

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.569 of 2020**

Arising Out of PS. Case No.-242 Year-2016 Thana- RAXAUL District- East Champaran

Srilal Yadav, Male, Aged about 23 years, Son of Late Kamal Yadav @ Late Kamal Ray, Resident of Village - Ahirwa Tola, Ward No.07, Raxaul, P.S.- Raxaul, Distt.- East Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Krishna Kant Singh, Advocate.

For the Respondent/s : Mr. Sunil Kumar Pandey, APP.

**CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
C.A.V. JUDGMENT**

Date : 07-12-2021

This Criminal Appeal is against conviction. The sole appellant faced trial before learned Special Judge, POCSO, East Champaran in POCSO Trial No. 47 of 2017 corresponding to CIS No. 47 of 2017, arising out of Raxaul P.S. Case No. 242 of 2016.

By the impugned judgment dated 14.11.2019, the learned trial Judge convicted the appellant for offences under Sections 341, 323 and 366 of the Indian Penal Code as well as under Section 8 of the POCSO Act. By the impugned order of sentence dated 19.11.2019, one month simple imprisonment was awarded for offence under Section 341 IPC, 6 months imprisonment was awarded for offence under Section 323 IPC and 6 years imprisonment along with fine of Rs. 10,000/- was awarded for offence under Section 366 IPC. Four years



imprisonment along with fine of Rs.10,000/- was awarded for offence under Section 8 of the POCSO Act.

The learned trial Judge acquitted the appellant of the charges under Sections 376(D) and 504 IPC.

2. PW-1 Shankar Sah initially filed a complaint case before the Chief Judicial Magistrate, Raxaul vide complaint case no. 240 of 2016 on 22.09.2016 which was transmitted by the Magistrate for institution of a police case on 25.10.2016 and accordingly the F.I.R. of Raxaul P.S. Case No. 242 of 2016 was registered on 03.11.2016 for offences under Sections 366A, 376, 323, 341 and 504/34 of the Indian Penal Code as well as under Sections 4 and 5 of the POCSO Act.

3. According to complaint based F.I.R., the minor daughter of the informant aged about 14 years who was a student of class VIII in Phulchand Sah Middle School, Raxaul had gone to attend call of nature at 7 PM on 18.09.2016. At that time, appellant and other six named who are father and siblings of the appellant forcefully kidnapped her with intent to ravish her. When the complainant asked the accused persons about whereabouts of his daughter, they started hurling abuses and committed assault. The complainant went to the police station, but the police refused to register the case, hence complaint petition was filed on 22.09.2016 after recovery of the victim girl



on 21.09.2016 in unconscious condition near railway crossing. On gaining consciousness, the victim disclosed that she was taken to Nepal by the kidnappers.

4. After investigation, the police submitted chargesheet against the appellant and investigation against others was kept pending. During trial, prosecution examined altogether seven witnesses. All are witnesses of the occurrence. The investigating officer or the doctor who had medically examined the victim were not produced before the Court nor any medical evidence is there.

5. PW-1 Shankar Sah deposed that the victim girl had gone to ease on the date of occurrence at about 7 PM when she was kidnapped. In the cross-examination, the witness stated that he had not seen the occurrence. The witness denied any love affairs between the victim and the appellant, however is specific that he does not want to proceed with the criminal case as he has already married the victim with some other man.

PW-2 Rajesh Kumar Sah is a hearsay witness on the occurrence of kidnapping. However he is specific that he does not know who had kidnapped to the daughter of Shankar Sah. The witness is not a hostile witness.

PW-3 Ashok Sah deposed that he knows nothing about the occurrence. Though the witness was declared hostile



by the prosecution, but his statement before the police was also as a hearsay witness.

PW-4 Krishna Sah has also not supported the prosecution case and has been declared hostile by the prosecution. The cross-examination of the witness also reveals that he was a hearsay witness of the occurrence.

PW-5 Urmila Devi has deposed that there was relationship between the daughter of the informant Shankar Sah and the appellant since before and for that reason quarrel had taken place between the two families. The witness is specific that she had seen the daughter of the informant going along with the appellant. The witness stated that the victim was aged about 19-20 years. She had voluntarily left her house and gone along with the appellant and no one had forcefully taken her. The victim girl voluntarily returned on the following day. The informant has lodged a false case. The witness is not a hostile witness.

PW-7 Radhika Devi is mother of the victim. She has deposed that the victim had left the house to attend call of nature, but she got missing and could not be traced out. After two days, she was found near railway crossing. The victim was aged about 20 years at the time of occurrence. She was in the habit of going anywhere and returning back. The witness is



specific that the victim did not disclose to her or to the father about the occurrence. In fact, she had gone to the house of maternal uncle after being irritated in the house. This witness is also not a hostile witness.

PW-6 is the victim girl has deposed that at 6 PM on the date of occurrence, she had gone to ease. The appellant came there and pressed on her mouth and took her to Raxaul and then to Nepal. Brought her back to Raxaul, thereafter father took her to the house. The police came and she made statement before the police. She was medically examined. The witness is specific that the appellant is her neighbour and prior to the occurrence, there was dispute between the two families and for that dispute a panchayati was convened and the dispute was settled. But both sides were not pulling well even after Panchayati. She stated that she has already been married by the father three months back. She has stated that she has no documentary evidence of her date of birth.

6. Mr. Krishna Kant Singh, learned counsel for the appellant submits that the testimony of the prosecutrix would reveal that she is not a “sterling witness” as she is not consistent with her earlier statement. Moreover her testimony finds confronted by the evidence of other prosecution witnesses, especially PW-2, PW-5 and PW-7 her mother. The prosecution



witnesses who are not hostile and have deposed about a quite different occurrence can be relied by the defence to disbelieve the testimony of the prosecutrix.

7. Mr. Sunil Kumar Pandey, learned Additional Public Prosecutor contends that the victim of the crime cannot be disbelieved and there is no bar for recording conviction on the basis of sole testimony of the witness of the occurrence. Learned counsel contends that, in fact, it is a case of sole evidence of the prosecutrix who was kidnapped and she has consistently supported that she was taken out of India by the appellant. On the date of occurrence, she was a minor. Hence conviction does not require interference.

8. In **Raja Ram V. The State of Rajasthan** reported in **(2005) 5 SCC 272**, the Hon'ble Supreme Court said that if a witness is not declared hostile by the prosecution, the defence can rely upon the evidence of such witness and it would be binding on the prosecution.

9. The aforesaid view was reiterated in **Mukhtiar Ahmed Ansari V. The State (NCT of Delhi)** reported in **(2005) 5 SCC 258**. Paragraphs 29 to 31 of the judgment are being reproduced below:

“29. The learned counsel for the appellant also urged that it was the case



of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 “hostile”. His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.

*30. A similar question came up for consideration before this Court in **Raja Ram V. State of Rajasthan** (supra). In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared “hostile”. The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor*



and it was binding on the prosecution.

31. In the present case, evidence of PW 1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to the police in which the police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, the accused can rely on that evidence.”

10. In the case on hand, PW-5 Urmila Devi is not a hostile witness. She is consistent in her testimony that the victim was in affair with the appellant. Victim was aged about 19-20 years at the time of occurrence. She was seen going along with the appellant near the orchard on the alleged date of occurrence. The case of the informant is false one. There is no material to say that the witness is not reliable. Hence the evidence of this witness coupled with the testimony of PW-7 Radhika Devi, the mother of the victim creates serious doubt on the acceptance of prosecution evidence. The mother of the victim said that the victim was not kidnapped rather being annoyed for some reason, she had left the house to go to the house of her maternal uncle. She was aged about 20 years at the time of occurrence. She was in the habit of leaving the house for anywhere and returning back thereafter. The victim did not disclose anything to her or to



the informant about the occurrence. The testimony of these two witnesses are sufficient to disbelieve the testimony of the victim as these witnesses are not hostile witnesses.

11. The learned trial Judge has not considered the aforesaid contradiction of the prosecution evidence while recording the conviction against the appellant.

12. Considering the fact that the prosecution evidence on the record contradicts the testimony of the victim whose evidence appears to be shaky one, hence the appellant deserves benefit of doubt. Accordingly, the judgment of conviction and order of sentence passed against the appellant are hereby set aside and this appeal is allowed.

Let the appellant be set free at once.

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(Birendra Kumar, J)

