistrate. Exhibited her signature. Identified the accused. By an order of the court she was handed



over to her parents on an undertaking (exhibited). It has also been disclosed at her end that on account of being raped for such long period, she became pregnant. She got it terminated at private clinic of a doctor at Saharsa. She has been cross-examined independently, separately by Angad Kumar Yadav as well as Hira Devi and Akhilesh Kumar Srivastava. At the end of the Angad Kumar Yadav, at para-6 she has stated that she had seen Angad Kumar Yadav for the first time on the date of kidnapping. Akhilesh Kumar Srivastava had disclosed the name of the accused as Angad Kumar Yadav at Bhagalpur. In para-7, she has stated that she is not knowing the registration number of the motorcycle. When she was caught hold of she shouted but at that very moment none might not have heard as, it was a lonely place having no residence near by. In para-8 she has stated that bike came from front (eastern side) and just after coming near her, parked. They have not directed her to sit. Only Angad got down and took her over motorcycle and for that, Akhilesh Kumar Srivastava had instructed. She had protested. Because of the fact that she was caught hold of on account thereof, could not succeed in escape. There was some sort of sedative in the handkerchief since before as a result of which it was over her face, she became unconscious. She regained sense inside a house at Purnea. She is unable to say



by which vehicle she was taken to Purnea as, she was suffering from unconsciousness. When the water was sprinkled over her face then she regained sense. Then thereafter, Angad Kumar Yadav returned back. Thereafter, she has seen Angad in the dock since thereafter. In para-9 she has stated that Akhilesh Kumar Srivastava had disclosed the place to be Kajhakothi. She had come to Saharsa in the month of January, 2013 before that, she remained at Purnea for three consecutive years at Ramnagar mohalla. She had seen Akhilesh to be driver of some body but, she is not knowing the name of his master When she was taken to Purnea. Then she knew Akhilesh by name. Then she said that she had not seen Angad driving a vehicle at Purnea then she denied the suggestion that it is false to say that she was knowing Angad since before the occurrence. She also denied the suggestion that she along with Akhilesh were in deep love with each other and, she on her own had accompanied Akhilesh and as the Angad happens to be friend of Akhilesh, on account thereof, he has been falsely named. On behalf of Akhilesh Kumar Srivastava and Hira Devi at para-10 she disclosed her date of birth as 15.10.1994. It was cold at the time of occurrence. There was fog but was very much visible. All the family members have awoke but, they were in their room. She, in routine manner came out for morning walk. In para-



11 she has disclosed that her house lies by the side of the road. She used to cover a distance of half kilometer. Her family members never protested on that very score. Houses of so many persons are in the vicinity of her house and such as Surya Prakash Narayan, Upendra Yadav etc. In para-12 she has stated that at the time when she was being lifted on motorcycle, she shouted loudly. She indulged in grappling. She pushed. Her cloth were not pulled. At that very moment none of morning walker were present though, on other day she had seen. At that very time, it was lonely. In para-15 she has stated that she was not knowing Akhilesh since before. She has further stated that while Akhilesh and Angad were talking at Purnea, on account thereof, she came to know their names. She had no opportunity to seat in a vehicle driven by Akhilesh. She had not talked with Akhilesh at an earlier occasion. At para-14 she has stated that she had protested at the house located at Kajhakothi. He had caught hold her hand and not the cloth. She was not knowing any family members of Akhilesh since before. In para-15 she has disclosed that Akhilesh used to bring food from outside wherefrom she was kept. Her mummy had given Sari, Peticoat and Blouse. Akhilesh always remained with her. She was penniless. Whenever he had gone to bring food used to lock from outside. During intermediary period, she had



tried to attract the people by pushing the door, shouting from inside but, none had come. On court question she has disclosed that whatever Akhilesh had kept her, he had not opened the room by unlocking the door. All the buildings were consisting of one room. There was river adjacent to the thatched house. Akhilesh used to carry her to latrine. There was no building in adjoining of the place where she was kept. In para-16 she has stated that none of her family members were knowing Akhilesh since before. Then she denied the suggestion that no such kind of occurrence had ever taken place rather, she had fallen in love with Akhilesh and, out of own volition married with him on 19.01.2013 and then, thereafter, she enjoyed his company as her husband, but, after institution of this case, coming in company of her parents in order to save herself and as well as being influenced by her family members got this case filed.

12. PW.7 is the I.O. he has deposed that on 24.02.2013 he was posted at Saharsa police station. After registration of Sadar P.S. Case No.87/2013, he took up investigation. Recorded further statement of Mahadev Rishidev, informant, visited the place of occurrence which happens to be the house of the informant lying near Laxminiya chowk, having boundary North-Surya Narayan Yadav, South-Ratilal Yadav, East-boundary of DJPS school and



West-Road. Nothing incriminating has been found at the place of occurrence. Recorded statement of the witnesses. Received supervision note and then submitted charge sheet. Then submitted that got presence of the victim, over statement under section 164 Cr.P.C. was recorded got the victim medically examined. Procured the medical report. During cross-examination at para-3 he has stated that he had also gone to the place wherefrom victim was kidnapped. It is road. He had not found any sign of kidnapping. In para-4 he has stated that victim was taken to the doctor for medical examination. In para-5 he has stated that he had not found criminal antecedent of the accused.

13. PW.9 is the informant. He has stated that on the alleged date and time of occurrence he along with his son had gone to market. They returned back at about 11:00 AM and then, came to know that his daughter (victim) was missing for the last 3-4 hours. During course of search, he came to know that Akhilesh Kumar Srivastava @ Ashish along with his companion Angad Kumar Yadav has been seen taking away the victim over a motorcycle towards Tiwary Chowk. Soon thereafter, he received a call that his daughter has been taken to Purnea. He immediately rushed, made hectic search at Purnea but could not traced her out. After 22 days he came to know that his daughter has been



confined by Ashish at Madhepura. Then they have gone from Purnea through bus. Then they have given written report before the police. (Exhibited the same). Identified the accused. During cross-examination at para-3 he has stated that he had not seen the event of kidnapping. He had not seen the accused taking away his daughter. During course of search he came to know. He had not given print out of the mobile to the police by which he received call. He had handed over his mobile to the police, in order to trace out the caller. Then, a paper was shown to him from the defence said to be in pen, signature of the victim which he declined. After seeing the Ext.2 he has said that he has nothing to say. Then he denied the suggestion that he has falsely deposed.

14. PW.1 is the brother. He during his examination-in-chief has stated that his sister (victim) while had gone to morning walk she was forcibly lifted by the Angad Kumar Yadav and Akhilesh Kumar Srivastava over their motorcycle and sped away towards Tiwary Tola. At that very time, he along with his father has gone to market. When they returned back at about 11 PM, came to know about the same. During course of search, he had gone to Saharsa, Madhepura, Bagnmankhi Purnea but failed to locate. He had gone to the house of Akhilesh where he met with his wife and mother whom he disclosed the event and asked for



help. They have flatly refused to say with regard to whereabouts of the accused. His mother happens to be In-charge Headmistress of Polytechnic School where they have also resident. His sister developed friendship with Jyoti Kumari with whom Akhilesh was in talking term. On 27.04.2013 her sister was apprehended along with Akhilesh Prasad Srivastava identified the accused. During cross-examination at para-2 he has disclosed that the victim was used to morning walk and then, she used to go to college at 10 AM. At about 01:00 PM. She used to return back from the college and then, at the evening hour, she used to go to the house of her maternal grand uncle lying at a distance of 100-150 meter. In para-4 he has stated that he had not seen the occurrence.

15. PW.4 is the Bhabhi, who has deposed that on the alleged date her husband as well as father-in-law have gone outside. Then thereafter her Nanad (victim) proceeded for morning walk. At about 10-11 AM her husband and father-in-law returned back and inquired about the victim whereupon she disclosed that for the last 3-4 hours she is not present. Then they gone in search of her and during course thereof, they came to know that Akhilesh has taken her away with an intention to marry. She was traced out after 2-2 ½ month of kidnapping. She has not claimed identification of the accused. During cross-examination,



she has stated that she had not seen the occurrence. She has deposed on the basis of hearsay. She has further stated that after 2-4 days of the occurrence their father-in-law, husband disclosed that her Nanad has been kidnapped by Akhilesh Kumar Srivastava. Then denied the suggestion that her Nanad on her own accompanied Akhilesh, got married and enjoyed marital life but, on account of influence of the family members, she has deposed falsely.

16. PW.5 is the mother of the victim. She has disclosed that on the alleged date she was at Purnea where she happens to be Assistant Teacher at polytechnic school. On that day Kundan Kumar, sala of Akhilesh Kumar Srivastav telephonically informed that Akhilesh Kumar Srivastava has enticed away her daughter (victim) from Saharsa. While she was at her school, Kundan Kumar came there at about 11 AM and disclosed the whole occurrence whereupon she talked with her son Ajay who reaffirmed and disclosed that he along with father is engaged in making hectic search. In the evening, she came to Saharsa. Victim was recovered after two months eight days. Identified the accused Akhilesh Kumar Srivastava. Whom she claimed to have seen at Police Station after arrest another accused was not identified by her. During cross-examination she has stated that she had not seen



the occurrence. She used to reside at Purnea she was not knowing Akhilesh since before. She was not knowing Kundan sala of Akhilesh since before. Then she denied the suggestion that victim herself accompanied Akhilesh Kumar Srivastava married with him and was enjoying her marital status but, on account of family pressure gone averse.

17. PW.2 has stated that on the alleged date and time of occurrence while he was engaged in morning walk and reached near Laxminiya chowk, he had seen Akhilesh Kumar Srivastava and Angad Kumar Yadav going towards southern direction over motorcycle. Later on, he came to know that victim is missing. Identified the accused. During cross-examination he has stated that informant happens to be his brother-in-law (Bahnoi). His house is near the house of informant. At para-3 there happens to be contradiction but same has not corroborated by the PW.7. In para-4 he has stated that he had not met with the Angad during course of morning walk nor he was knowing him since before. He has further stated that he has wrongly deposed during examination-in-chief that he had seen Angad also. He had seen only Akhilesh. In para-5 he has stated that he had not seen the occurrence. In para-6 he has further stated that he was not knowing Akhilesh Kumar Srivastava since before the occurrence.



For the first time he had seen Akhilesh Kumar Srivastava on the day of occurrence.

18. Needless that the victim is major. Needless to say that none has claimed to be an eyewitness to occurrence and so, the evidence of the victim has got primacy. Before filtering the testimony of the victim, evidence of PW.6 is to be taken thereof. PW.6 is the mother she has stated that Kundan Kumar firstly telephonically informed her with regard to activity of Akhilesh Srivastava and then, at about 11 AM while she was at school, Kundan Kumar had come and disclosed about the occurrence. Kundan Kumar has been disclosed Sala of the Akhilesh Kumar Srivastava. There happens to be no cross-examination at the end of the appellant that Akhilesh was unmarried and Kundan Kumar was not his sala. While PW.1 had gone to the place of Akhilesh, it is evident that he met with mother as well as wife of the Akhilesh so, Akhilesh was married since before and that is found conclusively proved. This event will play pivotal role in deciding the appeal, as, could a virgin allow herself to be concubine as second marriage happens to be void abinitio.

19. In the aforesaid background, the evidence of the victim is to be taken note of. During her examination-in-chief, it is evident that she had put an allegation against the Angad Kumar



Yadav to have lifted her over the motorcycle being driven by Akhilesh over which, she resisted and during course thereof, handkerchief was put over her face and then, thereafter, her consciousness was regained by way of sprinkling of water by the Akhilesh at a house located at Kajhakothi wherefrom Angad Kumar Yadav returned back and since thereafter, she had not seen the Angad. Presence of Hira has been shown during intermediary period when she was taken to Bhagalpur where, it has been disclosed by the victim that she had handed over Sari, Petticoat and blouse. No other activity has been alleged against her. No such Sari, Petticoat, bluse has been found while she along with Akhilesh was arrested. That being so, these two appellants, on the basis of the aforesaid evidence are found entitled for benefit of doubt and accordingly, the judgment of conviction and sentence recorded against them is hereby set aside. Cr. Appeal (SJ) No.1288/2017 filed by Angad Kumar Yadav is allowed. He is under custody, hence is directed to be released forthwith if not wanted in any other case. In likewise manner Cr. Appeal (SJ) No.1249/2017 relating to appellant Hira Devi is allowed. She is on bail hence is discharged from its liability.

20. Now coming to the status of the appellant Akhilesh Kumar Srivastava, from the cross-examination, it is evident that



attention of the victim has not been drawn up whether during course of travelling over bus or train, she had tried to raise alarm, whether during course of passing through different roads, there was any constructive effort at her end in order to rescue herself, whether the houses in which she was kept was on tenancy, at least the houses at Kajhakothi, Bhagalpur, Kishanganj and in likewise manner, as is evident no effort has been taken at the end of the appellant irrespective of institution of the case to claim victim to be his legally wedded wife and for that, any effort in accordance with Section 9 of the Hindu Marriage Act for restitution of conjugal right. The aforesaid activity could also be seen in the background of the fact that there happens to be specific disclosure at the end of the victim that she was threatened while she was captive of the appellant Akhilesh Kumar Srivastava that in case of protest not only her brother will be eliminated rather her mother's modesty will be outraged as well as she will be also subjected to rape which made her indolent. True it is, victim has been recovered after more than two months, but there would have been specific cross-examination to suggest her willingness, such as, whether they frequently moved in the town, visited temple, cinema house, hotel have gossip with neighbours, landlord, engaged in daily routine, manner of earning. The worst thing is,



there happens to be complete absence at the end of the appellant how he along with victim was arrested at Murliganj while he along with victim was in a way to Purnea. Whether any family member was present who introduced. Whether, they were carrying bag and baggage. In likewise manner, victim was not suggested how she had joined with the appellant whether she remained at only fixed place while enjoying their marital life. The appellant failed to controvert the activities whereunder victim was moved one place to other. When she was a consenting party, then what was justification for the same. The victim also not been confronted where she got married with the appellant, nor she was ever cross-examined on that score. It was mere a suggestion.

21. In *Gian Chand & others v. State of Haryana* reported in **2013(4) PLJR 7 (SC)** it has been held by the Apex Court:

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, **AIR 2013 SC 1204** observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the



statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)”

22. Furthermore, it is also evident from the record that while examining the I.O. PW.7, the learned APP did not opt to bring on record the incriminating material so collected by the I.O. during course of investigation and those are visible from para-47 wherein there happens to be description regarding CDR of the mobile concerning SIM No.9570701636 by which, PW.6 was informed and the same happens to be in the name of mother-in-law of the appellant and in likewise manner, paragraph 50, 51, 52 and 53 wherein, the police had arrested the appellant along with the victim. Although, it cannot form basis for judgment but, in



accordance with Section 172(2) of the Cr.P.C., those events could be looked into.

23. The learned counsel submitted that, in worst case, it could be a case under Section 494 IPC, as the appellant was married since before in stead of Section 376 IPC as well as 366 IPC, as appellant has confidently plead to be married with the victim.

24. The learned APP objected and submitted that it happens to be mere a suggestion that had been flashed before the victim without cross-examination on that very score. That being so, the victim could have an opportunity to explain under what circumstances she was forced to accompany or, she was a consenting party. Court on its own, in absence of positive evidence would not infer adverse to the prosecution when, the defence failed to test.

25. After, considering the rival submission as well as going though the material available on the record inconsonance with the deficiency persisting on the record whereunder defence failed to challenge the victim by way of cross-examination that she happens to be legally married life, as well as considering the event duly eclipsed by clause second/third/coupled with proviso 2 of Section 375 IPC, there happens to be no occasion to differ from



the finding so recorded by the lower court, Hence, this appeal lacks merit and is dismissed relating to appellant Akhilesh Srivastava @ Akhilesh Kumar Srivastva @ Ashish, he is under custody which he will remain till saturation of the sentence.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	28.08.2019
Transmission Date	28.08.2019

