

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.727 of 2018**

Arising Out of PS. Case No.-125 Year-2016 Thana- TURKAULIYA District- East
Champanan

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Tabasum Gulnaj @ Shaboo @ Sona Khan Wife of Irfan Ahmad, D/o Mukhtar
Alam Ansari, Resident of Village- Dashgawan, P.S.- Mehshi, Dist- East
Champanan.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 651 of 2018

Arising Out of PS. Case No.-125 Year-2016 Thana- TURKAULIYA District- East
Champanan

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Prakash Kumar S/o Madan Ram, R/o Vill.- Banke Sah Chowk Chandwara,
P.S.- Town, Muzaffarpur, District- Muzaffarpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 727 of 2018)

For the Appellant/s : Mr.Dilip Kumar Tandon, Adv.

For the Respondent/s : Mr. Sujeet Kumar, APP

(In CRIMINAL APPEAL (DB) No. 651 of 2018)

For the Appellant/s : Mr.Dilip Kumar Tandon, Adv.

For the Respondent/s : Mr. Sujeet Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 05-07-2023

- Both the appeals have been heard together and are

being disposed of by this common judgment.



2. Heard Mr. Dilip Kumar Tandon, the learned Advocate for the appellants and Mr. Sujit Kumar, the learned APP for the State.
3. The appellants have been convicted under Sections 363, 364, 364A and 120 (B) of the Indian Penal Code and have been sentenced to undergo R.I. for three years, to pay a fine of Rs. 5,000/- and in default of payment of fine, further imprisonment for three months under Section 363 of the IPC; R.I for four years, to pay a fine of Rs. 5,000/- and in default of payment of fine, further imprisonment for three months under Section 364 of the IPC ; and R.I. for life and to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo R.I. for six months under Section 364A of the IPC vide judgment of conviction and order of sentence dated 17.04.2018/21.04.2018 passed by the learned 1st Additional Sessions Judge, East Champaran at Motihari in Sessions Trial No. 940/16 arising out of Turkauliya P.S. Case No. 125 of 2016. All the sentences have been directed to run concurrently.
4. Fatima Azad, a minor girl of three years was allegedly



kidnapped by the appellants. She was recovered from a private house at Patna from a room which was taken on rent by the appellant / Prakash Kumar. Appellant/ Tabasum Gulnaj @ Shaboo @ Sona Khan is the cousin of victim, who had allegedly manipulated the kidnapping of the victim, perhaps for the purposes of extracting money from her own uncle who was financially well-off.

5. Mr. Tandon, the learned Advocate for the appellants has submitted that the evidence against the appellants is highly deficient and the conviction is based solely on presumption. Perhaps there was an effort of the informant or his other brothers to anyhow eliminate appellant / Tabasum and her father from being part of the family property. In any view of the matter, Mr. Tandon argues, a peculiar story has been weaved by the prosecution and it has falsely been claimed by the police that on the pointing of the appellant / Tabasum, the victim was recovered and the room from which she was recovered, three more persons were arrested including the appellant / Prakash Kumar and two others who have not been put on trial.



6. Mr. Sujit Kumar, the learned APP has submitted that all these discrepancies in the prosecution case vanishes with the victim herself deposing before the Court that she was kidnapped by her cousin (Tabassum). He further submits that the capability of the victim was assessed by the Trial Court by putting to her a few questions which she had answered in very proper way. With her evidence on record and the factum of recovery from a private house at Patna which was taken on rent by appellant/Prakash Kumar, who was having a liaison with the appellant/Tabasum, there could be no other view except for the guilt of the appellants.
7. The F.I.R. was lodged by the father of the victim, namely, Asrar Alam Azad (PW-5), who received an information from his brother/Anwar Alam Ansari (PW-1) on 26.03.2016 that his daughter was not to be found in the house. Aforesaid Anwar Alam Ansari further informed PW-5 that he was proceeding to the police station to lodge a case about Fatima going missing. PW-5 at that moment had been attending a religious congregation at Katihar. On the same day, he also received a ransom call from mobile telephone



no. 7739117694, asking him to pay up Rs. One Crore for the release of his daughter. He was also made to hear the sobs of his daughter on telephone. PW-5 immediately informed about this to the superior police officers and proceeded for his hometown at Turkauliya. He came to his home on 27.03.2016 i.e. a day after and then lodged the F.I.R.

8. On the basis of such written report given by him, Turkauliya P.S. Case No. 125/2016 dated 27.03.2016 was registered for investigation against unknown.

9. However, the police during the course of investigation, claims to have recovered the victim after about three days of lodging of the F.I.R. and the appellants were chargesheeted and put on trial.

10. At the trial, PW-5 narrated the same story. However, he has also stated that on 28.03.2016, the local police had come to his house and had enquired about the appellant /Tabassum who was residing in the same house. After some preliminary enquiries, the police entered the house and arrested appellant / Tabasum; one weapon was



also recovered from beneath of her bedding. A recovery memo was prepared which was signed by PW-5 and his brother/Muzaffar Alam (PW-4). (Be it noted that afore-noted recovery of the weapon has neither been exhibited nor brought on record in any manner). Thereafter, appellant / Tabasum and her mother were taken to police station where PW-5 also was called. He saw that appellant /Tabasum was being interrogated. Tabasum had told the police that appellant / Prakash Kumar had taken Fatima (victim) to his rented house at Transport Nagar, Patna. PW-5 claims that thereafter he along with Muzaffar Alam and PW-4 went to Patna and first visited Agamkuan Police Station. Along with the police team which was constituted, he went to the house at Transport Nagar from where the victim was recovered. In the room where the victim was found, three more persons were available, namely, Prakash Kumar, Rishabh and Amar. Few mobile telephones were also recovered from there, one of which had the same number from which the ransom call had come on his telephone. A seizure list of these mobile telephones were prepared on which PW-5 had put his



signature. All the three persons were arrested by the police.

11. In his cross-examination, he has admitted that he resided in Delhi and he used to come his village home occasionally. The family property had been apportioned between the brothers but the residential house was common. The victim was born after 12 years of his marriage with Khadija Khanam (PW-2). On being questioned about any incriminating material against Tabasum before her arrest, he had no idea. He did not even know as to on whose asking and on what information, the police had come to his house looking for Tabasum. He did not have any idea about the affairs of Tabasum before she was arrested.

12. Initially, PW-5 gathered the impression that because of recovery of firearm weapon from beneath the bed of Tabasum, she was arrested but later realized that she was arrested in the case of kidnapping of his daughter. He had no idea about the relationship of Tabasum and Prakash. After the recovery of his daughter, she was not subjected to any medical examination either at Patna or at Motihari nor was she produced before the local Magistrate at any of the



places. The victim was thereafter handed to him. He had not told the investigating officer that when for the first time, a ransom call had come, he was made to hear the cries of his daughter. He has also denied the suggestion that because of extra-religion relationship between the appellants, the family was not happy and that there was a concerted effort to oust the family of Tabasum from family property.

13. Pitted against this evidence, the investigating officer of this case, namely, Md. Zaffaruddin (PW-7) has something else to narrate before the Trial Court. He had taken over the investigation of this case on 27.03.2016. He had taken out the print-out of the CDR of telephone no. 7739117694 but never produced it along with the case diary and chargesheet, perhaps by mistake. He had also not recorded the confession of Tabasum and Prakash (the appellants) but had inscribed the confessional statement recorded by another police officer in the case diary. The CDR report was not received by him from the officials of the Telephone Exchange. The information of the victim having gone missing by Anwar Alam Ansari (PW) was taken note of



and station diary entry no. 542 dated 26.03.2016 was entered which was investigated by Manoj Kumar, who at the relevant time was Officer In-charge of Turkauliya Police Station. PW-7 did not record about such station diary entry in his diary. He never received any information from the office of the Superintendent of Police regarding any team having been constituted for recovery of the victim. Consequently, even the arrest of Tabasum has not been entered in the diary. He has also very candidly accepted that he never made any attempt of recording the statement of the victim after her recovery and that was because she was too small to make any statement. Nobody was interrogated after recovery of the victim. While he was at the investigation of the case, a spy had given oral information to him suggesting the complicity of Tabasum but no such suspicion was raised against her by her family members. Another disclosure made by PW-7 is that though Tabasum is shown in the records to have been arrested on 29.03.2016 but she was in police custody from 27.03.2016. No investigation was made with respect to the vehicle (Scorpio)



which was used in kidnapping the victim. A suggestion was given to him that under pressure from informant and his brothers, one of whom had good political clout, the appellants were chargesheeted, which he vehemently denied.

14. From the deposition of the aforementioned two witnesses, several facts come to the fore. What was the information which in any manner was incriminating against Tabasum remains unknown. What statement was given by Tabasum on which the recovery was made has also not been brought on record. The absence of such specific statement is conspicuous for the reason that if on her pointing, recovery has been made, so much of such information, whether it amounted to confession or not as it related distinctly to the facts thereby discovered, was admissible and the proof of such fact would have lent assurance that the recovery was at the instance of Tabasum. When the police arrested Tabasum from her house, allegedly a weapon was recovered, the details of which have not been provided by the prosecution witnesses.

15. PW-5 and PW-1, though claimed to have signed



such recovery memo but the same is not on record. The Investigating Officer of this case has not recorded the confession nor was he part of the raiding team which had gone to Patna and had recovered the victim.

16. The I.O. (PW-7) never even attempted to record the statement of the victim as he was absolutely sure that the victim was doli-incapax.

17. What would all these set of facts lead to ? Was it Tabasum who manipulated such kidnapping and if yes, for what purpose ? Was it for extracting money from the informant ? These questions could have been answered appropriately if the investigation would have been conducted in a proper manner. Where was the conspiracy and planning to kidnap the victim ? When was such planning hatched and with whom?. How was the victim taken from Turkauliya to Patna unnoticed. The distance between Motihari to Patna can be travelled only in a couple of hours. The victim is a toddler. Along with the victim, there were only male members in the room from where the recovery was made, though the victim (PW-8) had said in her deposition before



the court that one Aliya threw her in a vehicle and she was brought to a different place but where and when did it happen is not known. There does not appear to be any investigation with respect to the age of Aliya, who also might have been a kid at the time of the occurrence as she is touted to be the daughter of Tabasum.

18. From the evidence of one of the brothers of the informant, it appears that Tabasum was married to one Irfan Alam and they had a daughter called Aliya. If the victim was put on witness stand, why not Aliya ? These questions have been bothering us all through the hearing. What is most surprising is that no investigation has been made with respect to the vehicle which was used in carrying the victim from Turkauliya to Patna. Similarly, there is no investigation with respect to the ownership of the house from where recovery was made. Surprisingly, there was no protest, not even a feeble one, at the time of recovery. No firearm weapon was recovered from the three persons including appellant / Prakash, who were present in the room. The neighbourhood of the room also was not searched. As



an icing on the cake, there is no written record of the recovery of the victim from the room and her being handed over to her father PW-5. A recovery memo was required to be made; medical examination of the victim had to be done and a Court order had to be obtained for handing over the custody of the victim. Decidedly, the raiding team took it upon themselves to take a decision with respect to handing over the victim. The victim was never produced before a Judicial Magistrate either at Motihari or at Patna.

19. With this background, we do entertain a doubt whether the story of recovery of the victim from a room in a house at Patna was the correct version and not a contrived one.

20. The same story of the victim having gone missing has been repeated by the other brothers of PW-5 and PW-2, who is the mother of the victim. However, one another fact was elicited in the cross-examination of these witnesses that the victim always remained in the lap of her mother. When was she left unattended in the company of Aliya and for what time, again remains unknown. Was the



victim picked up from house and taken to some distance to be transported in a vehicle or the vehicle was parked near the house for executing the act of kidnapping also remains a mystery to us. As noted above, there has been no investigation with respect to the vehicle which was allegedly used in the occurrence.

21. Thus, the facts: namely, no suspicion against appellant Tabasum in the beginning; (i) no information to the informant and other witnesses about any incriminating material against Tabasum for the police to come to the house straightaway and arrest; (ii) non-production of recovery memo of a weapon which was allegedly recovered from the room of Tabasum; (iii) the capacity of the victim to provide any information, much less such lurid details, who was only three years of age at the time of occurrence; (iv) no written record of the recovery of the victim; (v) no protest by the persons who were guarding her in the room; or (vi) any evidence of any independent person at the time of recovery; and (vii) no investigation with respect to the telephone number which was used for calling the informant



for ransom and the CDR not being produced with proper certification, the correctness of the prosecution version appears to be bursting at the seams.

22. In this background, we have noted the suggestions given to the witnesses, all of which have been denied. The relationship between the father of Tabasum and the other brothers has not been cordial. According to the evidence, Tabasum was the eldest daughter of her father who was most vociferous in raising protests against family decisions of apportionment of family property. Tabasum stayed in the same house with an unconventional association with appellant / Prakash during the subsistence of her marriage with Irfan Alam. There is no investigation with respect to the marital status of Tabasum. Had she taken divorce from Irfan Alam and had married appellant / Prakash or was only having a fling with Prakash. These aspects were required to be investigated for completing the chain of events to lend credence to the prosecution version that the victim was kidnapped by Tabasum with the aid of Prakash for extracting money from PW-5.



23. The story propounded by the prosecution may or may not be true.
24. We need not reiterate that a big distance is required to be travelled between "may have" and "must have".
25. We have also entertained doubts about the assessment of the Trial Court in holding, in a brief voir dire, that the victim was capable of answering questions. We tend more to believe the statement of the I.O. that he did not even care to record her statement because she had no maturity to speak and respond.
26. These yawning gaps therefore make us doubt whether the prosecution has come with a true version.
27. For the afore-noted reasons, we are inclined to give benefit of doubt to the appellants.
28. The judgment of conviction and order of sentence dated 17.04.2018/21.04.2018 passed by the learned 1st Additional Sessions Judge, East Champaran at Motihari in Sessions Trial No. 940/16 arising out of Turkauliya P.S. Case No. 125 of 2016, is thus set aside.
29. The appellants are acquitted of the charges



levelled against them.

30. We have been informed that both the appellants are in custody. They are directed to be released from jail forthwith unless their detention is required in any other case.
31. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail for compliance and record.
32. The records of this case be also sent back to the concerned Trial Court forthwith.
33. Both the appeals stand allowed.

(Ashutosh Kumar, J)

(Shailendra Singh, J)

Sunil/-
Rajiv/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	07.07.2023
Transmission Date	07.07.2023.

