Jinish Lal Sah vs State Of Bihar on 20 December, 2002

Equivalent citations: AIR2003SC2081, 2003(51)BLJR434, 2003CRILJ4914, [2003(1)JCR298(SC)], (2003)1SCC605, AIR 2003 SUPREME COURT 2081, 2003 (1) SCC 605, 2003 AIR SCW 74, 2003 AIR - JHAR. H. C. R. 263, 2003 (1) LRI 121, 2003 ALL MR(CRI) 2384, 2003 SCC(CRI) 395, 2002 (9) SCALE 746, (2003) 1 CGLJ 138, (2003) 1 JCR 298 (SC), 2003 CRILR(SC&MP) 207, 2002 (7) SLT 383, 2003 (2) SRJ 267, 2003 (1) BLJR 434, 2003 CRILR(SC MAH GUJ) 207, 2003 CHANDLR(CIV&CRI) 541, (2002) 9 SCALE 746, (2003) 1 BLJ 806, (2003) 1 ALLCRILR 994, (2003) 24 OCR 407, (2003) 1 PAT LJR 239, (2003) 2 RAJ CRI C 358, (2003) 1 RECCRIR 247, (2003) 1 CURCRIR 41, (2003) 1 SUPREME 1, (2003) 1 UC 434, (2003) 1 JLJR 239, (2003) 1 INDLD 605, (2003) 1 CRIMES 246, 2003 (1) ALD(CRL) 374

Bench: N. Santosh Hegde, B.P. Singh

JUDGMENT

Santosh Hegde, J.

1. The appellant herein was convicted by the Sessions Judge, Sitamarhi in Sessions Trial No. 182/89 for offences punishable under Section 366A and 376 of the IPC and was sentenced to rigorous imprisonment for five years on each of those counts but the sentences were directed to run concurrently. On appeal, the High court of Patna has confirmed the said sentence. It is against that judgment and conviction the appellant is before us in this Criminal Appeal.

2. Briefly stated the prosecution case is that the appellant was giving tuition to the prosecutrix Geeta Kumari and her sister at their residence. It is stated that on 30th April, 1989 at about 7 PM the appellant came to their house and in the presence of the family members told Geeta Kumari P.W.1 that he won't be giving tuition on that day and went away. Immediately, thereafter, it is stated that PW-1 left the house telling the members of the family that she was going to grand-father's house to watch television. It is further stated that on the way she met by the appellant and he on the pretext of taking her to a movie took her in his motor cycle towards Muzaffarpur. From Muzaffarpur, he took her in a train to Jasidih from where he took her to Devghar. The prosecution further states that there he forced PW-1 to marry him and made her sign certain papers. From Jasidih it is stated that the appellant and PW-1 left for Babadham on 8.5.89 and from there to Bajitpur on 9.5.89. During this stay, it is stated that appellant committed rape on PW-1. On 10.5.89, PW-1 was recovered from the house of the appellant by the police. After investigation, a case was registered against the appellant and he was charged as stated above and having been found guilty by the two courts below

the appellant has filed this appeal.

3. The factum of the recovery of PW-1 from the house of the appellant is not in dispute. While it is the case of prosecution that it is the appellant who either by inducement or threat took away PW-1 from her house, the defence case is that PW-1 had eloped with somebody and her love affair having failed with the person with whom she eloped and she being scared to get back to the house had come to the house of the appellant who the had informed PW-6, the father of the girl about PW-1 coming to his house. The defence further states that after being annoyed and having found none else to blame her father has foisted a false case against the appellant. As noticed above, one of the charges of which the appellant has been found guilty is under Section 366A which refers to procreations of a minor girl. To establish this charge, the prosecution has to prove that PW-1 was a minor on the date when she was taken away from her house. In regard to this fact, the prosecution relies on the evidence of PW-1 the girl herself, PW-6, her father and PW-10 the Doctor who examined her. So far as PW-1's evidence is concerned it is prima facie not acceptable when she says that she was only 14 years on the date when she was taken way from her father's house. This evidence runs counter to all other material on record to which we shall refer presently.

4. PW-6 the father of the girl in his evidence has stated that he was married in the year 1952 and he had two daughters. The firs daughter Reeta was born 12 years after his marriage which would be in the year 1964. He states that his second daughter was born six years after Reeta was born that would be 18 years after his marriage which will be 1970. If that be the year of birth of PW-1 then the incidence in question being in the year 1989, PW1 ought to be 19 years on that day. This witness further says that PW1 had appeared for her Board examination in the year 1988 and had failed. This also gives an indication that it is likely that the age of PW-1 on the date of incidence was around 19 years.

5. PW-10 the doctor in his evidence has stated that PW1's X-ray photograph showed partial epiphyte seal fusion of iliac crest. In her opinion, PW1 appeared to be 17 years old which opinion of the Dr. is from the very language used by her shows it to be approximate. The physique of PW-1 as explained by PW-10 also indicates the probability of PW-1 being above the age of 18 years. In this background if we examine the evidence of PWs. 6 and 10 it is clear that evidence of PW-1 is wholly unreliable when she states that she was only about 14 years old. Even though PW-10 Dr. stated that PW-1 appeared to be 17 years old cannot be held that this evidence is conclusive enough to come to the conclusion that PW-1 was really below 18 years on the date of incidence, in view of positive statements made by PW-6 the father. We have already referred to the evidence of the father, according to whose evidence PW-1 was 19 years of age when she left the house of the father. In such situation, we think it not safe to come the conclusion that PW-1 was less than 18 years of age on the date when she left the house of her father. While discussing this part of the prosecution case, the Trial court in its judgment has not considered the evidence of PW-6 the father at all. It merely relied upon evidence of PW-10 accepting the same on its face value, without discussing the other material that was available on record. Even the High Court in this regard in its judgment merely stated "Dr. who examined the prosecutrix found her age to be 17 years....." the High Court has not independently given any finding either accepting this evidence or not. It has also not discussed the evidence of PW6 in regard to the age of PW-1. In this background for the reasons already stated

hereinabove we think that the prosecution has failed to establish that PW-1 was less than 18 years of age as on the date of incidence. If that be so, charge under 366A of which the appellant was found guilty by both the courts below shall fail. The leaned counsel for the State, however, contended that if the charge under Section 366A should fail then, the appellant is liable to be convicted under Section 366 for kidnapping, abducting or inducing a woman to compel her to marry. He has referred to the evidence of PW-1 in this regard and contends that even though there is no specific charge under Section 366 still on the material available on record a conviction under Section 366 could be based and no prejudice would be caused to the appellant. But then, we will have to notice that even to establish the charge under Section 366 IPC, there should be acceptable evidence to show that either PW-1 was compelled to marry the appellant against her will and/or was forced to or induced to intercourse against her will. This would therefore, require the prosecution to prove that there was some such undue force on the PW-1 either to marry the appellant or to have intercourse with him. Therefore, it becomes necessary for us to examine the prosecution case whether there was a threat or whether there was consent as contended by the defence. While we consider this question of existence of consent or absence of it we may also consider the charge under Section 376 IPC of which the appellant is found guilty by the courts below because one of the ingredients necessary for establishing such a charge in regard to a girl over the age of 16 is the presence or otherwise of consent. Therefore, both for the purpose of 366 and for the purpose of Section 376 IPC, there should be material to establish that either the alleged marriage or the intercourse has taken place without the consent of PW-1 if she is above the age of 18 years or 16 years as the case may be.

6. In this regard, if we examine the evidence of PW-1, it is clear that on the date of incidence when the appellant came to her house and told her that he will not be taking tuition class as on that day, she decided to go to her grand father's house to watch TV. She says on the way she was met by the appellant who took her on his motorcycle promising her of taking her to a movie at Sitamarhi. She found on the way that he was not going to Sitamarhi but was going to Muzaffarpur Railway Station. According to her, she protested but she was threatened. Then from Muzaffarpur to Jasidih they went by train and then onwards they went by tempo to Devghar for stay in Devghar for some days then proceeded to Bajitpur from where she was recovered on 10th May, 1989. She alleges that the appellant forced her to sign some papers to marry him. In our opinion, it is extremely difficult to accept her evidence when she states that she was taken by the appellant without her consent. if we see sequence of events starting from 30th April 1989 to 10 of May 1989 it is clear that she has accompanied the appellant willingly. The evidence of PW-1 indicates that there was a prior planning by her with the appellant together to elope, and it is because of that, the appellant came to PW's house on 30.04.1989 and told her that he will not be taking tuition on that day and immediately thereafter PW-1 left her house on the pretext of going to her grand father's house to see Television. It is not her case that when she was accosted by the appellant on his motorcycle, she went with him under a threat. On the contrary, the evidence shows that she willingly went with him on his motorcycle to see a movie at Sitamarhi. She says she was threatened only when she protested as against she being taken to Muzaffarpur. On the contrary, we notice she was with him from 30th of April to 10th of May, during which period she had travelled by train, temp and stayed with the appellant without there being any evidence of her having protested or having made any effort to seek help from others or even trying to run away. Apart from that from the record, it is seen that PW-6 in the FIR had stated that "I got information from my wife in the house that Geeta went away

by taking clothes and a gold chain and she took Rs. 500/- in cash in total amounting to Rs. 8500/-. This evidence though subsequently resiled by PW-6 indicates that PW-1 had planned her departure from the house in advance and had willingly gone away with the appellant which also indicates that there was no threat or inducement either in regard to her leaving the house or in regard to accompanying the appellant. In such situation in the absence of any other material to show to the contrary it will be difficult to accept the prosecution case that either there was a forcible marriage or rape as contended by the prosecution to find the appellant guilty under Section 366 or 376 IPC. Since the courts below proceeded on the basis that PW-1 was a girl below the age of 18 on the date she left the house they have not properly appreciated the evidence in regard to her consent which is a mandatory requirement before finding a person guilty under Section 366 or 376 IPC.

7. There is no doubt that the appellant who was a tuition teacher of PW-1 has misused the trust reposed in him by the PW-1's family but then since the prosecution has failed to establish the fact that PW-1 was below the age of 18 and the evidence on record indicates that PW-1 had willingly gone away with the appellant and in the absence of any threat, coercion or inducement, having been established by the prosecution we think it not possible to rely on the prosecution case to come to the conclusion that the appellant is guilty of the charges framed against him under Section 366A and 376 IPC or even 366 as contended by the learned counsel for the State.

8. For the reasons stated above, this appeal succeeds. The judgments and convictions of the court's below are set aside and the appellant shall be released forthwith if he is not required in any other case.