

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.98 of 2017

Arising Out of PS. Case No.-91 Year-2010 Thana- BUNIYAD GANJ District- Gaya

Rakesh Mistry son of Jagdish Mistry, resident of Moh- Jora Masjid, Head Manpur, P.S.- Buniyadganj, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Sanjay Kumar, Adv.

For the Respondent/s : Mr. Shyed Ashfaque Ahmad, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 27-03-2019

1. Sole appellant Rakesh Mistry has been found guilty for an offence punishable under Section 365 IPC and sentenced to undergo R.I. for 7 years as well as to pay fine appertaining to Rs.10,000/- in default thereof to undergo R.I. for two years, under Section 366A of the IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.10,000/- in default thereof to undergo R.I. for two years, under Section 376 IPC and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.20,000/- in default thereof to undergo R.I. for three years vide judgment of conviction dated 11.11.2016 and order of sentenced dated 18.11.2016 passed by IXth Additional District & Sessions Judge, Gaya in Sessions Trial No.2/2016.



2. Rajdeo Prajapat, father of victim (name withheld), a minor aged about 12 years student of Government Middle School, Khanjahapur filed written report on 26.10.2010 disclosing therein that she has gone to school on 25.10.2010 but did not return. His neighbour Rakesh Mistry, who is married since before, aged about twenty years, was threatening that he will kidnap with the victim and will marry. So he apprehends that aforesaid Rakesh Mistry might have kidnapped her either to marry for with some ulterior motive.

3. After registration of Buniyadganj P.S. Case No.91 of 2010, the investigation commenced and during course thereof, victim was traced out, recovered who was medically examined as well as whose statement was also recorded under Section 164 Cr.P.C. apart from under Section 161 Cr.P.C and after collecting substantial material concluded investigation followed with 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. Apart from this, it has also been pleaded that the victim herself allured the accused and took him away and subsequently, after having been pressurized by her



family members got the accused involved in this case with false and frivolous allegation. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether eight PWs who are PW.1-Suresh Prajapat, PW.2- Dr. Priti Kumari, PW.3-Rajdeo Prajapat, PW.4-Munni Devi, PW.5-Sunaina Devi, PW.6-Sita Prajapat, PW.7-Reena Kumari, PW.8-Md. Abdul Hafij. Side by side had also exhibited Ext.1-Signature of PW.1 over written report, Ext.2-Injury report, Ext.2/1-X-ray report, Ext.3-Signature of victim over statement under Section 164 Cr.P.C. As stated above, nothing has been adduced at the end of the appellant save and except one letter which has been marked 'X' for identification.

6. While assailing the judgment of conviction and sentence, two kinds of submissions have been made by the learned counsel for the appellant. The first one is that from the evidence of victim PW.7, it is evident that she had gone to Himanchal Pradesh availing Bus, train but, during midst thereof she had not raised any kind of alarm in order to rescue herself from the clutches of the appellant. Had there been a case of kidnapping then in that circumstance, victim would not have allowed herself in getting her transportation to Himanchal Pradesh from her native place



smoothly. That being so she was a consenting party. As per medical evidence her age happens to be in between 18-19 years and so was a major. Hence no offence is made out. That being so, appellant is entitled for acquittal.

7. In alternative, it has also been submitted that no offence under Section 366A is made out because of the fact that there happens to be no allegation at the end of the prosecution that victim was ever forced or seduced to indulge in illicit intercourse with any other person. That being so, the major ingredient of Section 366A of the IPC is not at all fulfilled. In likewise manner, also submitted that no offence under Section 365 IPC is made out because of the fact that the victim was not at all kidnapped with an intention to be kept secretly as well as wrongfully as is evident from para-21 of the evidence of PW.7 and in the aforesaid background, whatever offences is made out fell within the purview of Section 363A IPC as well as 376 of the IPC and for that, appellant has remained more than seven years in custody. It has further more been submitted that appellant has been sentenced for ten years only relating to Section 366A of the IPC which, as stated above, in the facts and circumstances of the case is not at all made out.



8. The learned APP while controverting the submission having been made on behalf of learned counsel for the appellant has submitted that from the evidence of PW.7, victim an offence under Section 363 as well as 376 of the IPC is made out and for that, appellant is to be convicted and sentenced.

9. From the evidence available on the record, it is apparent that age of the victim has been disclosed in the written report as twelve years. Furthermore, on the date of examination of the prosecution witnesses her age has been shown to be fourteen years. From the evidence available on the record, it is evident that PW.1, brother has not been cross-examined, over the same PW.2 the father has not even been suggested that she was major and she volunteered herself. In likewise manner, PW.4 the mother has not been suggested. The victim PW.7 has not been suggested that she was major and she volunteered herself. That means to say, her status as a minor has not been challenged.

10. The other PWs are not an eyewitness to occurrence and so, the evidence of PW.7 is to be looked into more particularly in the background being minor. From her conduct, it is evident that she had not resisted at any point of time coming to Himanchal Pradesh and in likewise manner tried to escape from the clutches of the appellant but, as she has not been confronted



even with a suggestion that she was a major, the entire gamut of consent is found washed away. Moreover detailed minute scrutiny of evidence is not at all warranted in the background of admission by way of suggestion which the victim was given under para-25 of her deposition as “यह गलत है कि मैं अपने जाल में फँसाकर राकेश मिस्त्री को हिमाचल ले गई थी।”

11. Much emphasis has been drawn at the end of the learned counsel for the appellant over the evidence of PW.2, Dr. Priti Kumari who has identified the victim to be in between 18-19 years. It is needless to say that she was a gynecologist and further, times without number the Hon'ble Apex Court has warned that age of the victim should not be assessed on the basis of the medical evidence rather the same has to be assessed after holding an inquiry as provided under Juvenile Justice Act relating to ascertainment of age of Juvenile as has been held in **Jarnail Singh Vs. State of Haryana** reported in **2013 Cr.L.J. 3976** and in **State of Madhya Pradesh vs. Anoop Singh** reported in **(2015) 7 SCC 773**. Consequent thereupon, the submission having at the end of the learned counsel for the appellant that as per medical evidence, the finding of the doctor with regard to age of the victim to be in between 18-19 years could not be accepted.



12. Now coming to other aspect, the central theme happens to be paucity of evidence at the end of the prosecution that the victim was forced to indulge in sexual intercourse with the others, which happens to be the prime ingredient for applicability of Section 366A of the IPC. The Hon'ble Apex Court in *Iqbal v. State of Kerala* reported in **2008 CR.L.J. 436**, at para-9 reiterated the same. So, the finding of the learned lower court with regard to Section 366A of the IPC is not at all found substance in the eye of law. In likewise manner, there happens to be no evidence more particularly, considering the evidence of the victim PW.7, Para-21 that she was kept at Himanchal Pradesh in multistoried building did not justify the finding whereupon, no offence under Section 365 IPC is made out. The finding recorded by the learned lower court to that extent is scrap and instead thereof, the appellant is found guilty for an offence punishable under Section 363 of the IPC and for that, he is directed to undergo R.I. for five years retaining the fine so inflicted against section 365 IPC as well as default clause. With regard to Section 376 IPC is concerned, there happens to be consistency in the evidence of the victim that during course of stay at Himchal Pradesh was raped which has also not been tested at the end of the appellant during course of cross-examination.



13. In *Gian Chand & others v. State of Haryana*

reported in **2013(4) PLJR 7 (SC)**, which has been held:

“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)”



14. That being so, affirming the finding recorded by the learned lower court with regard Section 376 of the IPC and further modifying the finding so far 365 IPC is concerned to 363 of the IPC and further, scrapping the finding relating to Section 366A of the IPC, the appeal is partly allowed. Appellant is under custody which he will remain till saturation of the respective sentence.

(Aditya Kumar Trivedi, J)

Prakash Narayan

AFR/NAFR	AFR
CAV DATE	NA
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