
(2011) 04 PAT CK 0067

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 447 of 2005

Naga Giri

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 22-04-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 364(A), 365

Citation : (2011) 04 PAT CK 0067

Hon'ble Judges : Dharnidhar Jha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dharnidhar Jha, J.—Four accused persons were put on trial by the learned Ist Additional Sessions Judge, Sitamarhi by framing charge u/s 364(A) IPC in Sessions Trial No. 269 of 2005/28 of 2005. Out of the four accused, one Chunchun Chaudhary was acquitted of the charge by judgment dated 11.8.2005 whereas the three Appellants in the connected three appeals were found guilty of committing offence u/s 365 IPC and each of them was directed to suffer rigorous imprisonment for seven years by the order of sentence which was passed after hearing the Appellants u/s 235 Code of Criminal Procedure on 12.8.2005. In addition to the substantive sentence of imprisonment each of the Appellants was also directed to pay a fine of Rs. 2,000/-, else to suffer rigorous imprisonment for a period of one year. The Appellants have chosen to question their conviction and the sentences which were passed against them by the learned trial Judge.

2. Subhash Kumar, aged about ten years on 11.4.2004, was sent by his grandfather P.W. 4 Shyamjee Sah to realize Rs. 5/- only from the egg-seller as he had not returned the amount. He went there and after a few moments, his cries were heard which attracted his uncle P.w. 5 Dinesh Sah and his other family members to the scene of occurrence which was on the road and by the side of a Gumti

from which Appellant Naga Giri was selling betel. They were informed that two unknown persons had picked up the child, gagged him and after putting him on the motorcycle, sped away in a particular direction. The informant stated that one of the two accused was pointed out to be one Munnu Singh (neither arrested nor brought to justice).

3. P.W. 5 Dinesh Sah drove into the direction by a motorcycle in which the accused persons had taken away his nephew, but could not get any trace of the criminals or the child and, lastly, was informed by some persons that the above named accused Munnu Singh had been seen taking away the child by the motorcycle towards Bishunpur. A bus driver was requested but he also did not chase the criminals, forcing the informant to retreat to his house from where he telephonically informed the police about the incident.

4. It is stated in the FIR that the above named accused Munnu Singh was seen in some suspicious conditions loitering around the place suspicious conditions loitering around the place of occurrence and talking to Appellant Naga Giri by taking precautions not to be suspected for anything otherwise and it was on that account that in conspiracy with Appellant Naga Giri, the kidnapping of the child had been accomplished by Munnu Singh.

5. P.W. 9 S.I. Rajeev Chaudhary who was the officer-in-charge of Sheohar police station was the officer who had received the telephonic message about the kidnapping of the child by some criminals. He, accordingly, recorded the message into Station Diary of the police station and reached village-Madhavpur Anant at 7 P.M. where he recorded the fardbeyan Ext-1 of P.W. 9 Rajeev Chaudhary and took up the investigation himself. He recorded the statements of the witnesses besides inspecting the place of occurrence as well and conducted raids at various places suspected to be the hide-outs either of the criminals or places where the victim could be kept confined but without any success. Lastly, on 26.1.2004 he could pick up some secret information that Appellant Ludan Pandey @ Basant Pandey @ Lodan Pandey (Cr. Appeal No. 478 of 2005) had kept the victim child confined, as he was being seen moving in between Sitamarhi and Punaura and accordingly, P.W. 9 with some officers and constables, came to Sitamarhi. While he was proceeding towards the township of Sitamarhi at about 3.45 P.M. he was informed by Homeguard Lalbaboo Singh that Appellant Ludan Pandey @ Basant Pandey @ Lodan Pandey was sitting at a particular tea shop. The vehicle was stopped and Appellant Ludan Pandey was arrested. He was questioned by the police. During his questioning, the Appellant Ludan Pandey confessed to having kidnapped the child and gave further details including the description of the place where the victim Subhash Kumar(P.W. 11) had been kept confined. As per the information given to the police by Appellant Ludan Pandey, it was the house of Appellant Mandhaniya Devi where the victim could be found and, accordingly, after recording the confessional statement Ext-2 of Appellant Ludan Pandey, P.W. 9 along with some Punch witnesses came to the house of Appellant Mandhaniya Devi and on search, it was found that the boy aged about ten years was tied on

both of his legs and hands was put up on the bed of straws in a Jhopari. The boy was recovered and the memo in that behalf Ext-3 was prepared. It has been stated by P.W. 9 that the document Ext-3, recovery memo, was written at his direction by A.S.I. Surendra Paswan and he had put his signature over it (P.W. 9 paragraphs-23 and 24).

6. The victim was brought to the police station and his evidence was recorded there and on 28.1.2004 he was handed over to his family members who had been called to the police station after recovery of the child. P.W. 9 also arrested Naga Giri as his complicity had been revealed by the confessional statement of Appellant Ludan Pandey. During the course of investigation P.W. 9 recovered the blue colour motorcycle which was allegedly used by the criminals in committing the offence which was found somewhere near the house of acquitted accused Chunchun Chaudhary. Finding sufficient materials, the four accused persons were sent up for trial which ultimately resulted in the impugned judgment.

7. Sri Krishna Prasad Singh, learned Counsel appearing on behalf of the Appellants has taken me through the evidence of the witnesses specially those of the victim and the investigating officer in all details. It was contended that in his cross-examination in paragraph-29, the investigating officer of the case has admitted that he had not recorded the statement of the victim and prior to that in statement of the victim and prior to that in paragraph-6, he stated that he had arrested the accused persons on 26.1.2004 but could forward them only on 28.1.2004. The victim had never an opportunity of participating in the test identification parade for identifying the culprits as no test identification parade was organized and it was for the first time that the victim was identifying the Appellants in court but still he was not identifying the Appellant Naga Giri. It was contended that the evidence of identification for the first time in court could not have been sufficient to convict the Appellants and further to sentence them. It was contended next that the house from which the child was recovered was belonging to Mandhaniya Devi, there could not be any concrete evidence on that aspect of the case and simply because the victim was naming her, that too for the first time in court in some connection, her conviction was also not justified. Moreover, it does not appear from the evidence of the victim that she and Ludan Pandey had participated in commission of the main offence. It was, as such, contended that the Appellants deserve to be acquitted.

8. As against the above Sri Ajay Mishra, the learned A.P.P. for the State has submitted that there is specific role assigned by the victim of the offence to the two Appellants, namely, Ludan Pandey and Mandhaniya Devi as to in what connection they were identified by him. The victim has remained in the company of the accused persons for about 15 days and he had the opportunity of not only seeing them but watching them very closely as the accused persons were his nemesis and their features and their actions must have remained imbedded in his memory. It could have been a matter of only recalling the features and actions that he was identifying the Appellants in court. It is not the law, as was

contended that in all cases, the evidence of identification by organizing a test identification parade ought to be produced by the prosecution. If the court finds the evidence of identification inspiring confidence, then the evidence of identification in court which is also only admissible evidence which could be utilized in recording a conviction.

9. There does not appear any dispute in the fact that the victim Subhash Kumar aged about ten years on the 11th day of January, 2004 was picked up from the place which was the road when he had gone there to realize Rs. 5/- from an egg seller. Witnesses almost all, like, P.Ws. 4, 5 and 10 and the victim himself (P.W. 11) have stated as to how the victim was picked up by the accused persons so as to be taken away. Even three hostile witnesses, like, P.Ws. 1, 2 and 3 have stated that the cries of the child were heard and they were attracted to the place of occurrence and they came to know that P.W. 11 Subhash Kumar had been kidnapped. Thus, there is no dispute in the fact that Subhash Kumar was kidnapped and was taken away by some criminals. The act of kidnapping of the child was accomplished by two criminals by the use of a motorcycle. This also stands established even by the evidence of three hostile witnesses, like, P.Ws. 1, 2 and 3.

10. The evidence in this case is mainly of P.Ws. 9 and 11, i.e., the investigating officer and the victim of the occurrence. Evidence of P.W. 9. I have extracted while narrating the facts of the case by pointing out that while investigating the case he could pick up some secret information on 26.1.2004 that it could be Appellant Ludan Pandey who could have the child in his custody or who could have confined the child somewhere after kidnapping him. This was the lead upon which P.W. 9 was acting and that was connected with further information that Appellant connected with further information that Appellant Ludan Pandey was being seen moving in between Punaura and Sitamarhi township. Accordingly, the Dy. S.P. was heading the police force along with the investigating officer of the case and they were headed towards Sitamarhi when they found at a particular place Ludan Pandey. This all has been narrated in paragraph-5 of P.W. 9 and in paragraph-6 of his evidence. He has stated that on questioning of Ludan, the disclosure statement was made by the Appellant disclosing as to how the offence was committed and where the child had been confined. Ext-2 is the confessional statement of Appellant Ludan Pandey which was recorded by P.W. 9. All parts of the statements are not admissible except that part which leads to the discovery of the fact of concealment of the child. It is well-known that when a statement relates to the discovery of a fact that discovered fact includes not only the fact discovered but also the place which is connected with the discovery of that particular fact. Thus, the fact that P.W. 11 was confined in the house of Mandhaniya Devi was not the only fact admissible u/s 27 of the Evidence Act, but the place from where P.W. 11 was recovered as described by P.W. 9 in his evidence in paragraph-6 is also admissible u/s 27 of the Evidence Act.

11. The child was recovered and the state of the child has been narrated by P.W. 9. He has stated that hands and feet of the child were tied down and he had been put on a straws and the child was aged about ten years when he was examined as P.W. 11. He was stating the same facts as regards his confinement and recovery. He has very specifically stated that Ludan Pandey was the person who used to bring meals for him and it was Appellant Mandhaniya Devi, whose house it was, that she was serving meals to her and was also giving blankets to her.

12. Identification Parades are held not because the evidence on identification given by a witness in a court could not be admissible. The procedure is adopted only to test the claim of a person as regards identifying the culprits. It is simply a procedure to test his capabilities of remembering and retaining the features of culprit who could have been identified in different connection while committing the offence. The evidence on identification which is equally evidence on identification which is equally admissible is the evidence on identification of an accused in dock during the course of the trial and evidence of the witness. There could be cases which could never be equal on facts and circumstances. If a witness has remained in the captivity of his captors for quite some time his interaction with them or in a particular case, if the culprits had done acts of torture, illtreatment or other such things to the victim, there could not be less better occasions to such victims of noticing the features of his captures on account of the seriousness of their acts. They remain imbedded prominently in the memory of such witnesses and as and when occasion comes to identify and narrate the circumstances or the features, upon which the evidence of identification is founded, it could simply be a matter of recalling the whole facts that the witness could be relating the whole scene before a court. In a case of the present nature where a child of ten years was picked up the very acts of picking him up or gagging him for taking him away would have remained imbedded in the memory of the child. After being taken to a particular place so as to be confined the child must have been in utter dismay and trauma and must have watched the utter dismay and trauma and must have watched the persons who had traumatized by kidnapping and confining him and their features could have equally remained imbedded in his memory. The above are the reasons that P.W. 11 was pointing out specific role which were being played during the period of his wrongful confinement in the house of Appellant Mandhaniya Devi. This was the real admissible evidence coming from the most competent witness, like, P.W. 11 who had remained for 15 days or so in company of the two Appellants and as such, had all the basic reasons to relate as to what was done by each of the two on the above score. The evidence of identification has rendered by P.W. 11 to me as well appears quite profound and is acceptable.

13. So far as the evidence as against Naga Giri is concerned, save the evidence raising mere suspicion that he could have conspired in commission of the offence, there does not appear any substantial material to connect him with the main act of kidnapping the child or the subsequent act of wrongfully confining

him. The evidence which has come is the confessional statement part (Ext-2) against which is quite inadmissible and even the victim has not identified him in dock while deposing during trial as his kidnapper or confiner. In that view, his case appears to be a case in which he ought to have been given benefit of doubt and acquitted. Accordingly, Cr. Appeal No. 447 of 2005 succeeds. Appellant Naga Giri is acquitted after extending benefit of doubt to him and as a result of that, his conviction and sentence passed upon him is hereby set aside.

12. As regards appeals of Ludan Pandey @ Basant Pandey @ Lodan Pandey and Mandhaniya Devi, their appeals on account of clear evidence of their complicity fail and the two are dismissed.

13. It was contended, at this stage that Appellant Ludan Pandey @ Basant Pandey @ Lodan Pandey was aged about 23 years on the day of judgment and Mandhaniya Devi was merely a lady who had been handed over the custody of the child to be kept and maintained in her house and she was 60 years of age on the day of judgment. It was contended that the whole life of Ludan Pandey @ Basant Pandey @ Lodan Pandey was ahead of him and it was the solitary act which resulted in his conviction and if a lenient view was not taken, then he shall have no chance to reform himself. As regards Mandhaniya Devi, it was contended that lack of evidence on direct participation requires lack of evidence on direct participation requires taking a lenient view on sentencing her. The act of Mandhaniya Devi is only of wrongfully confining a person whom she might have known kidnapped or abducted. The prosecution does not have any case that she had in any way, participated in kidnapping of the child. In that view and considering her age, her sentence is reduced to rigorous imprisonment for five years. As regards the sentence which was inflicted upon Appellant Ludan Pandey @ Basant Pandey @ Lodan Pandey, considering the very prominent circumstance which often have been confronted in such class of cases that youths in their prime twenties, are indulging in such offences, out of the lure for money, this Court is not inclined to lessen the sentence inflicted upon Ludan Pandey @ Basant Pandey @ Lodan Pandey.

14. It appears from perusal of the record of two appeals that Naga Giri is on bail. He shall stand discharged from the liabilities of his bail bonds. As regards Appellant, Ludan Pandey @ Basant Pandey @ Lodan Pandey he is also on bail. His bond is hereby cancelled. He should surrender to serve out his sentences.

15. With the above modification in sentence as regards Appellant Mandhaniya Devi the two appeals are dismissed. If Mandhaniya Devi has not been released from custody, she shall be forthwith released from custody, if not wanted in any other case.