

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2015 of 2017**

Arising Out of PS. Case No.-58 Year-2015 Thana- RAJEPUR District- East Champaran

Mukesh Sahani S/o Jailal Sahani, Resident of Village- Ismaila, P.S.- Rajepur,
District- East Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Jitendra Kumar Giri, Adv.

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

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

Date : 14-05-2019

1. Appellant, Mukesh Sahani has been found guilty for an offence punishable under Section 323 IPC and sentenced to undergo R.I. for six months under Section 354(B) of the IPC and sentenced to undergo R.I. for four years as well as to pay fine appertaining to Rs.4000/- in default thereof, to undergo S.I. for two months, additionally, under Section 366A of the IPC and sentenced to undergo R.I. for six years as well as to pay fine appertaining to Rs.5000/- and in default thereof to undergo S.I. for three months, additionally, under Section 457 IPC and sentenced to undergo R.I. for three years as well as to pay fine appertaining to Rs.3000/- in default thereof, to undergo S.I. of one and half months, additionally, under Section 8 of POCSO Act and sentenced to undergo R.I. for four years as well as to pay fine appertaining to Rs.4000/- in default thereof, to undergo S.I. for



two months, additionally, by the First Additional Sessions Judge-cum-Special Judge, POCSO, East Champaran at Motihari in POCSO Trial no.163/2016 by judgment of conviction dated 18.05.2017 and order of sentence dated 25.05.2017.

2. Dharamjeet Kumar (PW.2) filed written report on 15.05.2015 before the police official of Rajepur P.S. disclosing therein that he happens to be resident of Bara Jagarnath, P.S.-Ahiyapur, District-Muzaffarpur and his sister is married at village-Noniman, P.S.-Rajepur. On the eve of marriage of his Bhagini he along with his daughter (name withheld, PW.3) aged about 8 years came on 14.05.2015 to the place of his sister. In the night, after food he got his daughter slept on Varandaha and thereafter, he along with other family members got engaged in feast. During midst thereof, getting an opportunity Mukesh Sahni lifted his daughter from Darwaja with bad intention to a maize field and affected to commit sin with her. During course thereof, he bite over cheek of his daughter. He also threatened to kill showing the knife as a result of which, his daughter began to weep. Hearing sound of her weeping, they gone in search and, coming to maize field found Mukesh Sahani indulged in apprehending his daughter whereupon, he was caught hold of. Villagers, have assaulted.



3. The written report along with accused were produced before police officials who, on the basis of the written report registered Rajepur P.S. Case No.58/2015 and sent the accused to judicial custody. After registration of the case, investigation was taken up and after concluding the same charge sheet has been submitted, 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. Furthermore, it has also been pleaded that due to dispute over payment of wages, with the brother-in-law of the informant, this case has falsely been instituted. However, nothing has been adduced in defence.

5. Altogether seven PWs have been examined on behalf of prosecution in order to substantiate its case who are PW.1- Pramod Rai, PW.2-Dharamjeet Rai, PW.3-(name withheld, victim), PW.4-Maujelal Rai, PW.5-Prabhu Sahani, PW.6-Kedar Sahani, PW.7-Kishori Chaudhary. Side by side has also exhibited written report Ext.1. As stated above, nothing has been adduced at the end of the defence.

6. The learned counsel for the appellant while challenging the finding recorded by the learned lower court has



submitted that the evidence of the witnesses have been disbelieved with regard to other offences whereunder acquittal has been recorded in favour of the appellant and that being so, all the witnesses should have been disbelieved completely by observing that evidences happen to be unbelievable whereupon prosecution failed to substantiate its case beyond all reasonable doubt. It is further submitted that doctor has not been examined. I.O. has not been examined. Independent witnesses have not supported the case of the prosecution. In the aforesaid background, the learned lower court should have considered the probability of the falsity in the prosecution case and, should have acquitted the appellant.

7. Furthermore, it has also been submitted that virtually none is an eye-witness to occurrence. None had seen the appellant lift the victim nor the victim herself had disclosed that she had seen the appellant lifting her from darwaja. When the evidence of victim is minutely gone through, it is evident that no case is made out. Even if, the court is of the view that some offences is made out, then in that circumstance, the sentence be modified as period having undergone in the background of the fact that appellant is under custody since 15.05.2015. That means to say, for the last four years he is behind bar.



8. On the other hand, the learned Additional P.P. supported the finding recorded by the learned lower court and in order to substantiate the same, it has been urged that “falsus in uno falsus in omnibus” is not at all applicable on account thereof, learned lower court rightly acquitted with regard to some of the offences whereunder charge has not been found proved against the appellant after going through the evidence but, rightly convicted and sentenced with regard to remaining charges. That being so, the judgment needs no interference.

9. Admittedly, the I.O. as well as the doctor has not been examined. There happens to be no allegation of rape. From evidence of PW.3, it is evident that she had alleged that there was bite over her cheek by the accused. While the cross-examination has been gone through, it is evident that she has not been tested on that very score. In para-18, she had disclosed that she was examined by the doctor but again, no further cross-examination has been made and in the aforesaid background, non-examination of doctor is not at all found adverse to the interest of the prosecution. In likewise manner, the non-examination of the I.O. is not at all found pre-judicial to the interest of the prosecution in the background of the fact that there happens to be no exaggeration /inconsistency amongst the evidence of the witnesses



nor, controversy with regard to the place of occurrence. Had there been, then in that circumstance, the non-examination of the I.O. would have cost the prosecution.

10. In Lahu Kamlakar Patil v. State of Maharashtra reported in (2013) 6 SCC 417, it has been observed:

“18.It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In *Behari Prasad v. State of Bihar* (1996) 2 SCC 317, this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar*(2000) 9 SCC 153, it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in *Arvind Singh v. State of Bihar*(2001) 6 SCC 407, *Rattanlal v. State of J&K*(2007) 13 SCC 18 and *Ravishwar Manjhi v. State of Jharkhand*(2008) 16 SCC 561, has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should



have been examined and his non-examination creates a lacuna in the case of the prosecution.”

11. Now coming to the evidence of witness so examined on behalf of prosecution, it is evident that PW.7 is the part I.O. He had simply submitted charge sheet. PW.5 and PW.6 were declared hostile as they have not supported the case of the prosecution. Now coming to evidence of PW.1 and PW.2 and PW.4, it is apparent that they are not witness of lifting the victim by the appellant from the Darwaja of PW.1 to the maize field by the appellant rather, they all have stated that after hearing cry of the victim, they gone in search and during course thereof, found the victim under grip of appellant in a maize field situated adjacent to the house of PW.1 as such was caught hold of and was assaulted. They have also stated with regard bite over cheek of PW.3 although they have not claimed to have witnessed the activity. In the aforesaid background, it is only the evidence of PW.3 which need proper consideration. Being her of tender age, the court took necessary precaution and then found her to be of avverage intelligence whereupon, completing the formalities so prescribed under the POCSO Act, examined her who has stated that on the eve of marriage of Nitu Didi about two and half years ago, she along with her father had gone to her place. Her father, after food got her sleep over Darwaja. While she was asleep, one



person lifted her to maize field where threw her and then, shown knife. She beg to release whereupon, he gave a bite. She shouted whereupon, her father, along with others came others caught hold that person who was kept whole night and on the following day, handed over to police. Identified the accused in clock. During cross-examination at para-9 her IQ has been tested and during course thereof, she has stated that she, visited the field to urinate and during course thereof, she had not met with the accused Mukesh. In para-10 she had further stated that when she was lifted by the accused, she was in slumber. In para-11 she had stated that when she met with her father in the field she was already woke up. In para-12, she had stated that at the time of occurrence there was darkness in the maize field. Nothing was visible. She was very much afraid off. In the darkness itself she had perceived knife. At that very time, she had wore T-shirt Pant and Bandi. Clothes were not torn, buttons were not broken. In para-13 she stated that when people came, she was lying over the ground. All the persons were carrying torch. In para-14 she had stated that accused Mukesh was caught hold by her father and then, dragged to house where he was kept whole night. At para-18 she had stated that she was examined by the doctor. In para-19, her statement was recorded by the police. At para-20 and 21 it has been suggested that no



occurrence took place with her. All the allegations having attributed against the accused happen to be palpably false.

12. It is surprising that a stranger, having no grievances against the appellant would be projected at the end of PW.1 to implead the appellant as, some sort of dispute was over wage as suggested though not substantiated. Furthermore, from the evidence of victim, it is crystal clear that the victim stood the test of cross-examination and pinpointed the appellant to be the culprit. That being so, the status of the appellant to be guilty for having incident behavior with the victim is found duly proved. However, no offence under Section 366A of the IPC is found proved because of the fact that kidnapping of victim was not concerning her to indulge with others and so in conviction and sentence with regard thereto, is not at all found legally maintainable. In likewise manner no offence under Section 457 of the IPC is made out because of the fact that there happens to be no evidence that appearance of the accused was by means of lurking house trespass. Instead thereof, it happens to be a case falling under Section 448 of the IPC. Furthermore, there happens to be no allegation at the end of the victim she was assaulted and so no offence under Section 323 of the IPC is made out. As such, the finding recorded by the learned lower court is found erroneous



and is accordingly set aside. So far remaining sections i.e. 354B of the IPC is concerned, the same is found applicable and in likewise manner there also happens to be substantial evidence with regard to section 8 of the POCSO Act and so, the conviction and sentence recorded therefor are legally maintainable and are accordingly, affirmed. Furthermore, for Section 448 of the IPC, the appellant is directed to undergo RI for one year with a further direction to run the sentences concurrently. Consequent thereupon, the appeal is partly allowed. Appellant is under custody which he will remain till saturation of the period of the sentence.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	20.05.2019
Transmission Date	20.05.2019

