

(2022) 07 PAT CK 0029

In the Patna High Court

Case No : Criminal Appeal (DB) No. 335 Of 2014 In Criminal Appeal (SJ) No. 399 Of 2013

Barun Kumar Mandal @ Biro Mandal @ Barun Mandal

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 12-07-2022

Acts Referred:

Indian Penal Code, 1860 — Section 149, 302, 366, 366A, 376
Code Of Criminal Procedure, 1973 — Section 164, 313, 378

Citation : (2022) 07 PAT CK 0029

Hon'ble Judges : A. M. Badar, J;Rajesh Kumar Verma, J

Bench : Division Bench

Advocate : Archana Palkar Khopde, Abhay Kumar

Final Decision : Dismissed

Judgement

1. By this appeal, appellant/convicted accused Barun Kumar Mandal @ Biro Mandal @ Barun Mandal is challenging the judgment and order dated 25.04.2013 and 08.05.2013 respectively, passed by the learned Additional Sessions Judge, IV, Naugachia, in Sessions Trial No.919 of 2010, thereby convicting him of the offence punishable under Section 366A of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for five years apart from imposition of fine of Rs.5,000/- (Five thousand) and in default to undergo rigorous imprisonment for three months. For the sake of convenience, the appellant shall be referred to in his original capacity as an accused.

2. Though this appeal pertains to the jurisdiction of the learned Single Judge, in view of order dated 29.05.2013 passed by the learned Single Judge issuing notice to the appellant to show cause as to why he should not be convicted for the offence punishable under Section 376 of the Indian Penal Code and why he should not be sentenced accordingly, the appeal came to be placed before us for consideration.

3. Facts in brief leading to the prosecution of the accused, projected from the

police report, can be summarized thus:

(A). According to the prosecution case, on 02.06.2010 at about 10:00 PM, elder daughter of the first informant to whom we are referring as "X" for concealing his identify, came to be kidnapped by accused persons including the present appellant as well as Dhaniram Mandal, Maniram Mandal, Dharmendra Mandal, Jagdish Mandal, Jitendra Mandal, wife of Dhani Ram Mandal and Ajay Mandal. The said victim female child, at the time of the incident was 13 years of age. Her father "X", therefore, lodged report to Police Station Naugachia on 03.06.2010 itself which has resulted in Crime No.85 of 2010 for the offences punishable under Sections 366 and 366A of the Indian Penal Code against the accused persons.

(B) During the course of investigation, the victim female child returned on 15.06.2010. Her statement came to be recorded under Section 164 Cr.P.C. by the learned Magistrate. She was subjected to the medical examination. Statement of other witnesses came to be recorded. The accused herein came to be arrested.

(C) . On completion of investigation, the appellant/accused came to be charge sheeted for the offences punishable under Sections 366A as well as 376 of the Indian Penal Code. The learned trial Court framed and explained the charges to the accused. He pleaded not guilty and claimed trial.

(D) . In order to bring home the guilt to the accused, the prosecution has examined in all 8 witnesses. PW 1 is the victim female child, PW 2 Anju Devi is the co-villager who had accompanied the victim child and had witnessed the incident of her kidnapping. PW 3 is the mother of the victim female child. PW 4 Narayan Mandal is the uncle of the victim female child. PW 5 "X" is the father of the victim female child who had lodged the First Information Report. PW 6 Tetri Devi is the aunt of the victim female child. PW 7 Nand Kishore Yadav is the Investigating Officer whereas PW 8 Dr. Sushila Choudhary, Medical Officer of the Sadar Hospital, Bhagalpur, had medically examined the victim female child on 16.06.2010.

(E). The defence of the accused as gathered from the line of the cross-examination of the prosecution witnesses as well as from his statement under Section 313 Cr.P.C. was that of total denial. However, he did not enter in the defence.

(F). After hearing the parties, the learned trial Court by the impugned judgment and order was pleased to convict the appellant/accused and to sentence him as indicated in the opening para of the judgment and he came to be convicted accordingly.

4. We heard Ms. Archana Palkar Khopde, the learned Advocate, who was appointed to act as Amicus Curiae, as none appeared for the appellant to prosecute the instant appeal. She vehemently argued that evidence of the victim female child regarding her kidnapping is duly corroborated by evidence of PW 2

Anju Devi who had witnessed the incident of kidnapping. Even PW 3 who happens to be mother of the victim female child has deposed that the victim female child had accompanied PW 2 Anju Devi for going for easing. Therefore, according to Ms. Archana Palkar Khopde, the learned Amicus Curiae, the prosecution has made out the offence punishable under Section 366A of the Indian Penal Code and, therefore, there is no need to interfere in the impugned judgment and order. However, according to Ms. Archana Palkar Khopde, the learned Amicus Curiae, the learned trial Court had taken plausible view in acquitting the accused of the offence punishable under Section 376 of the Indian Penal Code. She pointed out paragraph 8 of the impugned judgment and contended that the Medical Officer had not found any signs of sexual intercourse with the minor female victim and, therefore, the learned trial Court came to the conclusion that evidence of the victim female child to that extent is not reliable. This, according to the learned Amicus Curiae, is the possible view which requires no interference at the hands of this Court. In order to support this contention she placed reliance on the judgment of the Supreme Court in the matter of N. Vijayakumar Vs. State of Tamil Nadu reported in AIR 2021 SC 766, Murugesan and Others Vs. State through Inspector of Police reported in AIR 2013 SC 274, Chandrappa and Ors. Vs. State of Karnataka reported in (2007) CriLJ 2136 and Bhaiyamiyan and Ors. Vs. State of Madhya Pradesh reported in AIR 2011 SC 2218.

5. As against this, the learned Additional Public Prosecutor contended that apart from the offence punishable under Section 366A of the Indian Penal Code, the prosecution has also proved the offence punishable under Section 376 of the Indian Penal Code, as seen from the version of the victim female child.

6. We have considered the submissions so advanced and we have also perused the record and proceedings including oral as well as documentary evidence relied by the prosecution.

7. According to the prosecution case, the present appellant/accused along with other accused persons had kidnapped the victim female child- PW 1 in order to force or seduce her to illicit intercourse. It is seen that though names of several persons are mentioned in the FIR as kidnappers of the victim female child, vide subject Sessions Case, only the appellant/accused came to be prosecuted. He was charged for the offences punishable under Section 366A and 376 of the Indian Penal Code. On this backdrop it is in evidence of the victim female child- PW 1 that the incident took place at about 10:00 PM of 02.06.2010. She had at the relevant time gone for easing herself in the neighbourhood of her house. However, at that time, the accused and one unknown person had taken her to the Shiv Mandir of Thakurbari, Purnea, and the accused married her against her wish. She further testified that then she was taken to one 'Dharmshala' and was kept there for 10 to 12 days. The accused had sexual intercourse with her at that Dharmshala for 10 to 12 days. The victim female child further deposed that as she got chance, she escaped from the custody of the accused and came to

Naugachia Bus Stand from where the police took her to the Police Station, called her parents and got her medically examined. The victim female child has duly identified the accused and while in the witness box had stated her age as 15 years. The incident had taken place on 02.06.2010. Evidence of the victim female child was recorded on 07.03.2011. As such, the victim was aged about 14 years at the time of the incident in question. There is no cross-examination in respect of the age of the victim at the time of the incident and the defence has not disputed that at the time of the incident, the victim was a minor below 18 years of age. There is nothing in cross-examination of the victim female child which will doubt her testimony regarding taking her by the accused along with one unknown person. She admitted in cross-examination that when she was being taken, she was the pillion rider of the motorcycle of the accused and she had not shouted during the course of that journey. However, as the victim female child was minor at the time of incident, her consent if any to her taking is of no consequence.

8. PW 2 Anju Devi has corroborated the victim female child by stating that when she had accompanied the victim female child for easing the accused came and took the victim female child on the motorcycle. She further stated that in fact marriage of the victim female child was scheduled to be held on 06.06.2010, i.e., after three days of the incident in question.

9. The PW 3 who happens to be the mother of the victim female child has categorically deposed that at the time of incident age of her female child was 14 to 15 years. She heard from others that her minor female child came to be kidnapped by accused Barun. The PW 3 has categorically deposed that her minor female child had accompanied PW 2 Anju Devi for going for easing. Thus, evidence of PW 2 Anju Devi is gaining corroboration from the evidence of the PW 3. PW 4 Narayan and PW 6 Tetri Devi are not eyewitnesses to the incident of taking the victim female child. Similarly PW 5 who is father of the victim female child and the first informant in the case in hand was also not aware about the incident by his personal knowledge. His evidence is to the effect that at the time of the incident his minor female child was aged about 13 years. There is no cross-examination to this version of the first informant regarding age of the victim female child.

10. Thus, it is evident from the version of the minor female child-PW 1 as well as PW 2 Anju Devi that at about 10:00 PM of 02.06.2010, the victim female child came to be kidnapped by the accused with the help of an unknown co-accused. Similarly, it is seen from the evidence of the victim female child that she was compelled to marry the accused against her wish at the temple and she stayed with the accused at a Dharmshala for 10 to 12 days thereafter.

11. Now let us examine whether the prosecution has proved that the accused had committed sexual intercourse with the minor female victim. The learned trial Court disbelieved her version regarding the sexual intercourse by accused on her on the basis of medical evidence. It is further observed by the learned trial Court

that there is no investigation regarding the so called Dharmshala where the incident of commission of rape on the victim female child took place.

12. Let us, therefore, examine the evidence adduced by the prosecution in support of the charge for the offence punishable under Section 376 of the Indian Penal Code for arriving at our independent conclusion. The victim female child – PW 1 at the relevant time was 13 to 14 years of age. As per her version she stayed with the accused for 10-12 days after the incident which took place on 02.06.2010. She claims that then she escaped from the custody of the accused and along with the police she went to the Police Station. It is in evidence of PW 7 Nand Kishore Yadav, the Investigating Officer, that the victim female child came to be recovered on 15.06.2010. Thus it is seen that the victim female child was separated from the accused on 15.06.2010. As per her version prior to 15.06.2010, the accused used to have sexual intercourse with her during her stay with him. The victim female child was subjected to medical examination on 16.06.2010 itself at the Sadar Hospital, Bhagalpur. PW 8 Dr. Sushila Choudhary conducted her medical examination and evidence of this Medical Officer shows that the victim was not having any injury on her person including the private parts. Upon internal examination of the victim female child, PW 8 Dr. Sushila Choudhary had not found any signs of sexual intercourse with the victim female child. On the backdrop of this medical evidence, one will have to conclude whether the view taken by the learned trial Court in acquitting the accused of the offence punishable under Section 376 of the Indian Penal Code is a plausible or possible view or not?

13. The accused, at the relevant time, was an adult man aged about 22 years. The victim was hardly 13 to 14 years of age. She was in company of the accused from 02.06.2010. As per version of the victim she escaped from the custody of the accused on 15.06.2010 and during this period, the accused was committing sexual intercourse with her. A day thereafter, i.e., on 16.06.2010, PW 8 Dr. Sushila Choudhary had medically examined the victim female child and upon internal examination of the victim female child, this Medical Officer had not found any sign of sexual intercourse with the victim female child. Therefore, we are of the considered opinion that the view taken by the learned trial Court is a possible and plausible view and as such, though we may come to the different opinion in the matter, as the accused came to be acquitted of this charge, the impugned judgment and order of acquittal does not deserve to be interfered with.

14. We may reproduce paragraph 10 of the judgment of the Supreme Court in the matter of N. Vijayakumar (Supra) cited by the learned Amicus Curiae which reads thus:

“10. Mainly it is contended by Sri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a “possible view”, having regard to evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal

and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in the case of Chandrappa and Ors. v. State of Karnataka {(2007) 4 SCC 415} has laid down the general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under:

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the Accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the Accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. Further in the judgment in Murugesan (Supra) relied on by the learned Senior Counsel for the Appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", High Court not to reverse the acquittal to that of the conviction. The relevant paragraphs in this regard where meaning and implication of "possible view" distinguishing from "erroneous view" and "wrong view" is discussed are paragraphs 32 to 35 of the judgment, which read as under:

32. In the above facts can it be said that the view taken by the trial court is not a possible view? If the answer is in the affirmative, the jurisdiction of the High Court to interfere with the acquittal of the Appellant-Accused, on the principles of law referred to earlier, ought not to have been exercised. In other words, the reversal of the acquittal could have been made by the High Court only if the conclusions recorded by the learned trial court did not reflect a possible view. It must be emphasised that the inhibition to interfere must be perceived only in a situation where the view taken by the trial court is not a possible view. The use of the expression "possible view" is conscious and not without good reasons. The said expression is in contradistinction to expressions such as "erroneous view" or "wrong view" which, at first blush, may seem to convey a similar meaning though a fine and subtle difference would be clearly discernible.

33. The expressions "erroneous", "wrong" and "possible" are defined in Oxford English Dictionary in the following terms:

'erroneous.— wrong; incorrect.

wrong.—(1) not correct or true,mistaken.

(2) unjust, dishonest, or immoral. possible.—(1) capable of existing, happening, or being achieved.

(2) that may exist or happen, but that is not certain or probable.'

34. It will be necessary for us to emphasise that a possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact where it is agreed upon or not by the higher court. The fundamental distinction between the two situations have to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court.

35. A consideration on the basis on which the learned trial court had founded its order of acquittal in the present case clearly reflects a possible view. There may, however, be disagreement on the correctness of the same. But that is not the test. So long as the view taken is not impossible to be arrived at and reasons therefor, relatable to the evidence and materials on record, are disclosed any further scrutiny in exercise of the power under Section 378 CrPC was not called for.

Further, in the case of Hakeem Khan and Ors. v. State of Madhya Pradesh {(2017) 5 SCC 719}, this Court has considered powers of the appellate court for interference in cases where acquittal is recorded by trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under:

9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. Under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the Accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned Counsel for the Respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case.

This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

15. As the learned trial Court has taken a possible view in the matter, the acquittal of the accused for the offence punishable under Section 376 of the Indian Penal Code cannot be reversed in the appeal filed by him, particularly, when the State has not even challenged the same. Similarly, we find no fault in the conviction and the resultant sentence recorded by the learned trial Court on the accused for the offence alleged to be proved against him.

16. In the result, the appeal is devoid of merit and the same is dismissed.

17. We appreciate the assistance rendered by Mrs. Archana Palkar Khopde, the learned Amicus Curiae. Let the Amicus Curiae be paid a fee of Rs.5,000/-.

18. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.