

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2055 of 2017

In
CRIMINAL APPEAL (DB) No.639 of 2017

Arising Out of PS. Case No.-165 Year-2015 Thana- JANDAHA District- Vaishali

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Chandan Kumar, Son of Ganesh Paswan, Resident of Village- Nasratpur, P.S.
Jandaha, District- Vaishali

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Siddharth Harsh, Amicus Curiae.

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

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CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT

Date : 10-01-2024

1. Heard learned Amicus Curiae for the appellant and
learned APP appearing for the State.

2. The appeal has been filed against the judgment of
conviction dated 24.04.2017 and order of sentence dated
25.04.2017 passed by the learned Sessions Judge, Vaishali at
Hajipur, in connection with Sessions Trial Case No. 461 of 2015
arising out of Jandaha P.S. Case No. 165 of 2015, whereby and
whereunder the appellant has been convicted for the offences
punishable under Sections 363 and 366A of the Indian Penal Code
(hereinafter referred to as IPC) and sentenced to undergo rigorous
imprisonment for three years for the offence punishable under
Section 363 of IPC and seven years for the offence punishable

under Section 366A of IPC with a fine of Rs. 25,000/- and both the sentences of imprisonment have been directed to run concurrently.

3. The appellant namely, Chandan Kumar stood charged for the offences punishable under Sections 363 and 366 of the IPC.

4. It has been argued by Mr. Siddharth Harsh, learned Amicus Curiae that P.W. 1 and 3 are stated to be eye-witnesses of the alleged occurrence of kidnapping and the victim is stated to be 14 years of age at the time of commission of the occurrence of kidnapping and the said witnesses fully supported the case of prosecution in respect of the offence punishable under Section 363 of the IPC and in this regard, the evidence of the victim is also supportive. It has been further submitted that though regarding the manner of occurrence, there are some contradictions in between the statements of both the witnesses and the statement of the victim but only minor contradictions come out which are not important and the same are ignorable and so far as the victim's age is concerned, the evidence of P.W. 8, who examined the victim medically for determining her age, is relevant and the same supports the victim's age as disclosed in the FIR. It has been further submitted that as per the victim's own evidence, the appellant, firstly, kidnapped the victim and thereafter, made her hostage at a particular place and kept her confined for some period

and fed her intoxicated food material, owing to which the victim remained partly in unconscious condition that might have been misused by the appellant, though the medical evidence given by P.W. 7, who examined the victim for determining the sexual assault on the victim, goes against any possibility of sexual assault by the appellant or any other person with the victim during the period when the victim remained in captivity. Further submission is that from the evidence of the material witnesses, the alleged offence of Section 363 of IPC can be deemed to have been proved but the offence of Section 366A of IPC, for which the appellant has been convicted, does not appear to have been proved as the evidences produced by the prosecution do not prove the appellant's intention under Section 366A of IPC which requires that the victim may be or likely will be forced or seduced to have intercourse with another person.

5. Learned APP appearing for the State has argued that the material witnesses, including the victim herself, fully supported the case of prosecution and there is sufficient evidence to substantiate the offences charged and there is no force in the present appeal and the same is liable to be dismissed.

6. Heard both the sides and perused the evidences available on the case record of the trial court and also gone through the statement of the convict.

7. In the present matter, the FIR was lodged by the victim's father on 19.08.2015, two days after the commission of the alleged occurrence of kidnapping of the victim and in the FIR, the direct allegation of kidnapping was levelled against the appellant and the informant after getting knowledge of the occurrence, firstly, approached to the house of the appellant and made an enquiry regarding whereabouts of the victim and appellant and thereafter, he took legal action by lodging the FIR and the said circumstance justify the delay of two days having taken place on the part of the informant in taking legal action against the appellant for the alleged offences and the FIR (Ext. -5) which was lodged in the form of written application (Ext. -1) appears to be natural. As per the allegation levelled in the FIR, the victim, who is stated to be 14 years old at the time of occurrence, went to a Shiva temple situated at Jalalpur village for worshipping in the morning at 8:00 A.M. and when she did not return back, her father started searching for her near the said temple and then two persons namely, Chandeshwar Singh and Ravindra Singh, who were found standing near the temple, told the informant that they

had seen the accused Chandan Kumar, resident of informant's village, taking the victim with him on a motorcycle. In this way the FIR goes to show that two persons namely, Chandeshwar Singh and Ravindra Singh were eye-witnesses of the alleged occurrence of kidnapping and both the said persons were examined before the trial court as P.W. No. 1 and 3.

8. P.W. 1 deposed that on 17.08.2015 at around 7:30 A.M., while he was standing near a Shiva temple as his house is situated near the said temple then he saw the informant's daughter coming at temple for worshipping and also saw the appellant Chandan Kumar standing near the temple with a motorcycle and thereafter, the appellant told the victim that he would leave her at her home and after half an hour, the informant also reached there and started searching for the victim but before that his daughter had gone away with the appellant and the said fact was brought in the knowledge of the informant by P.W. 1. In the examination-in-chief, this witness claimed himself to be able to identify the appellant. In the cross-examination, he stated that he had no concern with the affairs of both the parties and denied to have any knowledge of love affair in between the victim and the appellant. These facts stated by P.W. 1 show impartiality on the part of the said witness as he stated that he had no concern with the affairs of

both the parties and he supported the factum as to the appellant taking the victim with him from a Shiva temple on a motorcycle. In the cross-examination, he deposed that he did not raise any hulla at the time of commission of the alleged occurrence as he knew the victim and appellant and at the time of occurrence, the appellant simply persuaded the victim to go with him showing his readiness to leave her at her home and believing the appellant, the victim became ready to go with him, so there was no reason for this witness to raise hulla against the said act of the appellant. Accordingly, the evidence given by this witness appears to be reliable and the same goes in favour of the prosecution.

9. P.W. 3, Ravindra Singh, deposed that the alleged incident took place on 17.08.2015 in the morning at 8:00 A.M. and at that time, he sat in his cattle shed (*bathan*) which is situated 100 steps away from the Shiva Temple and then he saw the informant's daughter going to temple for worshipping and after some time, he saw that the victim was going with the appellant on his motorcycle and thereafter, he went to his shop. The witness identified the appellant in the court. The facts stated by this witness in the examination-in-chief clearly go in support of the allegation of taking away the victim by the appellant on his motorcycle from the Shiva Temple where the victim had gone to offer prayer. The

witness deposed in cross-examination that he had not visited the house of the informant before the commission of the alleged occurrence and he could not state the details of the family members of the informant. Though, these facts show that the witness had no concern with the affairs of the informant's family but it does not appear that the witness was not able to identify the victim as in this regard, he did not say anything and moreover, in view of the above discussed circumstance appearing from his evidence, the witness appears to be an independent person. Accordingly, I find the evidence of this witness to be reliable and learned trial court rightly placed reliance on his evidence.

10. P.W. 4 is the informant who deposed almost same facts as stated by P.W. No. 1 and 3 in respect of the main allegation of kidnapping. Though the informant does not appear to be an eye-witness of the alleged occurrence and he got the knowledge of the occurrence from P.W. No. 1 and 3 but he did not say anything to show that there was some affair in between the victim and the appellant and he supported the factum of victim's going with the appellant from the Shiva temple and also supported the victim's recovery after several days of the occurrence and also supported the victim's going to Shiva Temple situated at Jalalpur village on 17.08.2015 in the morning. The witness denied any love affair

between the victim and the appellant at the time of the alleged occurrence. The evidence given by this witness clearly supports the facts of the FIR and his evidence is in consonance with the evidence of P.W. No. 1 and 3 and reliance can be placed upon his evidence in respect of the relevant facts which took place at the initial stage of the occurrence.

11. In the present matter, the most important witness of the prosecution is P.W. 5 who is stated to be the victim. She deposed that the alleged occurrence took place on 17.08.2015 in the morning at about 8:00 A.M. and at that time, she went to a Shiva temple situated at Jalalpur village for worshipping and when she came out of the temple, the appellant met her and said that he would leave her at her home and then she sat on his motorcycle and after some travelling, the appellant gave her some *Prasad* and she became unconscious after taking the said *Prasad*. She further deposed that when she regained her consciousness and asked the appellant whereabouts of her, the appellant told her that she was at Begusarai and then she asked him to leave her at her parents' house but she was threatened by the appellant and thereafter, the appellant took her to some other place by train and at that time, 2-3 boys also accompanied the appellant. She further deposed that the appellant confined her in a room for about one and half months

and she always requested him to take her to her home and also wept but the appellant did not care her request and oftenly, she remained unconscious or in sleeping condition after taking food so she could not give the details of any wrong if committed with her when she was in captivity of the appellant. She further deposed that after one and half months from the occurrence, the appellant brought her to Mahua by a Bus and when she got down from the bus she saw police and then she rushed to the police and gave all the details of the incident and thereafter, she was taken to Jandaha Police Station, from where she was taken before the Judicial Magistrate where her statement was recorded. The witness deposed in the cross-examination that the appellant was known to her as he was brother of her friend and the appellant gave her *Prasad* which was taken by her but thereafter, she became unconscious and she was taken by the appellant on his motorcycle. The witness remained consistent in the cross-examination in respect of the allegation levelled by her in the examination-in-chief and she fully supported the allegation of taking her away by the appellant on a motorcycle on the pretext of taking her to her home and thereafter, making her hostage at different places and confined her for about one and half months and gave her food mixed with intoxicated material which resulted in her

unconsciousness whenever she consumed the food and during the period of her captivity, the appellant always threatened her. Accordingly, I find the evidence of the victim to be reliable and it goes in favour of the prosecution.

12. So far as the age of the victim is concerned, as per the FIR she was 14 years old at the time of commission of the alleged occurrence and in this regard, she was medically examined by P.W. 8, Dental Surgeon, who opined the victim's age as between 14 to 15 years. Furthermore, school leaving certificate issued by the concerned school where the victim studied was also proved by the headmaster of the said school who was examined as P.W. 9 and according to the said educational document, the victim's date of birth is 25.01.2000 and the alleged occurrence is said to have taken place on 17.08.2015, so by this documentary evidence, the victim's age appears to be about 15 years at the time of commission of the alleged occurrence. Accordingly, there is sufficient material to prove the fact that the victim was below 18 years at the time of commission of the alleged occurrence.

13. The appellant has been convicted for the offences punishable under Sections 363 and 366A of IPC. To attract the offence punishable under Section 363 of IPC, it must be proved that the person in question has kidnapped any person from India or

from lawful guardianship. The term 'kidnapping from lawful guardianship' has been described in Section 361 of IPC and as per the provisions of this Section, whoever takes or entices any minor under 16 years of age if a male, or under 18 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.

14. As such, when one takes or entices away any female who is under 18 years of age without the consent of lawful guardian of such female then the offence of kidnapping from lawful guardianship will be deemed to have been committed. In the present matter, there are sufficient evidences to show that the appellant persuaded the victim to ride on his motorcycle and assured her to leave her at her home and then the victim started riding on his motorcycle with him from the Shiva Temple where she had gone for worshipping but during the course of journey, the appellant fed the victim some *Prasad* laced with intoxicated material that made the victim unconscious and thereafter, the victim was taken to different places by using train journey.

15. The victim's age being below 18 years at the time of commission of the alleged occurrence has been proved by the

prosecution and the evidences available clearly go to show that the victim went with this appellant believing that he would leave her at her home, so her going with the appellant was the result of persuasion caused by the appellant with her and in that incident there was no consent of the victim's father who is stated to be her lawful guardian, as such, the main ingredients of the offence of Section 363 of IPC clearly attract in this case and the prosecution succeeded to prove the said offence. Accordingly, I find the conviction of the appellant to be proper and legal for the said offence.

16. So far as the appellant's conviction for the offence punishable under Section 366A of IPC is concerned, the said conviction does not appear to be proper and legal, as firstly, the appellant was charged for the offences punishable under Sections 363 and 366 of the IPC only but the trial court convicted him for the offences punishable under Sections 363 and 366A of IPC without altering the charge in respect of the offence of Section 366 of IPC that was not the correct approach of the trial court as in view of the punishment prescribed for the offence under Section 366A of IPC the said offence does not appear to be a minor offence than the offence punishable under Section 366 of IPC for which the appellant was charged and secondly, the evidences

adduced by the prosecution are not sufficient to prove the fact that the appellant kidnapped the victim with the intention that the victim might be or likely would be forced or seduced to have illicit intercourse with another person and here, 'the another person' means a person other than the person who kidnaps the victim but such intention being present on the part of the appellant does not gather from the evidences available on the case record of the trial court. Accordingly, I find the conviction of the appellant for the offence punishable under Section 366A of IPC to be not proper and legal, hence his conviction for the said offence stands set aside.

17. The case record of the trial court goes to show that the appellant remained in custody during the whole period of trial and he was not granted bail during the pendency of this appeal also and he was taken in custody on 04.10.2015, so he has definitely served the complete sentence of rigorous imprisonment awarded upon him for the offences under Sections 363 and 366A of the IPC, hence there is no need to pass any order for his release.

18. Accordingly, the appellant's appeal stands disposed of with upholding the appellant's conviction for the offence punishable under Section 363 of the IPC and setting aside his

conviction and acquitting him for the offence punishable under Section 366A of the IPC.

19. Let the LCR be sent back to the trial court concerned forthwith.

20. Let the judgment's copy be sent to the trial court as well as jail authority concerned for needful.

21. Mr. Siddharth Harsh, learned *Amicus Curiae* shall be entitled to remuneration, as per notification dated 18.05.2017 issued by the State Government, to be paid by the Patna High Court Legal Services Committee for assisting this Court as *Amicus Curiae*.

(Shailendra Singh, J)

annu/-

AFR/NAFR	AFR
CAV DATE	NA
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