

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.600 of 2023**

Arising Out of PS. Case No.-211 Year-2018 Thana- JAMALPUR District- Munger

CHHOTU YADAV, Male, Aged about 25 years, S/O ASHOK YADAV
@ ASHOK KUMAR R/o- Nayatola, Keshopur, Faridpur O.P., P.S.-
Jamalpur, District- Munger

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s :	Mr. Ansul, Advocate
:	Mrs. Nisha Singh, Advocate
:	Mr. Sagar Suman, Advocate
:	Mrs. Priyanka Singh, Advocate
For the Respondent/s:	Mr. Anand Mohan Prasad Mehta, APP

**CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT**

Date : 22-08-2023

1. Heard the parties.
2. The instant criminal appeal has been filed against the judgment of conviction dated 28.11.2022 and order of sentence dated 30.11.2022 passed by learned Exclusive Special Judge (POCSO Act)-cum-Additional Sessions Judge VI, Munger in G.R. No.2207/2018 and POCSO Case No.34 of 2018 arising out of Jamalpur P.S. Case No.211 of 2018. By



the judgment impugned, the appellant has been convicted for the offence punishable under Section 366 of the Indian Penal Code (hereinafter referred to as IPC) and sentenced to undergo Rigorous Imprisonment for five years for the said offence and a fine of Rs.5,000/- (Five Thousand Rupees) was also imposed upon him, in default of the payment of which the appellant was directed to further undergo simple imprisonment for three months.

3. The prosecution's case in brief is that as per written application (Exhibit P-7) of the informant, on 27.07.2018 at 07:30 P.M., the informant's daughter aged about 14 years (hereinafter referred to as "victim") had gone to a shop from her house for bringing some articles but thereafter she did not return back. In the night at about 9:00 P.M., the informant and his family members started searching for the victim but could not trace out her till 28.07.2018. During the course of searching, they went to the house of accused/appellant and did not find the appellant being present at his house, then the



informant became confident that the appellant had enticed away the victim with the help of his family members and a friend Kishan Mandal. The informant further alleged in his written application that prior to the alleged incident, the appellant had remained involved in bad activity which was complained by him to appellant's parents and on account of the behaviour of the appellant, he dropped the education of the victim from Premanand Tiwari Saraswati Shisu/Vidya Mandir, Keshopur, Jamalpur, Munger, Bihar and since then the victim was studying at her home.

4. On the basis of written application of the informant a formal FIR was registered as Jamalpur P.S. Case No.211 of 2018 dated 28.07.2018 under Section/s 366-A, 120-B/34 of the IPC and Section/s 8/12 of the Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO Act). After investigation, charge-sheet was submitted under Section/s 366(A), 120(B) and 34 of IPC and Section/s 8/12 of the POCSO Act against the



appellant and five other co-accused persons, but all the co-accused persons were discharged by the Trial Court and the present appellant was charged for the offence/s punishable under Section/s 366A, 120B of IPC and Section/s 8/12 of POCSO Act. Accordingly, the appellant faced trial for the said offences, for which he was charged. During trial, altogether eight prosecution witnesses including the victim were examined by the prosecution and in documentary evidence the prosecution proved and exhibited the following documents:

(I) Exhibit P-1: Signature of the victim X on her statement recorded under Section 164 Cr.P.C.

(II) Exhibit P-2 & 3: Signature and writing of victim X on the back of her Medical Report regarding her refusal for her physical examination.

(III) Exhibit P-4: Signature of victim X on the report of medical board regarding the age assessment of victim.

(IV) Exhibit P-5 & 5/1: Signatures of victim X as well as of her counsel on her application dated



24.08.2018.

(V) Exhibit P-6 (with objection): An original School Transfer Certificate of Victim.

(VI) Exhibit P-7: Written application.

(VII) Exhibit P-8: Affidavit of Victim X.

(VIII) Exhibit P-9: Report of Medical Board regarding age assessment of the victim.

(IX) Exhibit P-10: Medical Report of victim.

(X) Exhibit P-11: Endorsement on written application regarding registration of case.

(XI) Exhibit P-11/1: The formal FIR.

(XII) Exhibit P-12: Statement of Victim X recorded under Section 164 Cr.P.C.

5. After the completion of prosecution's evidence, the statement of the appellant was recorded by the trial Court under Section 313 of Cr.P.C., in which he denied the incriminating evidences appearing against him and claimed himself to be innocent. The appellant did not produce any evidence in his defence except a certified copy of Order dated 03.02.2020 passed by this Court in Cr. Misc.



No.1246 of 2020. The learned Trial Court after evaluating the evidences of the prosecution and considering the arguments of both the sides did not hold the appellant guilty for the offence/s punishable under Section 120B of IPC and Section/s 8/12 of the POCSO Act, hence he was acquitted for the said offences, but he was held guilty for the offence punishable under Section 366 of IPC and in the result he was convicted and sentenced for the said offence.

6. Mr. Ansul, learned counsel for the appellant has argued that the appellant has been wrongly convicted by the Trial Court for the offence punishable under Section 366 of IPC and while convicting the appellant for the said offence, the victim's statement recorded under Section 164 of Cr.P.C (Exhibit P-12) and her deposition, which were the most important evidences for the prosecution, were not rightly appreciated and the trial Court wrongly deemed the victim to be minor at the time of commission of the alleged offence mainly placing reliance upon Exhibit P-6, which is School Transfer



Certificate, ignoring the principle laid down by the Hon'ble Apex Court in the judgment passed in the case of ***P. Yuvaprakash Versus State Rep. by Inspector of Police in Cr. Appeal No.1898 of 2023 reported in 2023 SCC Online SC 846*** and moreover the said certificate was issued during the trial which was marked as an exhibit despite an objection having been raised by the appellant. The learned Trial Court did not conduct any inquiry to ascertain or find out the genuineness of the Exhibit P-6. It is further argued that as per the evidence of PW-6, who examined the victim for the purpose of determining her age, he assessed victim's age as being between 17 and 18 years at the time of examination which was conducted on 04.08.2018 i.e. some days after the commission of the alleged occurrence and it is a settled principle of law that a margin of error of two years in the age determined by the doctors always remains and whenever the age of one is assessed by a doctor, the Courts are required to add two years to the assessed age for considering the age of the victim



by the Courts. In this regard, learned counsel has placed reliance upon the judgment of this Court passed in the case of *Awadhesh Rai Versus The State of Bihar in Criminal Appeal (SJ) No.1016 of 2007* but in the present matter the learned Trial Court did not add two years to the age of the victim assessed by the doctor concerned (PW-6). If two years was added to the said assessed age, then the victim would have been considered to be a major girl at the time of commission of the alleged offence.

7. Learned APP has vehemently opposed the appeal and submitted that as per documentary evidence i.e. Exhibit P-6 submitted by prosecution during the trial, the victim was below 18 years of age at the time of commission of the alleged occurrence, though the victim did not support the allegations levelled in the FIR but the evidence of other witnesses of the prosecution goes in favour of the prosecution and all of them deposed that the appellant used to harass and misbehave with the victim prior to the commission of the alleged



occurrence of kidnapping. He has further argued that PW-4 who is step mother of the victim, deposed that during the course of searching for the victim, her one neighbour namely Pintu Singh told that he had seen the appellant taking the victim away and there is sufficient evidences to justify the conviction of the appellant for the offence punishable under Section 366 of IPC.

8. Heard both the sides and perused the evidences available on the case record of trial Court and also has taken into account the statement of the accused. The main point for consideration is: whether the essential elements to constitute the offence punishable under Section 366 of IPC attract in this case or not?

9. To constitute an offence under Section 366 of IPC, it must be proved by the prosecution that firstly, so-called victim has been kidnapped or abducted by the accused and secondly, the kidnapping or abduction has been committed by the accused for any of the purposes described in Section 366 of IPC.



In the present matter, as per prosecution the victim's age was about 14 years at the time of commission of the alleged occurrence, so the provisions of Section 361 of IPC will apply in the present matter which are being reproduced as under:

“361. Kidnapping from lawful guardianship - *Whoever takes or entices any minor under (sixteen) years of age if a male, or under (eighteen) years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”*

10. From the provisions of Section 361 of IPC, one thing is quite clear that one can be held guilty for kidnapping a female minor only when if he takes or entices her away from the custody of victim's lawful guardian without the consent of such guardian. In the instant matter, as per FIR the informant is not stated



to be the eye witness of the alleged occurrence and he merely suspected that the appellant had kidnapped her minor daughter when she did not return back from the shop. Hence, in the present matter in respect of the alleged offence punishable under Section 366 of IPC, the most important evidence of the prosecution is victim's own statement. During investigation, the victim was examined before the Judicial Magistrate under Section 164 Cr.P.C. and during trial she deposed her evidence as PW 1.

11. The victim stated before the Judicial Magistrate under Section 164 Cr.P.C. that her father (informant of this case) used to harass her sexually and oftenly touched her private parts with bad intention. She further stated that she herself went with the appellant and solemnized marriage with him at a temple and nobody took or enticed her away and on the day when she fled away her father had an intention to commit wrong with her. It is important to mention that the victim disclosed her age as 19 years while recording her statement before the Judicial



Magistrate. Similar evidence was given by the victim in her deposition before the trial court. She deposed that in the evening of 27.07.2018, she was tortured by her father, so she left her home and went to appellant's place, her father used to touch her private parts after taking drink. She further deposed that she refused for internal or external examination on her person. She denied the allegation that the appellant and others took her away forcibly from her home and kept her at some unknown place for six to seven days and raped her several times. During evidence, the victim proved her statement recorded under Section 164 Cr.P.C. which was marked as Exhibit 1. In the cross-examination, she stated that due to misbehaviour of her father, she left her home and went to appellant's place and married him and nobody took her forcibly from her parent's custody. In this way, the evidence of the most important witness of the prosecution goes against the prosecution's allegations and her evidence is sufficient to prove that the appellant neither took her



away from the custody of her lawful guardian without the consent of such guardian nor enticed her away to leave the custody of her guardian and her evidence clearly goes to show that she voluntarily, without any persuasion or force, left the custody of her natural guardian on account of misbehave and sexual harassment committed with her by her father. So far as the evidence of other prosecution witnesses other than PW-6 and PW-7 is concerned, the evidence given by them also does not help the prosecution as none of them claimed to have seen the appellant taking the victim away or enticing her to leave the custody of her guardian and they merely raised suspicion and in this regard the statement made by PW-2 in paragraph No.8 of his cross-examination, statement made by PW-3 in his cross-examination in paragraph No.10 and the statement of PW-4 made in paragraph No.6 of her cross-examination are relevant.

12. While holding the victim as being below the age of 18 years at the time of commission of the



alleged occurrence of kidnapping, the learned Trial Court mainly placed reliance upon School Transfer Certificate of the victim's school which was produced by the prosecution during trial and the same was exhibited as P-6. In this regard, this Court is of the view that the learned Trial Court committed an error while determining the age of the victim by merely placing reliance upon the said document as the document was issued by the concerned school after the institution of the FIR and the same was objected by the defence when it was exhibited and in such a situation the learned Trial Court ought to have conducted an inquiry to decide the genuineness of the said document. Moreover, the Apex Court in the judgment passed in the case of ***P. Yuvaprakash Versus State Rep. by Inspector of Police in Cr. Appeal No.1898 of 2023 reported in 2023 SCC Online SC 846*** observed that in respect of crime against women and children, School Transfer Certificate is not acceptable for age determination of victim. Hence, in view of the said principle the



learned trial court committed an error in placing reliance upon the Exhibit P-6 while determining the age of the victim. As per medical evidence of the doctor concerned, who was examined as PW 6, the victim's age was assessed between 17 and 18 years and in view of the principle laid down by this Court in the above-mentioned judgment, the learned trial Court ought to have added two years to the age of the victim assessed by the doctor concerned. If two years is added to the assessed age of the victim then she would be more than 18 years of age at the time of commission of the alleged occurrence.

13. Further, in order to attract the offence punishable under Section 366 of IPC, the prosecution is bound to prove that the victim was kidnapped or abducted for any of the purposes mentioned in the said section. In the case of abduction or kidnapping, the victim is deemed to be the most important eye-witness of the commission of the alleged occurrence and in the present matter the victim did not say anything to prove that the appellant kidnapped her



for any of the purposes described in Section 366 of IPC. Here, it is relevant to mention that the appellant was charged for the offence/s punishable under Section/s 366A, 120B of IPC and Section/s 8/12 of POCSO Act, but he was convicted under Section 366 of IPC without altering the charge which can be deemed to be a serious prejudice caused to the defence of the appellant during the trial.

14. Accordingly, for the reasons mentioned and discussed above, this Court is of the considered view that the learned Trial Court erred in holding the appellant guilty and convicting him for the offence punishable under Section 366 of IPC and while convicting the appellant, the learned Trial Court did not appreciate the victim's evidence properly and in right manner while her evidence clearly goes against the prosecution's story and does not attract the main and essential ingredients to constitute the offence of Section 366 of IPC.

15. As such, the impugned judgment and order of sentence are hereby set aside and the instant appeal



stands allowed.

16. Since, the appellant is in judicial custody, he is directed to be released forthwith in the present matter, if his custody is not required in any other matter.

17. Let the judgment’s copy be sent to the Court concerned as well as Jail Superintendent concerned for immediate compliance of this judgment.

(Shailendra Singh, J.)

Sangam/-

AFR/NAFR	AFR
CAV DATE	NA
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