

Kuldeep K. Mahato

Vs

State of Bihar

Criminal Appeal No. 1181 of 1997

(G. T. Nanavati, S. P. Kurdukar JJ)

06.08.1998

JUDGMENT

KURDUKAR, J. –

1. Ishwari Mahato and Kuldip Kumar Mahato were tried for offences punishable under Sections 363, 366 and 376 IPC.
2. The trial court found that the evidence adduced by the prosecution could be safely accepted as truthful and accordingly by its judgment and order dated 7-6-1996 convicted Kuldip Mahato, the appellant for offences punishable under Sections 363, 366 and 376 IPC and sentenced him to suffer rigorous imprisonment for five years on the first two counts and seven years on the third count. The substantive sentences were ordered to run concurrently. However, Ishwari Mahato was convicted under Section 368 IPC and sentenced to suffer rigorous imprisonment for five years.
3. Aggrieved by the judgment and order or conviction, both the accused preferred an appeal to the High Court and the High Court its judgment and order dated 11-7-1997 allowed the appeal filed by Ishwari Mahato holding him not guilty and acquitted him of the said charge. The conviction and sentence of Kuldip Kumar Mahato for the offences punishable under Sections 363, 366 and 376 IPC was upheld. It is against these concurrent judgments passed by the courts below, the appellant, Kuldip Kumar Mahato has filed this appeal.
4. It is the case of the prosecution that on 11-2-1993 at about 1.00 p.m., Kiran Kumari, (PW 3), the prosecutrix was going to a bazar for purchasing bangles. Kuldip Kumar Mahato on seeing her, asked her as to where she was going. In the meantime, a tempo came from the opposite direction which was stopped by Kuldip Kumar Mahato, the appellant and he forcibly made the prosecutrix sit in the said tempo. After sitting in the tempo, Kuldip Kumar Mahato showed a knife to the prosecutrix and threatened her to keep quiet. It is then alleged that they got down at Ramgarh and stayed there till 12-2-1993. It is then alleged by the prosecution that during the night of 12-2-1993. Kuldip Kumar Mahato committed rape on her against her will. On 13-2-1993, the brother of Kuldip Kumar Mahato came to the said village and brought them back to Maraikhund. The appellant as well as the prosecutrix are residents of the same village and in fact, the house of the appellant is quite close to the house of the prosecutrix. Both were known to each other well.
5. Kiran Kumari, the prosecutrix narrated the incident to her father. Thereupon, a complaint was lodged on 14-2-1993, pursuant to which, offence came to be registered against the appellant and the acquitted accused for the aforesaid offences.

6. Kuldip Kumar Mahato denied the charge and claimed to be tried. We need not deal with the defence of Ishwari Mahato since he has been acquitted by the High Court. It is against this judgment and order of conviction passed by the High Court, the appellant after obtaining special leave has filed this criminal appeal.

7. The learned counsel for the appellant contended that Dr. Maya Shankar Thakur (PW 5) who examined the prosecutrix admitted during the cross-examination that her age might have been between 17 and 18 years at the time of the occurrence and if a margin of error of six months is taken into account, it must be held that the prosecutrix was above 18 on the date of occurrence. We are unable to accept this submission because Dr. Maya Shankar Thakur, (PW 2), had emphatically stated that the age of the prosecutrix was below 18 years on the date of the occurrence. Both the courts below found that the age of the prosecutrix was below 18 years. After going through the evidence of Dr. Maya Shankar Thakur (PW 5) and other material on record, we are of the opinion that this finding needs no interference.

8. Coming to the conviction of the appellant under Sections 363 and 366 IPC, it was contended on behalf of the appellant that the prosecutrix was a consenting party and she had accompanied the appellant of her own will and, therefore, the appellant cannot be convicted for the said offences.

9. As far as conviction under Section 366 is concerned, we find that the evidence of the prosecutrix in this behalf is not conclusive. Her evidence does not indicate that the appellant had kidnapped the prosecutrix with the intention to marry her against her will or in order that she may be forced to illicit intercourse. These two vital ingredients for upholding conviction under Section 366 are not proved and, therefore, the conviction of the appellant under Section 366 cannot be sustained.

10. Coming to the conviction under Section 363 IPC, in our opinion, having regard to the age of the prosecutrix on the date of the occurrence being below 18 years as deposed to by Dr. Maya Shankar Thakur, (PW 5), it will have to be held that the prosecutrix was a minor on the date of the occurrence. If this be so, we will have to examine whether Kiran Kumari (PW 1) was taken away from lawful guardianship. Kiran Kumari (PW 1) has stated that the appellant had forced her to sit in the tempo and thereafter at the point of a dagger, made her keep quiet. She was very much scared and lost her senses for some time. In the meantime, the tempo reached Ramgarh. On this issue, the defence of the appellant is that she herself came and sat in the tempo but the fact remains that the appellant carried her to Ramgarh out of lawful guardianship. There is no serious dispute that the prosecutrix was taken in a tempo to Ramgarh by the appellant. If this be so, then the offence of kidnapping under Section 363 is clearly made out against the appellant for which he has been rightly convicted for the said offence. There is no error in the judgments of the courts below in convicting the appellant under Section 363 IPC.

11. Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of the prosecutrix as being truthful that the appellant had forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of the neighbours from the said village. The medical evidence of Dr. Maya Shankar Thakur, PW 5 also indicates that there were no injuries on the person of the prosecutrix including her private parts. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the

result that her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant.

12. For the foregoing reasons, we partly allow the appeal. The conviction of the appellant for the offence punishable under Section 363 IPC is upheld. The conviction and sentence of the appellant under Sections 366 and 376 IPC recorded by the courts below are quashed and set aside and the appellant is acquitted of the said offences. The courts below have awarded sentence of five years' rigorous imprisonment for the offence punishable under Section 363 IPC. If the appellant had undergone the said sentence, he be released forthwith.

13. The appeal is partly allowed and disposed of in the above terms.