

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.69 of 2023

Arising Out of PS. Case No.-64 Year-2012 Thana- MANSAHI District- Katihar

Julekha Khatoon @ Bibi Julekha, W/o Md. Naimul Haque R/o Village-
Mirkaha, P.S.- Mansahi, Distt- Katihar.

... .. Appellant/s

Versus

1. The State of Bihar
2. Md. Tabrez S/o Md. Sayeed R/o village- Mirkaha, P.S.- Mansahi, Distt-
Katihar.
3. Md. Sayeed S/o Late Afsar Ali, R/o Village- Mirkaha, P.S.- Mansahi, Distt-
Katihar.

... .. Respondent/s

Appearance :

For the Appellant	:	Mr. Rajendra Prasad Sah, Advocate
For the State	:	Mr. Binod Bihari Singh, A.P.P.
For the Informant	:	Mr. S.B.K. Manglam, Advocate
		Mr. Awnish Kumar, Advocate
		Mr. Vikash Kumar Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date: 04-08-2025

The present criminal appeal has been preferred under Section 372 of the Code of Criminal Procedure against the judgment of acquittal dated 09.12.2022 passed by the learned Additional Sessions Judge- V, Katihar in Sessions Case No. 254/2013, arising out of Mansahi P.S. Case No. 64/2012, whereby Respondent Nos. 2 & 3 have been acquitted by the learned Trial Court from the charge of Sections 363, 366A and 364 of Indian Penal Code.



2. Vide order dated 01.04.2024, notices were issued to the Respondent Nos. 2 & 3, upon which they appeared by filing Vakalatnama through learned Advocate, Mr Awnish Kumar.

3. The prosecution case, in brief, is that, on 10.08.2012 at 10:00 a.m., the daughter of the informant along with her sister was going towards her farm and, after covering some distance, she felt nature's call. She told her younger sister to bring water from her home. When, after 10 minutes, her sister returned with a vessel of water, she did not found her sister. After searching her sister for some time, she returned home and provided information to her family members. They searched for the victim girl but she was not traced. The informant came to know that Tabrej (Respondent No. 2), Md. Sayeed (Respondent No. 3), Md. Sakim, Md. Manirul, Md. Nizam, Md. Matin and Md. Rafique have kidnapped her minor daughter and her daughter has been kept hidden with Md. Tabrej. The informant was apprehensive that the accused persons may kill her daughter.

4. On the basis of fardbeyan of the informant, Mansahi P.S. Case No. 64/2012 was instituted under Sections 363, 366A and 364 of Indian Penal Code and investigation was taken up by the police. The police after investigation submitted



charge-sheet against Respondent Nos. 2 and 3 and, accordingly, cognizance was taken. Thereafter the case was committed to the Court of Sessions. Charges were framed against the accused persons to which they pleaded not guilty and claimed to be tried.

5. During the trial, the prosecution examined altogether five witnesses viz. PW1 Reshmi Khatoon, PW2 Md. Samsul Haque, PW3 Md. Samir, PW4 Subed Ali and PW5 Julekha Khatoon. The prosecution has also produced certain exhibits (carbon copy of fardbeyan and carbon copy of chargesheet). After closure of prosecution evidence, the statements of the accused persons were recorded under Section 313 Cr.P.C. and after conclusion of trial, learned trial court has acquitted the accused persons.

6. In criminal appeal against acquittal what the Appellate Court has to examine is whether the finding of the learned court below is perverse and prima facie illegal. Once the Appellate Court comes to the finding that the grounds on which the judgment is based is not perverse, the scope of appeal against acquittal is limited considering the fact that the legal presumption about the innocence of the accused is further strengthened by the finding of the Court. At this point, it is imperative to consider the decision of the Hon'ble Supreme



Court in the case of Surajpal Singh & Ors. Versus The State reported in 1952 SCR 193, paragraph 13 of which reads as under:

“..the High court has full power to review the evidence upon which the order of acquittal was founded. But it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.”

7. In the case of ***Ghurey Lal v. State of Uttar Pradesh*** reported in ***(2008) 10 SCC 450*** in paragraph 75, the Hon’ble Supreme Court reiterated the said view and observed as under:

“The trial Court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable.”

8. The grounds for acquittal as emerge from the impugned judgment are as under:

1. PW1 i.e., Reshmi Khatoon aged about 10 years appeared to be a tutored witness.



2. PW2 and PW3 testimonies cannot be relied upon as there was material contradiction in examination-in-chief and cross-examination regarding their presence at scene of occurrence.

3. PW4 is a hearsay and interested witness.

4. The unexpected delay in instituting an F.I.R without reasonable explanation.

5. The non- examination of investigating officer causing serious prejudice to the case of defence, and Fardbyan and F.I.R. have not been proved.

9. After hearing the arguments advanced by the learned counsels appearing for both the parties and upon examining the material available on the record, the following issues arise for consideration before this Court:

(I) The presence of sister of informant does not find place in the F.I.R, however in course of trial, she as a prosecution witness has claimed to be eye- witness of occurrence. In that background, whether she can be treated as credible and trustworthy witness to the occurrence.

(II) Whether the FIR, lodged on the basis of suspicion by a person admittedly not an eyewitness, can form



the basis of a credible prosecution case.

(III) Whether the testimony of PW-1, being a child witness, is legally admissible and reliable in the absence of any recorded competency test as required under law.

(IV) Whether the testimonies of PW-2 and PW-3, who were not mentioned as eyewitnesses in the FIR and were introduced at trial stage, can be relied upon.

10. With reference to issue (I), it is found that there is inconsistency regarding eye- witness of the incident. As per the F.I.R, there is no eye witness but PW1 (sister of informant) for the first time claimed to be eye- witness during the trial. In this regard, it is noteworthy that PW1 has deposed in her examination- in- chief that when she was going to take water, she turned her face and saw that Shakim, Nizam, Manrul, Tabrej, Sayyid and Rafique came with a four- wheeler and fled away with her sister Rubina Pravin. In this regard, it is noteworthy that the F.I.R. does not mention anything about PW turning her face and seeing that accused persons took away her sister in a four- wheeler. At this juncture, it would be relevant to take note of the decision passed by the Hon'ble Supreme Court in the case of *State of M.P. vs. Dhirendra Kumar* reported in



(1997) 1 SCC 93, wherein para 11 of the following has been observed:

“11. This view owes its origin to the thinking that if there be material departure in the prosecution case as unfolded in the FIR, which would so if material facts not mentioned in the FIR are deposed to by prosecution witnesses in the court, the same would cause dent to the edifice on which the prosecution case is built, as the substratum of the prosecution case then gets altered. It is apparent that prosecution cannot project two entirely different versions of a case. This is entirely different from thinking that some omission in the FIR would require disbelieving of the witnesses who depose about the fact not mentioned in the FIR. Evidence of witnesses has to be tested on its own strength or weakness. While doing so, if the fact deposed be a material part of prosecution case, about which, however, no mention was made in the FIR, the same would be borne in mind while deciding about the credibility of the evidence given by the witness in question.”

Accordingly, the issue no. I is decided in negative.

11. With reference to issue no.(II), it is relevant to point out that PW5- informant (mother of victim) is not an eye-witness to the occurrence. In this regard it is noteworthy, that PW5 has disclosed the name of the accused persons in the F.I.R. merely on the basis of suspicion as she has deposed in her cross-examination that she was at home at the time of occurrence and had not seen Rubina being taken away. At this juncture, it would



be relevant to take note of the decision passed by Hon'ble Supreme Court in the case of ***Basheera Begam Vs. Mohammed Ibrahim and Ors.*** reported in ***2020 INSC 116*** wherein para 192 of the following has been observed:

“192. It is well settled, suspicion however strong cannot substitute proof beyond reasonable doubt. Enmity as a result of property related disputes may give rise to suspicion. However, conviction can never be based on suspicion unless the prosecution clearly proves circumstances conclusively and all circumstances proved should only point to the guilt of the Accused. Possibility of any conclusion other than the conclusion of guilt of the Accused would vitiate a conviction.”

Accordingly, the issue no. II is decided in negative.

12. With reference to issue no. (III), it is found that PW1 is a child witness. It is a settled position in law that as per Section 118 of the Indian Evidence Act, 1872, every person is competent to testify unless the Court considers that by reason of tender years, disease, or any similar cause, the witness is incapable of understanding the questions put to them or of giving rational answers thereto.

“118. Who may testify. — All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body



or mind, or any other cause of the same kind.

Explanation. — A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.”

13. In the case of a child witness, the Court is duty-bound to conduct a voir dire test before recording such testimony, to ascertain whether the child possesses sufficient mental maturity to comprehend the nature of the questions and the moral duty to speak the truth.

14. In the present case, PW1 is a child witness, and it is evident from the record that no preliminary examination (voir dire) was conducted to assess her competency prior to recording her evidence. There is no judicial satisfaction recorded regarding her ability to understand the questions or to give rational answers. At this juncture, it is relevant to take note of the decision passed by Hon’ble Supreme Court in the case of **Ram Hazoor Pandey vs State** reported in MANU/UP/0100/1959, wherein it has been observed that:

“The learned Judge, it appears to us, as a matter of course administered the oath to both these boys without ‘satisfying himself whether or not these two boys understood the significance of the oath or even that they understood the significance of the desirability of speaking the truth, Although it is not necessary to have a preliminary examination. namely, Voire dire, of a child-



witness in order to make his testimony admissible, nevertheless, we are of the opinion that such a course is desirable and should be resorted to. For it offers an opportunity to the Court to assess the mental capacity of a child-witness.

The difficulty with child-witnesses often is that they can be made to believe in things which they themselves have not seen and this belief, when once it gets hold of a child-witness, is difficult to shake. It is also well known that child-witnesses can be tutored much better than adults and further that when once a child-witness has been properly tutored then such a child-witness cannot easily be shaken in cross-examination. A preliminary examination has the merit of leaving the child-witness in the hands of the Court for it to discover by asking questions which have no relevance or connection with the facts about which that witness was expected to give evidence, so that the evil effects of tutoring could not mar the assessment of the mental capacity of the witness by the Court.

We are aware of the fact that the position of the evidence given by a child-witness in India is different from the position of that evidence given in other countries, for under section 118 of the Indian Evidence Act, all persons are deemed to be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tenderness of age or other such disabilities.

The question naturally arises how is the Court to determine whether a particular child-witness is capable of understanding the questions and capable of giving rational answers unless the Court resorts to some sort of



preliminary examination of the child-witness before the witness is actually put into the witness-box to give evidence.

.....

it would be clear that it is very desirable that a Trial Judge, who has a child-witness before him, should preserve on the record, apart from the child-witness's evidence in the case, some other questions and answers which could help the Court of Appeal to come to the conclusion whether or not the Trial Judge's decision in regard to the competency of the child-witness was right or erroneous."

15. In ***Mangoo & Anr. vs. State of Madhya Pradesh AIR 1995 SC 959***, Hon'ble Supreme Court while dealing with evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

16. It is noteworthy that, there exists a material contradiction within PW1's deposition. In para 1 of her examination-in-chief, she stated that the incident occurred while she was going to the farmland, whereas in para 6, she claims to have witnessed the incident while returning after plucking



vegetables. In view of the lack of corroboration, and the procedural lapse in assessing her competency, her testimony appears to be tutored and cannot safely be relied upon, especially in the absence of any supporting independent evidence. Therefore, her deposition does not inspire confidence and cannot form the basis of conviction.

Accordingly, the issue no. III is decided in negative.

17. With reference to issue no. (IV), it is to be taken note that as per the F.I.R., except for PW1, there was none at the place of occurrence, if anyone would have been present at the place of occurrence, definitely the prosecution would have disclosed the name of the said witness in the F.I.R. itself. The name of PW2 and PW3, who claim themselves to be the eye-witness (are a chance witness claiming to have seen abduction taking place) has come at a belated stage and there has been improvement in their statement that amount to material contradiction as both PW2 and PW3 have deposed in their testimony that they were in their field when they heard hulla and rushed silently on road and saw 4 persons taking away Rubina whereas in their statement to police under Sec. 161 of Cr.P.C., they both have stated that they came to know about occurrence when they came home at 11a.m. Hence, the testimony cannot be



relied upon.

Accordingly, issue no. IV is decided in negative.

18. Thus, in the opinion of this Court, the trial court has taken a plausible view based on the evidence available on the record. The view taken by the trial Court cannot be held to be bad or perverse. Under such circumstance, no case for interference with the impugned judgment is made out.

19. In the result, the present criminal appeal preferred against judgment of acquittal dated 09.12.2022 passed in Sessions Case No. 254/2013 arising out of Mansahi P.S. Case No. 64/2012 by the Addl. Sessions Judge- V, is dismissed at the admission stage itself.

(Sudhir Singh, J)

(Ramesh Chand Malviya, J)

Sachin/-

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