

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.124 of 2021**

Arising Out of PS. Case No.-227 Year-2017 Thana- KATIHAR NAGAR District- Katihar

MD KANNU @ KANNU, Son of Md. Mahboob @ Mohd. Mahboob,
Resident of Village- Sewa Nagar, Baigna, Ward No. 45, P.S.- Katihar,
District- Katihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Gyanand Roy, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 20-04-2023

The appellant has preferred this appeal under section
374(2) of the Code of Criminal Procedure against the judgment
and order dated 29.09.2020/ 03.10.2020 passed by the learned
1st Additional Sessions Judge-cum-Special Judge, Katihar, in
Sessions Trial No. 67 of 2018/C.I.S. No. 67 of 2018 arising out



of Katihar Town P.S. Case No. 227 of 2017, whereby and whereunder he has been convicted and sentenced as under :-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
366/34 of the IPC	RI for ten years	10,000/-	RI for one year
376-D of the IPC	For life	5,00,000/-	RI for three years

2. Father of the victim (P.W. 4) is the informant, on the basis of whose written report, the concerned Katihar Town P.S. Case No. 227 of 2017 was registered for the offences punishable under Sections 363 and 365 of the Indian Penal Code. In his typed written report dated 08.04.2017, addressed to the Officer-In-charge, Town Police Station, Katihar, he disclosed that on 05.04.2017 at about 4:00 PM, his daughter (the victim, P.W. 4) had gone to witness ‘*Ram Navami*’ procession near Shiv Mandir Chowk, Yagyashala Maidan. As she did not return till late in the evening i.e. up to 8:00-9:00 PM, he proceeded in her search to Yagyashala Maidan. On the next day, he enquired about her whereabouts from his relatives. As he could not get any information about her, he approached the police by filing the said written report.

3. In the said written report, he further mentioned that Md. Hasim, his son Bodha, Md. Shamshad and this appellant



lived in the neighbourhood and he suspected that they might have kidnapped the victim under a conspiracy. It is easily discernible from the written report, which is the basis for registration of the FIR, that it was primarily in the nature of a missing report of the victim given to the police and at the same time, raising suspicion about involvement of the accused persons, namely, Md. Hasim, his son Bodha, Md. Shamshad and this appellant, who might have played role in disappearance of the victim.

4. Before adverting to the merits of the case emerging from the evidence of the prosecution's witnesses, we consider it apposite to mention at this juncture that the victim was recovered on 28.04.2017 with the appellant by the police near an over bridge when the appellant was taking the victim to the Court for solemnizing "Court Marriage". Before the recovery of the victim, the appellant is said to have put vermilion powder (*Sindoor*) in the parting of the hair ("*maang*") of the victim and had managed to get a snap taken in that situation.

5. Based on certain disclosures made by her to the police, the provisions under Sections 366, 376-D read with Section 120-B of the Indian Penal Code were added in the F.I.R. under the orders of the Court below. The police, upon



completion of investigation against this appellant submitted charge-sheet for commission of the offences punishable under Sections 376-D, 366 and 120B of the Indian Penal Code on 23.07.2017. The cognizance was taken on 14.09.2017 by the learned Chief Judicial Magistrate, Katihar, whereafter the case was committed to the Court of Sessions.

6. It is noteworthy that while submitting charge-sheet against this appellant, the police had kept investigation against other accused persons pending.

7. The trial court framed charges against the appellant of the commission of the offences punishable under Sections 376-D, 366 read with Section 120-B of the Indian Penal Code. The appellant denied the charges and claimed to be tried.

8. At the trial, the prosecution examined altogether eight witnesses including the two Investigating Officers (P.Ws 1 and 8), the victim (P.W. 4), the informant (P.W. 7), mother of the victim (P.W. 5), the victim's sister (P.W. 6), the victim's brother (P.W. 3) and the doctor who had examined the victim (P.W. 2). The prosecution adduced at the trial following documentary evidence:-

- (i) Charge sheet (Exhibit- 1)
- (ii) Medical Report (Exhibit- 2)
- (iii) Signature of the victim over the statement made by her under Section 164 of the CrPC



(Exhibit- 3)

(iv) Signature of the victim obtained on the statement of the victim girl at Mahila Police Station (Exhibit-3/1)

(v) The written report of the informant (Exhibit-4)

(vi) Endorsement note on the FIR (Exhibit- 4/1)

(vii) Formal FIR (Exhibit- 5)

9. Upon closure of the evidence of the prosecution's witnesses, the learned Trial Court questioned the appellant with reference to the evidence emerging against him during the course of the trial in support of the charges framed against him. The appellant in his response to the questions put to him under Section 313 of the CrPC answered that the prosecution's witnesses were not telling the truth and that they had made false depositions at the trial. The defence brought on record by way of Exhibits A, A/1 and A/2, three laminated letters to make out a case that the victim and the appellant were in relationship and that the victim was there with the appellant out of her own free will.

10. The learned Trial Court, after having appreciated the evidence adduced at the trial, has concluded that the charges of commission of the offences punishable under Sections 366 read with Section 34 and Section 376-D of the Indian Penal Code against the appellant stood proved. After having held the



appellant guilty of the charges, the Trial Court has imposed the sentences as has been mentioned at the very outset.

11. Mr. Gyanand Roy, learned counsel appearing on behalf of the appellant has submitted that the entire case of the prosecution, as set up at the trial, is highly improbable and manifestly flimsy. He has submitted that though the victim (P.W.4) deposed at the trial that she was kidnapped from a public place where she had gone to witness *Ram Navmi* procession by the co-accused Hasim and Bodha, there is no witness to support the case of her abduction from a densely populated public place. He has further submitted that the victim deposed in her evidence that she had become unconscious after co-accused Hasim and Bodha had made her smell some unidentified thing and when she regained consciousness, she had found herself sitting in a train.

12. There is no witness to support the prosecution's case, firstly of the victim having been taken by Hasim and Bodha, to the railway station Katihar and secondly, her presence in the bogie of the train. Even the victim has not deposed that she had made any protest against her being taken away by the co-accused Md. Hasim and Bodha to some unknown place in a train, he contends



13. Further, according to the prosecution's case, the victim had deboarded the train at Delhi railway station where co-accused Shamshad was present. There is no evidence to the effect that she had raised any alarm or made any protest to draw the attention of the persons present at the railway station in Delhi. Further, according to the victim, she was taken to a room by co-accused Md. Hasim, Bodha and Shamshad in Delhi where this appellant Md. Kannu @ Kannu and another person, namely, Laddan was there. He has submitted that though the victim deposed at the trial that she was sexually assaulted by both, Md. Kannu @ Kannu (the appellant) and Laddan in Delhi, it is evident from her own deposition that she had stayed with Md. Kannu @ Kannu (the appellant) in Delhi for nearly 15 days.

14. Further, there is no investigation by the police on the point of the victim residing with the appellant in New Delhi. He contends that it is evident from the evidence of the Investigating Officer that he did not even bother to go to Delhi to enquire about the correctness or otherwise of the disclosures made by the victim.

15. He has further argued that the victim herself deposed at the trial that she had fallen ill within 2-3 days after she had reached Delhi and that the appellant had taken her to a



government hospital for her treatment. There is no evidence to the effect that the victim had disclosed to the doctor or any one about her abduction from Katihar. He has also argued that after the victim was recovered by the police, she was subjected to medical examination but the evidence of the doctor does not suggest any forceful sexual intercourse committed on the victim. He has further submitted that if the entire evidence adduced at the trial is considered holistically, it can be easily concluded that the appellant was falsely implicated in the facts and the circumstances emerging from the evidence adduced at the trial and that the charge of commission of the offence punishable under Section 376-D or Section 366 of the Indian Penal Code cannot be said to have been established by the prosecution beyond all reasonable doubts.

16. Learned Additional Public Prosecutor appearing on behalf of the State has submitted, *per contra*, that there is no reason why the victim would have falsely implicated this appellant in a case of this nature at the cost of her dignity and prestige. He has submitted that there is no reason to doubt the evidence of the victim who appears to be trustworthy and consistent in her deposition. He has further submitted that the medical evidence does support the prosecution's case of



commission of rape, despite the absence of any mark of injury found on the person of the victim. He has submitted that all the prosecution's witnesses have supported the case of the prosecution of commission of abduction and gang rape and the finding recorded by the trial Court of conviction does not suffer from any legal infirmity requiring this Court's interference.

17. We have perused the judgment and order of the trial Court as well as the lower court's records. We have carefully gone through the evidence, both oral and documentary, adduced at the trial. We have given our thoughtful consideration to the rival submissions made on behalf of the parties.

18. Before advertng to the evidence of other witnesses, we consider it desirable to refer to the evidence of the doctor who had examined the victim soon after her recovery on 28.04.2017. According to her evidence, the age of the victim was found to be 18-19 years. It has never been the case of the prosecution that the victim was a minor as on the date of occurrence. She further deposed in no uncertain terms that no mark of injury was present on the person of the victim. She deposed that she did not find any sign of forceful sexual intercourse nor any sign of violence on internal or external part of the body of the victim.



19. Now coming to the deposition of the victim (P.W.4), we notice that according to her she was abducted by co-accused Md. Hasim and Bodha from Katihar and was taken by them to Delhi in a train. She stayed in Delhi in a room for 15-20 days where, according to her, the present appellant and one Laddan continuously committed rape upon her. Investigation, on the point of the presence of co-accused Laddan in the room in Delhi is completely absent. It is manifest that the police did not make any effort to investigate into the prosecution's case that this appellant and co-accused Laddan jointly committed rape upon the victim. Section 376-D of the IPC which defines gang rape states that where a woman is raped by one or more persons constituting a group or acting in furtherance of common intention, each of those persons shall be deemed to have committed the offence of rape.

20. In the present case, there is absolutely no evidence other than for the oral evidence of the victim that one Laddan had also committed rape upon her. In the absence of any cogent proof that co-accused Laddan had committed rape jointly with the present appellant, the conviction of the appellant for commission of the offence punishable under Section 376-D of the Indian Penal Code cannot be sustained.



21. We, at this juncture, need also to address as to whether the prosecution can be said to have established, commission of the offence punishable under Section 376 of the Indian Penal Code against the appellant instead of Section 376-D of the Indian Penal Code. In this regard, we are of the view that there are certain reasons which create doubt about the trustworthiness of the evidence of the victim. It is peculiar to note that the victim (P.W.-4) deposed at the trial that on her insistence the appellant had brought the victim from Delhi to Katihar by train. They had deboarded the train one station before Katihar railway station from where the appellant had taken her to someone's house where the appellant's father Mahboob, co-accused Hasim, Bodha and Shamshad had come. They made the victim, write something on a plain paper, whereafter the appellant is said to have put *sindoor and* got photographs taken with her. For marrying her against her will, the appellant was taking her to Court and in the meanwhile, near the over bridge, when she made an attempt to flee away, a police vehicle came in which the victim's father was also there. The appellant was thereafter apprehended by the police and both of them were taken to the police station.

22. The picture, which emerges from the evidence of



the victim, is that the appellant had brought the victim from Delhi to Katihar on the victim's insistence. The appellant wanted to marry the victim. The appellant had put *sindoor* on the head of the victim. On the one hand, the victim deposed that her father was there with the police when the appellant was apprehended with the victim, her mother (P.W.5) deposed at the trial that the police had apprehended the appellant and the victim and thereafter had informed the informant about the recovery of the victim. She also deposed that thereafter the father of the victim (P.W.7) had gone and identified the victim.

23. Similarly, P.W.7, the informant also deposed at the trial that the victim was recovered from near the over bridge by the police and thereafter, the police had informed him. The evidence of the mother (P.W.-5) and father (P.W.7) are apparently in conflict with the evidence of P.W.4 (the victim), according to whom, when the victim and the appellant were apprehended by the police, the father of the victim was there with the police.

24. We reiterate that the victim specifically deposed that her father (the informant, P.W.7) was there in the police vehicle when the appellant and the victim were apprehended. Needless to say that the prosecution's witnesses other than the



official witnesses are family members of the victim, whose evidence on the point of abduction and commission of rape is primarily based on the disclosures made to them by the victim.

25. Considering the evidence of the victim and the other prosecution's witnesses, in our considered view, the victim does not appear to be a truthful witness of sterling character, on whose solitary evidence, the conviction of the appellant can be sustained, particularly in the background of the medical evidence which does not fully support the prosecution's case as disclosed by the victim. There are material inconsistencies in the evidence of prosecution's witnesses. It is not acceptable to this court, in the absence of any clinching evidence that a grown up girl would be abducted from a public place that too on the occasion of *Ram Navami* procession and would be forcibly taken in a train to Delhi without any protest being raised by the victim and without the same being noticed by any other person.

26. It is clear from the evidence of the second Investigating Officer (P.W.1) that the charge-sheet against the present appellant was submitted in haste, mainly because he had spent ninety days in custody, apparently so as to deny him the privilege of compulsory bail under Section 167 of the Cr.P.C., while keeping the investigation pending against other named



accused persons. It appears that no investigation at all was conducted after submission of charge-sheet against this appellant. It is albeit true that a defective investigation cannot be the sole ground for an appellate court to unsettle the finding of conviction recorded by the trial court, however, in our opinion, the learned counsel for the appellant has been able to convince this Court that upon examination of entire evidence on record that a reasonable doubt on the prosecution's case is created and the prosecution has not been able to prove the charge beyond all reasonable doubts.

27. In view of the aforesaid discussions, in our view, the appellant deserves to be acquitted of the charges framed against him by giving him benefit of doubt. We do not consider it safe to uphold the impugned finding of conviction recorded by the trial court. Accordingly, the impugned judgment of conviction and order of sentence dated 29.09.2020 and 03.10.2020 passed in Sessions Trial No. 67/2018/CIS No. 67/2018, arising out of Katihar Town P.S. Case No. 227 of 2017 are hereby set aside. The appellant stands acquitted of the charges for commission of the offences punishable under Sections 366/34, 376(D), 120(B) of the IPC by giving him benefit of doubt.



28. The appellant is in custody. Let him be released forthwith if he is not required in any other case.

29. This appeal is accordingly allowed.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

Jagdish/-

AFR/NAFR	NAFR
CAV DATE	NA
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