

Md. Khalil Vs. State of Bihar

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Court : Jharkhand

Decided On : May-15-2002

Reported in : 2002CriLJ4235

Judge : Vishnudeo Narayan, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 366 and 376; Code of Criminal Procedure (CrPC) - Sections 164

Appeal No. : Criminal Appeal No. 6 of 1996 (R)

Appellant : Md. Khalil

Respondent : State of Bihar

Advocate for Def. : J.P. Gupta, Adv.

Advocate for Pet/Ap. : Ananda Sen, Adv.

Disposition : Appeal allowed

Judgement :

Vishnudeo Narayan, J.

1. This appeal by the above named sole appellant is directed against the judgment and order dated 30-1-1996 passed by Shri G.K. Verma, 2nd Additional Sessions Judge, Jamshedpur in S.T. No. 387 of 1989 whereby the sole appellant was found

guilty for the offence punishable under Section 366, I.P.C. and he was convicted and sentenced to undergo R.I. for 5 years. However, the appellant was acquitted under Section 376, I.P.C. and co-accused-Md. Akhtar was also acquitted for the offence under Section 366, I.P.C.

2. The prosecution case has arisen on the basis of the written report of informant Anil Kumar Panda, the father of minor victim girl Anima Panda said to be aged about 14 years lodged before the Kadma P.S., Jamshedpur on 24-6-1988 at 9.00 hours regarding the occurrence which is said to have taken place on 20-6-1988 at Bhatia Basti P.S. Kadma, District Singhbhum. The prosecution case in short is that Kalyani Panda and Anima Panda, the wife and daughter respectively of the informant used to work as female labourer a year ago in the Gangotri Construction in village Bhatia Bastee and appellant-Md. Khalil used to work as a petty contractor for doing mosaic work in the said construction and he used to vex and tease Anima Panda and on getting information in respect thereof he disallowed his wife and daughter to work there as female labourer. It is alleged that on 20-6-1988 when the informant and his wife returned to his house he did not find Anima in his house. On enquiry, the informant came to know that appellant-Md. Khalil along with acquitted co-accused Md. Akhtar had kidnapped Anima Panda after inducing her. It is alleged that co-accused-Md. Akhtar lives with appellant-Md. Khalil and he worked as a mosaic mason in the said construction and the appellant and co-accused-Md. Akhtar once or twice had visited the house of the informant but seeing the informant, they had fled away. It is also alleged that Anima is aged about 14 years and she is a minor. It has also been alleged that delay in lodging the F.I.R. has been due to the time consumed in making enquiry and search about the whereabouts of Anima Panda.

3. The alleged victim girl Anima Panda during the course of investigation voluntarily returned to her parents house after three and half months of the occurrence in the company of one Gita and her statement under Section 164, Cr.P.C. was recorded by P.W. 1. The victim girl in her statement under Section 164, Cr.P.C. has stated that she was taken away by the appellant to Sonari, Bhalubasa, Patna and several other places and finally she was brought back to Jamshedpur and kept her at Bhalubasa, Kharangajhar and Jugsalai and during the

period of her stay at the aforesaid places the appellant has ravished her.

4. The appellant had pleaded not guilty to the charges levelled against him and he claimed himself to be innocent and have committed no offence and that he has been falsely implicated in this case at the instance of the informant, when the appellant had demanded for return of Rs. 1700/- advanced to the mother of the victim girl for the treatment of her father.

5. In course of trial, eight witnesses were examined by the prosecution to substantiate the charge levelled against the appellant. P.W. 2 is the informant in this case and the father of the victim girl. P.W. 3 is her mother. P.W. 4 Anima Panda is the alleged victim girl herself. P.W. 5 is the medical witness. P.W. 7 is the I.O. of this case. P.W. 1 is the Judicial Magistrate who had recorded the statement of victim girl under Section 164, Cr.P.C. P.W. 6 and P.W. 7 are formal witnesses of this case. Ext. 3 is the medical report of P.W. 5. Ext. 7 is the fardbeyan of this case.

6. In view of the oral and documentary evidence on the record the learned Court below found the appellant and co-accused-Md. Akhtar not guilty for the offence punishable under Sections 376 and 366 respectively. However, the appellant was found guilty for the offence punishable under Section 366, I.P.C. and convicted and sentenced as stated above.

7. Now the question arises for determination in this case is as to whether there is any illegality in the impugned judgment and order requiring an interference therein.

8. It has been submitted by the learned counsel for the appellant that P.W. 4 Anima Panda is not a minor girl on the date of occurrence and she was major and she has herself left her house voluntarily out of her free will and no case under Section 366 is at all made out against the appellant in the facts and circumstances of this case. It has also been contended that charge under Section 376, I.P.C. has not been substantiated against the appellant in view of the medical evidence which totally belied it coupled with the fact that P.W. 4 was a consenting party to the alleged sexual intercourse and in this view of the fact the very intent of alleged abduction that P.W. 4 shall be compelled or seduced to illicit intercourse or she will

be compelled to marry the appellant against her will stand totally falsified and not established in this case for finding the appellant guilty for the offence under Section 366, I.P.C. It has been further contended on behalf of the appellant that charge framed against the appellant is that he has abducted Anima Panda with intent that she may be compelled to marry against her will and that she may be forced to illicit intercourse and when this intention is not established by the prosecution, the charge under Section 366, I.P.C. against the appellant fails and conviction of the appellant under Section 366, I.P.C. is illegal. It has also been submitted by the learned counsel for the appellant that the charge framed against the appellant is conspicuously silent and absent regarding the alleged fact that P.W. 4 Anima Panda was taken away by the appellant from her house to Bhalubasa, Kharangajhar and Jugsalai and several other places and kept there for the purpose of sexual intercourse. It has also been submitted that the charge framed against the appellant itself suggests that P.W. 4 Anima Panda was not under 18 years of age on the date of occurrence as the word 'abducted' has been used in the charge as framed against the appellant. Elaborating further in respect thereof, it has been submitted that enticing any minor girl under 18 years of age out of her lawful guardianship amounts to kidnapping whereas a person by force or by any deceitful means induces any person to go from any place is stated to have abducted that person and in this case as per prosecution witness it is crystal clear that P.W. 4 Anima Panda who is major, above 18 years of age has out of her very sweet will and voluntarily had left her house and as such no case under Section 366, I.P.C. is at all made out against the appellant.

9. Learned A.P.P. has submitted that P.W. 4 Anima Panda was a minor below 18 years of age at the time of occurrence and she was induced to elope with the appellant with the intent that she may be compelled to marry the appellant against her will and she may be forced to illicit intercourse with him.

10. In view of the submissions aforesaid of the parties the crux of the matter is as to whether PW 4 Anima Panda was above 18 years of age on the alleged date of occurrence or not. The alleged date of occurrence is 20-6-1988. According to the averment made in the fardbeyan (Ext. 7) she is stated to be aged about 14 years. PW 1 has recorded his statement on 7-10-1988 under Section 164, Cr.P.C. in

which he has ascertained the age of Anima Panda aforesaid as 15 years. PW 4, Anima Panda has taken oath in this case on 13-11-1989 in which she has stated that she is either 15 or 16 years old and her age has been assessed by the Court as 17 years. PW 2 the informant and PW 3, the wife of the informant in their evidence on oath have not at all disclosed the age of PW 4 Anima Panda. PW 5, the medical witness has deposed in para 3 of his testimony that PW 4 Anima Panda was found to be above 17 and below 20 years of age. It appears from Ext. 3 that the medical witnesses has examined PW4 on 8-10-1988. The medical witness has furnished reasons in his deposition on the basis of which he has opined the age of PW 4 Anima Panda above 17 years and below 20 years. It has been settled by the Apex Court in the case of *Jaya Mala v. Home Secy. Govt. of Jammu and Kashmir* AIR 1982 SC 1297 : 1982 Cri LJ 1777, that it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. In the case of *Ram Deo Chauhan v. State of Assam* AIR 2001 SC 2231 : 2001 Cri LJ 2902 the Apex Court has held that the statement of the doctor is no more than an opinion. The Court has to base its conclusions upon all the facts and circumstances disclosed on examination of physical features of the person whose age is in question in conjunction of its oral testimony as may be available and X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can be no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. PW 5, the medical witness has deposed in the most clear and unequivocal terms that PW 4, Anima Panda is above 17 years but below 20 years on the date when she has been examined. In view of the principle of law enunciated in the case of *Jaya Mala* (supra) by the Apex Court the age assessed by the medical witness is variable by two years either side. Therefore, it can safely be held in view of the evidence discussed above that PW 4, Anima Panda was a major definitely above 18 years of age. 11. To constitute the offence under Section 366, I.P.C. the abduction must be with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will or that she may be forced or seduced to illicit intercourse. The second part of Section 366, I.P.C. provides that for abduction there must be criminal intimidation or abuse of authority or by

compulsion inducing any women to go from any place and such going must be with intent that she may be with knowledge that it is likely that she will be forced or seduced to illicit intercourse with some persons. The charge framed against the accused runs hereunder :

xxx xxx xxx xxx That on or about the 20th day of June, 1988 at Bhatia Basti, P.S. Kadma. District Singhbhum in furtherance of common intention of you and Md. Akhtar abducted Anima Panda with intent that she may be compelled to marry you against her will and that she may be forced to illicit intercourse and thereby committed an offence punishable under Section 366/34, I.P.C. and within my cognizance.

Secondly, that on or about the same day between 20th June, 1988 and 5th Oct. 1988 at Adityapur, P.S. Adityapur, District Singhbhum and in different places of Bihar committed rape on Anima Panda and thereby committed an offence punishable under Section 376 of the Indian Penal Code and within my cognizance.
xxx xxx xxx xxx

The charge framed against the appellant is in respect of the first part of Section 366, I.P.C. and no charge has been framed against the appellant in respect of the second part of the offence under Section 366, I.P.C. It is evident from the impugned judgment that allegation of illicit intercourse and charge framed under Section 376, I.P.C. against the appellant has not been established on the evidence on the record and the appellant has already been acquitted in respect thereof. It further appears that the learned Court below has come to a finding that the sexual intercourse appears to have been a consented one in the case. It is also relevant to mention here that PW 4 in para 2 of her evidence has deposed that 16 months prior to the occurrence she had been to the site of the work on a particular Sunday and Md. Khalil told her that there is no work here today and you may get work if you go to Ramnagar and on the pretext of Ramnagar appellant brought her to Adityapur wherein in the house of one Ratni the appellant has ravished her. In her evidence she has further stated that thereafter Md. Khalil brought her on his motorcycle and dropped her at Kadma Bazar but she has not stated this fact to her parents due to shame. This evidence of the informant has no relevancy in this

case. In view of the fact that even if the intention to abduct a woman in order to seduce her to illicit intercourse is present, the fact that the appellant has illicit intercourse with her before she was abducted is wholly immaterial. In view of the finding of the learned Court below in the impugned judgment that the alleged sexual intercourse is a consented one and acquittal of the appellant regarding the charge under Section 376, I.P.C. the very intention of abduction, as alleged and as stated in the charge, fails. By merely finding that the appellant abducted PW 4, Anima Panda, the charge under Section 366, I.P.C. cannot be held to have been proved and it is necessary to establish that Anima Panda was abducted for any of the purpose mentioned in Section 366, I.P.C. and in the absence of such a finding the charge cannot be said to have been established against the appellant. It further appears from the evidence of PW 4, Anima Panda that she was on intimate terms with the appellant and there were occasional meetings between them. PW 4 in para 6 has deposed that appellant has told her that what she will do in living in the house of her parents as they would not solemnise her marriage and she may accompany him. She has further deposed in para 7 of her evidence that on the day of occurrence she was at her house and the appellant came there and told her that he has arranged a house and there is no need to live in the house of her parents and he asked her to accompany him and took her with himself. She has further stated that thereafter she has gone with appellant and remained at several places for 31/2 months. It, therefore, appears from this evidence that no force has been used, no criminal intimidation was put on her and she was not compelled at all to accompany the appellant. She has further deposed in para 7 of her evidence that appellant sometimes does not stay with her during the period of her stay with him and he used to go out. The testimony of PW 4, Anima Panda clearly demolishes the allegation of her abduction. She has deposed in para 19 that she has consented to accompany the appellant on his request and she had a desire to get her married with the appellant. She has further deposed that she accompanied him on the motorcycle as a pillion rider and in course of sitting on the motorcycle she remained catching of the appellant. In para 20 she has deposed that wherever she lived it was a family quarter and she did not object regarding her stay in those quarters and at all those places she has been described as his wife and she used to live with him as husband and wife. She has further deposed that she has no

objection at all in living with the appellant at the aforesaid places. In para 22 of her evidence she has deposed that she did not think it necessary to inform her parents for going in the company of the appellant. She has deposed in the most clear and unequivocal terms in para 24 of her testimony that her parents were not willing and ready to solemnise her marriage with the appellant.

12. From the evidence referred to above it appears that PW 4, Anima Panda had a desire to get herself married with the appellant and for that she has left her house in the company of the appellant. In view of the evidence on the record she was major on the date of the occurrence and she has left her parents house voluntarily out of her free will. It further appears that PW 4, Anima Panda had gone out of her parents' house with the appellant willingly and without any exercise of compulsion or deceitful means on her and no charge under Section 366, I.P.C. can be said to have been established against the appellant. The learned Court below has failed to scrutinise and appreciate the evidence on the record in proper perspective and has, accordingly, erred in coming to the finding of the guilt of the appellant under Section 366, I.P.C. Therefore, the impugned Judgment suffers with illegality which requires an interference therein.

13. There is merit in the appeal and it succeeds. The appeal is hereby allowed. The impugned judgment and order is hereby set aside. The appellant is not found guilty for the offence punishable under Section 366, I.P.C. The appellant is hereby acquitted and he is discharged from the liability of his bail bond.