

(2011) 09 PAT CK 0129

Patna High Court

Case No: Criminal Appeal (SJ) No. 48 of 1998

Nishit Kumar

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: Sept. 23, 2011

Final Decision: Dismissed

Judgement

Gopal Prasad, J.

The Appellant has been convicted under Sections 366 and 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years for each of the offence separately. However, it has been ordered that both the sentences shall run concurrently.

2. The prosecution case as alleged in the fardbeyan of the informant Arvind Kumar Sinha is that his daughter Jyoti Sinha aged about sixteen years used to go to Sewing Centre to learn sewing. On 07.09.1996, she went to the Sewing Centre as usual at 9:00 A.M. But she did not return as usual till 2:00 P.M. and in the evening he got information in court as he is Peshkar in Nawada Civil Court, then he made out a search at Sewing Centre and other places but all in vain. He searched at his relative. The search continues on 08.09.1996 to his relative but did not get any clue. On 09.09.1996, he learnt from his neighbour Santosh Kumar Sinha is that on 07.09.1996 at about 9:30 A.M. he saw his daughter with his nephew (Bhagina) Nishit Kumar near Devi Asthan. When he inquired about his Bhagina, then he found that the landlord in whose house his (Bhagina) Nishit Kumar used to live both were absconding and hence alleged that his daughter Jyoti Kumari has been kidnapped by Nishit Kumar Sinha and Ashok Jha (the landlord) for illegal acts.

3. Jyoti Sinha, the victim aged about sixteen years, is the daughter of informant Arvind Kumar Sinha who is Peshkar in Civil Court, Nawada. The victim went to sewing centre on 07.09.1996 at 9:00 A.M. as usual. She did not return till 2:00 P.M. The informant learnt about the missing of his daughter in the evening. He searched the victim at sewing centre as well as to her relative but all in vain. On 09.09.1996, he learnt from his neighbour

Santosh Kumar Sinha that he had seen Jyoti Kumari with Nishit Kumar at Devi Asthan. The informant inquired about Nishit Kumar who used to live in the rented house of one Ashok Jha. Nishit Kumar and Ashok Jha were found missing and the house found to be locked. The informant lodged a fardbeyan.

4. On the fardbeyan, the First Information Report was lodged and investigation proceeded. During the investigation the informant went to the house of his sister and brother-in-law who were the father and mother of Nishit Kumar. The informant is the father of the victim and Mama of accused Nishit Kumar. The informant did not find his daughter and his Bhagina the accused Nishit Kumar there. The father and mother of Nishit Kumar pressurized the informant to compromise. However, the victim Jyoti Sinha having not recovered. The informant was compelled to sign a paper of compromise on 12.12.1996 with an assurance that the girl will be handed over at Nawada. The girl released on 13.12.1996, and on the same day Nishit Kumar also surrendered. The statement of the victim Jyoti Sinha was recorded u/s 164 of the Code of Criminal Procedure. on 16.12.1994 during investigation. The victim disclosed about the occurrence that while she was going to sewing centre Nishit Kumar came from behind and requested her to sit on rickshaw with a plea that he dropped her at sewing centre as the accused Nishit Kumar was her Fufera brother so she reposing confidence and faith on him, sat on the rickshaw. Nishit Kumar offered her Laddu as pretending to be "Prasad" and on taking Laddu, she became unconscious when she regains conscious she found herself in a room. Nishit Kumar kept her in a room for ten days. After ten days she was shifted to the house of parents of Nishit Kumar on a tempo. The house of the parents of Nishit Kumar was at Chandamari road while she was taken to house of the parents of Nishit Kumar at Chandamari road she did not make any cry because she was threatened and frightened. She was kept at the house of the father of accused for one-two hours. Thereafter, she was taken to the house of some relatives. There she was kept at the home of relative for five-six days. Again she was sent to another relative there also she was kept for five-six days. In the house of the said relatives she lived with the female members of the family. She was kept in the house of several relatives, changing the place from one relative to another at an interval of five-six days. She was kept in houses of 5-6 relatives changing her residence from one relation to another at an interval of 5 to 6 days.

5. After lodging of the First Information Report on 09.09.1996 by the father-in-law, the investigation proceeded and the charge-sheet was submitted, cognizance was taken. During the trial four witnesses were examined they are P.W. 1 Santosh Kumar Sinha, P.W. 2 is the victim, P.W. is the informant and P.W. 4 is the I.O.

6. The defence has also adduced documentary evidence which is marked as Ext. A, matriculation certificate of the victim. That the defence of the accused person as appears from the trend of cross-examination and suggestion is complete denial of the involvement of the Appellant in the occurrence and assertion that the Appellant has falsely been implicated in this case. It has further been asserted that the victim was eloped with some other boys and when she returned back the Appellant has falsely been implicated.

7. The trial court after considering the evidence that the victim is minor. The trial court further held that since the Appellant is not another person hence, offence u/s 366A of the Indian Penal Code is not made out but offence u/s 366 of the Indian Penal Code is made out and hence convicted the Appellant u/s 366 of the Indian Penal Code as well as u/s 376 of the Indian Penal Code and sentenced as mentioned above.

8. Learned Counsel for the Appellant, however, assailed the finding of the trial court about the age of the victim as below sixteen years. It has been asserted that Ext. A is the matriculation certificate of the victim and the age given in the matriculation certificate prevailed over any other evidence and it appears that the victim is more than eighteen years and hence was in a consenting age. It has further been asserted that the victim was a consenting party. She has not resisted during the period of alleged captivity nor has even raised any alarm nor reported the matter though she lived with the Appellant for several months. Hence, she shall be deemed to the consenting party. It has further been submitted that the investigation is not proper. The story of giving Laddu and getting her unconscious has not been corroborated by the rickshaw puller and taking her from Nawada to Patna itself is not believable without her consent.

9. Learned Counsel for the State, however, submits that the victim supported the prosecution case about kidnapping and rape and has asserted about the threat and fear while taking on tempo. She reported about kidnapping to the family members where she was taken. There was no opportunity to resist or report or to make a Halla. There is no enmity between the accused and the informant who is Mama of the accused-Appellant. The guardian of the accused has been speared by the prosecution.

10. On the respective submissions, I proceed to consider the evidence in the light of submissions made.

11. Learned Counsel for the Appellant has raised two contentions first regarding the age of the victim and second is that she was a consenting party.

12. However, the first point raised is about the age of victim. The victim in her statement u/s 164 of the Code of Criminal Procedure. disclosed her age as sixteen to seventeen years. The Magistrate assessed her age as seventeen years. The victim in her evidence before the Sessions Judge has stated her age as seventeen and half years and the Presiding Officer of Session Court assessed her age as seventeen years. The father of P.W. 2 has not given any evidence about the age of the victim and Ext. A is the provisional matriculation certificate issued by the Bihar School Examination Board, Patna and date of birth of the victim mentioned as 27th July, 1976 and the said certificate has not been challenged and hence the evidence about the age in Ext. A shall prevail and hence I find and hold that the age of the victim on the basis of the matriculation certificate as 27th July, 1976. The finding recorded by the lower court is that the victim was minor is hereby set aside.

13. However, taking into consideration the date of birth of the victim as 27th July, 1976. The victim was more than eighteen years on the date of occurrence i.e. 07.09.1996.

14. However, the next point raised for consideration is whether the victim was a consenting party.

15. P.W. 2 has stated in her evidence that she was offered and taken on rickshaw in pretext of taking her to sewing centre. She was provided Laddu in pretext of Prasad of deity and after taking Laddu she became unconscious and found herself in a room. The room was attached with bathroom and used to be locked where she was raped and kept there for ten days. Thereafter she was carried from tempo under threat, fear and terror and was kept at the house of the father and then she was kept at the house of five-six days changing from one relative to another at the interval of a week and wherever she was kept. She disclosed the family inmates of the relatives disclosed that she has been kidnapped by Nishit Kumar.

16. However, the criticism has been made that Jyoti Sinha was seen with Nishit Kumar at Devi Asthan and hence it shall be deemed that there was consent.

17. However, taking into consideration the evidence of P.W. 1 who has stated that he saw Jyoti Sinha going at Devi Asthan ahead of Nishit Kumar. Nishit Kumar was going towards Jyoti Sinha hesitantly and the evidence of Jyoti Sinha that Nishit Kumar came and asked him to sit on the rickshaw to drop sewing Centre.

18. The two statements however, supported the prosecution case that while Jyoti Sinha was going to sewing centre Nishit Kumar came from behind on rickshaw and asked Jyoti Sinha to follow him and hence on these evidences, it cannot be held that the victim Jyoti Sinha was a consenting party these evidences are in consonance with the prosecution case that Nishit Kumar came got her seated on the rickshaw on pretext of taking to sewing centre. The other part of the evidence is the evidence of the victim, who has supported the prosecution case that she was kept in a room then taken on a tempo under the threat and fear. She was kept for few hours at the house of the father of the accused. Thereafter, she was kept at the house of the relative changing her

residence from one relative to another when she disclosed the family members of the relative that she has been kidnapped by Nishit Kumar.

19. However, the conduct of the Appellant is that, the place of residence of the victim was changed from one place to another indicates that they were apprehensive of a police raid and so the residence was being changed from one place to another.

20. Further the evidence of father that he went to the house of the father of the accused and there he tried for release of the girl, but he was being compelled for compromise and ultimately he had to compromise for release of the girl. This itself indicates otherwise than consent in the mode and manner in which the victim was kept. Therefore, the conduct of

the parties does not show that the victim was a consenting party.

21. However, the criticism that the victim did not resist and report the matter and hence it shall deem that there was consent. However, the evidence indicates the fact otherwise. The victim was taken and kept in a room and it come in evidence that she was taken on tempo with threat and fear and was kept in the house of the relative changing the house from one relative to another at a regular interval. Hence, the victim was neither kept free to act at her own violation. Hence, in the circumstances she had no opportunity either to make Halla or to resist or to report the matter and hence there was no occasion for the victim as she was kept in captivity.

22. It is pertinent to mention that how a person shall react in an adverse situation is not depends on the sweet will of the accused but it varies from man to man. A person may become nervous in an adverse situation and may not resist at all. Another person may resist to some extent. Some persons may be so violent even not caring his life even if other side armed with deadly weapon. It is not inflicted that each person shall react in same manner in adverse situation. The prosecution story cannot be rejected on the ground that why a person has not been reacted in the mode and manner as suggested by the accused person. However, it has been suggested that rickshaw puller has not been examined and how the accused took the victim.

23. Learned Counsel for the Appellant, however, relied upon decisions reported in 2011 (2) BBCJ IV 352 (Alamelu and Anr. v. State Represented by Inspector of Police), [Jinish Lal Sah Vs. State of Bihar](#), and [Kuldeep K. Mahato Vs. State of Bihar](#), However, these decisions do not apply to the facts and circumstances of the case.

24. Learned Counsel for the Appellant, however, relied upon a decision reported in 2011 (2) BBCJ IV 352 however, under the facts and circumstances of this case the girl was married and at the time of marriage the relatives of the girl who were witness to the case were present at the marriage they did not sent someone to the police station nor resisted. The presence of relatives confirmed by the evidence of the prosecution witnesses itself. The prosecution party learnt that the victim had gone with the accused on a car. They also went on car and even when they learnt that the victim was taken by the accused they did not report to the police nor went to the house of the accused to complain his mother. Hence, taking into consideration these facts as well as the facts that after the marriage, the victim was taken to the house of the husband and taken to the house of her relatives the victim never reported to the relative that she has been kidnapped and she had many opportunity to complain and ran away but she did not make such effort. However, under the facts and circumstances of the case at hand, it is quite different from the facts and circumstances stated and relied upon in decision reported in 2011 (2) BBCJ IV 352 and hence ratio decided in 2011 (2) BBCJ IV 352 is not applicable. In the decision reported in [Kuldeep K. Mahato Vs. State of Bihar](#), the fact was that there was sufficient opportunity for the prosecutrix not only to run away from the house but she could have also taken the help of neighbours hence held that the conduct clearly show that she was consenting

party whereas fact of present case at hand is otherwise as discussed above and her.

25. In decision reported in 2003 (1) 605 the sequence of the event shows that the victim accompanied the Appellant willingly, there was prior planning by the victim to elope together and victim went willingly with him and hence not applicable to the fact and circumstance of this case and so ratio decided are not applicable. There is clear evidence of kidnapping and the victim has supported the prosecution case and the evidence of the victim supports the prosecution case which inspires confidence and there is nothing in her evidence to disbelieve her nor there is any circumstance to show that she was a consenting party and had opportunity. Hence, under the fact and circumstance of this case the victim was taken on rickshaw on false pretext and then kept in room and houses of relatives under threat and fear and even the victim reported to the relative that she has been kidnapped and there was no opportunity to resist and report to infer anyone. Moreover, the Appellant is Fufera brother of the victim and the informant is father of the victim, who is Mama of the Appellant and there is no reason to falsely implicate Bhagina with an allegation of rape. As it is well settled, that making allegation of rape itself impact the victim and her family and the informant losing the respect and having looked down in society by her own family members, relatives and friends and affect the future of the victim to find a suitable match for her marriage. Hence, in view of these facts when the crime is brought to book there is built assurance that the allegation is true. However, it is a peculiar case in which the Appellant is cousin of the victim and hence I do not find any merit in the appeal to interfere with the order of conviction and sentence as the prosecution has been able to prove the charge beyond reasonable doubt. Hence, the order of conviction and sentence is hereby confirmed and hence, the appeal is dismissed.