

**(2011) 09 PAT CK 0131****Patna High Court****Case No:** Criminal Appeal (SJ) No. 121 of 1997

Surendra Paswan @ Surendra  
Kumar Paswan and Others

**APPELLANT****Vs**

The State of Bihar

**RESPONDENT****Date of Decision:** Sept. 19, 2011**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 363, 366, 368

**Hon'ble Judges:** Gopal Prasad, J**Bench:** Single Bench**Final Decision:** Allowed

### **Judgement**

Gopal Prasad, J.

These two appeals are being heard together and are being disposed off by this common judgment as both arise out of judgment, dated 25th April, 1997, in Sessions Case No. 400 of 1993/T.R. No. 424 of 1996 arising out of K. Hat P.S. Case No. 109 of 1993, dated 13.04.1993.

2. The Appellants have been convicted u/s 366 and sentenced to undergo rigorous imprisonment for five years.

3. The prosecution case is that the victim, Punam Kumari, went to school along with her sister, Rubi Kumari. At the time of prayer, itself, the victim got abdominal pain. She left the school intimating her friend Ms Mary that she is going to her home and requested her intimate her younger sister, Rubi Kumari. Further, case is that when Punam Kumari went out from the school, she saw Surendra Paswan and Sanjay Kumar Mandal standing there and then Surendra Paswan threatened and got her on his rickshaw. It is alleged that Surendra Paswan prior to that occurrence used to threaten her for marriage. It is alleged that both, Surendra and Sanjay abducted her and closed her in a room.

4. The sister of Punam Kumari, Rubi Kumari learnt from Miss Mary that her sister went to house and when Rubi Kumari did not find Punam Kumari in house, she reported her mother. Her mother instructed her father, who lodged a first information report about the missing of the victim during the investigation police raided the house, recovered the victim and after recovery she was examined by the doctor and the police recorded the contention of the accused persons and after investigation the police submitted the charge sheet. Subsequently, the cognizance was taken and the case was committed to the Court of sessions, after commitment charge was framed for offence u/s 366 of the Penal Code and trial proceeded.

5. During the trial six witnesses were examined. P.W. 2 is the mother of the victim, has stated that Rubi Kumari returned from the school at 12.30 p.m. and disclosed that Punam Kumari has left the school due to abdominal pain. She asked her daughter, Rubi Kumari, to inform her husband. The husband was informed. He made out a search and filed a case. P.W. 3 is Rubi Kumari. She has stated that she learnt from Miss Mary, the friend of Punam, that she has left her school due to abdominal pain and she went to the house and informed her mother and the mother asked her to inform the father. The victim was recovered by the police. P.W. 4 is the victim and has supported the prosecution case that she, Punam Kumari, developed abdominal pain, came out the school then the accused persons kidnapped her by force and took her. However, she has stated that Surendra Paswan and Ramu Rai used to threaten her to marry. However attention drawn with regard to the statement made before police in paragraph 5 of her deposition with regard to her incidence of threat by Surendra and Sanjay for marry, but, the investigating officer has not been examined to record the contradiction. She has, further, stated that she was recovered by police from the house. P.W. 5 is the doctor, who assessed her age between 14 to 15 years and P.W. 6 is the formal witness, who has formally proved the Exhibit.

6. The trial Court, taking into consideration the evidence, convicted the Appellants u/s 366 of the Penal Code taking into consideration the evidence that the victim was kidnapped by force and the accused persons used to threaten the victim to marry.

7. The learned Counsel for the Appellants, however, contends that the age of the victim has been assessed as 14 to 16 years by the doctor. The victim in her evidence stated the age 15 years, but, the Court has assessed her aged as 16 years and there are number of decisions which disclose that age assessed by the doctor has an error two years grace may be given and if the two years is added then her age comes to 18 years and, hence, was in consenting age to be a consenting party. It has, further, been contended that three letters have been proved and marked as Exhibits "A", "A/1" and "A/2", the love letters, in the writing of the victim, and these three letters coupled with the circumstance that the victim came out from the school in the pretext of abdominal pain whereas the timing of the school was from 06.30 a.m. to 12.30 p.m. and the presence of the accused persons at 07.30 a.m. at school's gate

shows that apparently had there had been prior planning. The accused persons may not have been present there for kidnapping if they were not knowing that the victim will come out at 07.30 a.m. and, hence, they must had been planning to elope together and the she did not resist or raise alarm during the rickshaw passed through the busy market area. Hence, it is contended that the presence of the accused persons at 07.30 a.m. at the school gate and coming out of the victim from the school at 07.30 a.m. and not making alarm during kidnapping indicates that there was a prior planning and, hence, was a consenting party. It has, further, been contended that there is No. cogent and reliable evidence that the kidnapping was for the purpose of rape and illicit relationship. The only evidence about the kidnapping with intention to illicit intercourse is the evidence of P.W. 4, but, attention of the witness has been drawn to record the contradiction, but, the investigating officer has not been examined to record contradiction and, hence, it has caused prejudiced to accused. It is, further, stated that in the evidence of evidence of investigating officer the place of recovery has not been established.

8. The learned Counsel for the State, however, opposed the contention and submissions made by the Appellants and asserted that the prosecutrix has well proved the case by her evidence that she was kidnapped under the threat and duress. The contention that the victim did not raise the alarm during her kidnapping on rickshaw when the rickshaw was passing through the market is devoid of any merit as she was under the duress and how a person behaves is not on wish of the Appellants.

9. The charge has been framed u/s 366 of the Penal Code. So far the evidence regarding the age is concerned, the informant has not led any evidence about the age. The victim has stated her age as 15 years during evidence and the Court has assessed her age as 17 years and the doctor, P.W. 5, on radiological examination has stated her age in between 14 to 16 years and has opined that on the basis of x-ray and radiological examination, the age of the victim is below 17. Hence, two years concession has already been given as it has been stated that the age of the victim is in between 14 to 16 years and in all circumstances she is below seventeen years. Hence, it is held that the victim was less than eighteen years on the date of occurrence.

10. However, the defence has proved Exhibits "A", "A/1" and "A/2" and it indicates that there some intimate relation between the victim and the accused. The circumstance that the accused persons remained present at the gate of the school at 07.30 a.m. when the school hour is from 06.30 a.m. to 12.30 p.m. and the victim came from the school at 07.30 a.m. in pretext of abdominal pain indicates some nexus between the accused and the victim and this followed with love letters, Exhibits "A" and "A/2" probablise the case of the defence. However, the age of the victim is less than 18 years and, hence, even the consent of the victim is of No. avail to the accused persons in view of the fact that the victim is minor on the date of

occurrence.

11. However, there is evidence that the victim was kidnapped by force and was taken. However, an argument advanced that she did not make any cry, but, merely because that victim did not raise alarm does not infer that she was a consenting party, it may be a helpless non-resistance may be due to inevitable compulsion out of fear may not be a ground to hold that the consent was there. However, earlier held that consent is of No. consequence under the facts and circumstance that the victim is already held to be minor. However, one of the important aspects that the victim in her evidence has stated about the forceful kidnapping when she came out of the school, but, has not stated that she was kidnapped with intention that she will be compelled to marry against her will or she may be used for illicit intercourse. In her evidence in paragraph 2 she has stated that prior to the occurrence Surendra Paswan used to threaten her that he wants to marry her for which she used to protest. However, the attention has been drawn with regard to this part of the evidence regarding her statement before police in paragraph 5 of her evidence. However, the investigating officer has not been examined to record the contradiction and neither it is alleged about any apparent intention nor the doctor has definitely found any sign of rape and, hence, there is No. specific, cogent and reliable evidence regarding the intention for kidnapping for the purpose of rape or illicit intercourse then the charge u/s 366 of the Penal Code can not stand and, hence, the order of conviction and sentenced recorded u/s 366 of the Penal Code is not sustainable.

12. However, having regard to the facts and circumstances that there are evidence about kidnapping and keeping her and, hence, the conviction u/s 363 of the Penal Code can be recorded. However, having regard to the fact that occurrence is of the year 1993 and Appellants 1 and 2 of Cr. Appeal (S.J.) No. 121 of 1997 have remained in jail for about four months and Appellant Ramu Rai of Cr. Appeal (S.J.) No. 137 of 1997 also remained in jail for some time and, hence, the interest of justice there is No. averment or role assigned to Ramu Rai in kidnapping, hence, conviction u/s 366 of the Penal Code is set aside. However, he was present at the time when the victim was recovered and his conviction u/s 368 of the Penal Code is maintained, however, having regard to the fact that the occurrence is of the year 1993, hence, the interest of justice shall be served by sentencing the Appellant for the period already undergone.

13. In view of the modification in sentence, both the appeals are allowed in part.