

Criminal Appeal (D.B.) No. 1837 of 2023
[arising out of Judgment of conviction dated 8th
September, 2023 and order of sentence dated
13th September, 2023 passed by the Additional
Session Judge-II, East Singhbhum at
Jamshedpur in Sessions Trial No.377 of 2012]

Bapi Namta @ Baapi Namta son of Sri Bimal Chandra Namta,
resident of Ram Krishna Colony, Near Payal Talkies, PO Olidih,
Mango, PS Olidih, Mango, Town Jamshedpur, District East
Singhbhum.

... **Appellant**

-versus-

The State of Jharkhand

... **Respondent**

For the Appellant : Mr. Indrajit Sinha, Advocate

For the Respondent : Mr. Pankaj Kumar, Spl.P.P.

PRESENT: SRI ANANDA SEN, J.
SRI SUBHASH CHAND, J.

J U D G M E N T

Per Ananda Sen, J. Today this appeal was listed for consideration of bail plea of the appellant after suspending the sentence.

2. Learned counsel appearing for the appellant argued the entire case on merits. He has taken this Court through the First Information Report, in details and also through the evidence of all the 7 (seven) witnesses and also the documents, which have been exhibited. He submits that from the evidence on record and from the materials no case under Section 364 of the Indian Penal Code is made out. He submits that the basic ingredients of Section 364 of the Indian Penal Code, i.e., “kidnapping” or “abduction” is missing in this case. Thus, even if the deceased was murdered later, the offence of Section 364 of the Indian Penal Code cannot be attracted. He submits that the instant Sessions Trial No.377 of 2012 was only under Section 364 of the Indian Penal Code and case under Section 302 has been initiated in the State of West Bengal where the body was found. On this ground, he prays for bail.

3. Learned A.P.P. for the State admits that this trial is only under Section 364 of the Indian Penal Code and the case under Section 302 of the Indian Penal Code is being tried in the other State, i.e., West Bengal where the body was found, being Bara Bazar Police Station Case No.52 of 2012.

4. Considering the arguments of the appellant and the State, wherein they have argued each and every point and taken us through all the evidence, we feel that the entire appeal can be heard finally at this stage.

Further, this appeal has already been admitted for final hearing and the Trial Court Record is already with us and both the State and the Appellant have submitted that they are well equipped with all the documents including the depositions and other materials and they are ready to assist this Court for final hearing.

5. Considering the aforesaid fact, we have taken up this case for final hearing and thus, we are proceeding accordingly.

6. The appellant has preferred this appeal against the judgment of conviction dated 8th September, 2023 and order of sentence dated 13.09.2023 passed by the Additional Session Judge-II, East Singhbhum at Jamshedpur in Sessions Trial No.377 of 2012, whereby the appellant has been convicted for offence punishable under Section 364 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for 10 (ten) years and fine of Rs.50,000/- and in default of payment of fine to undergo further rigorous imprisonment of 01 (one) year.

7. Learned counsel for the appellant submits that the only material to convict this appellant under Section 364 of the Indian Penal Code is that two witnesses had stated that they had seen the deceased along with another in a three wheeler (auto rickshaw / tempo), which was being driven by this appellant. He argues that even if this statement has any evidentiary value, though he denies, in view of the evidence of the investigating officer, this cannot be taken to be a sufficient evidence to convict the appellant under Section 364 of the Indian Penal Code. He submits that the Investigating Officer has given a categorical statement before the Court that none of the witnesses had disclosed before him during investigation that they had seen the deceased in a tempo, which was being driven by this appellant. As per him, in view of the statement of the Investigating Officer, the evidence of witnesses, who had made the statement that they had seen the appellant with the deceased gets demolished. He argues that save and except the aforesaid material, there is no other material to convict the appellant under Section 364 of the Code of Criminal Procedure. He lastly submits that admittedly, the appellant in this case, has not been tried and convicted under Sections 302/201/34 of the Indian Penal Code.

8. Learned A.P.P. for the State submits that two witnesses have categorically stated that they had seen the appellant in company of the deceased and they were in the same tempo. Later on the dead body was

found admittedly in the State of West Bengal, for which a case under Section 302 of the Indian Penal Code was initiated in West Bengal.

9. We have already gone through the records and have gone through the entire evidence.

10. Mahadeb Dey (P.W.2), in his fardbeyan, as informant, has stated that in forenoon of 25.05.2012, his son Sumit Dey left his house with his three wheeler (tempo) bearing registration No. JH 05AF 3164, but he did not return. He gave the information to the police station. Thereafter he searched for his son when he could come to know that tempo of his son was parked in a place within the jurisdiction of Ulidih Outpost within Chandil jurisdiction. He then went to the place where the tempo was lying and found the tempo on which mobile number of his son was written. He found that attempt was made to deface the registration number and the phone number, which was printed. He further mentions that he could come to know that Bapi (appellant) and Sunil and other two were seen going in the tempo of this deceased. He believes that to commit murder of his son they kidnapped him.

11. On the basis of the aforesaid written information, Mango (Olidih) Police Station Case No. 188 of 2012 was registered under Section 364/34 of the Indian Penal Code against Bapi, Sunil and two others.

12. Police took up the investigation and thereafter, on conclusion of the investigation, filed chargesheet under Section 364/302/201/34 of the Indian Penal Code. After commitment, the Trial Court only framed charge under Section 364 of the Indian Penal Code on 4th December, 2013.

13. From the records, we find that admittedly, no dead body was found within the State of Jharkhand, far less within the jurisdiction of the Trial Court. Admittedly, the dead body was found within the jurisdiction of Bara Bazar Police Station, West Bengal for which Bara Bazar Police Station Case No.52 of 2012 was instituted at the instance of one Amit Dey under Sections 302/201/34 of the Indian Penal Code against Sunil, this appellant and against 3 or 4 unknown. Thus, the Trial Court proceeded to try the appellant only under Section 364 of the Indian Penal Code as per the Fardbeyan.

14. In order to prove the charge under Section 364 of the Indian Penal Code, 7 (seven) witnesses were examined, namely, Amit Dey (P.W.1), the informant Mahadev Dey (P.W.2), Deepak Majumdar (P.W.3), Swapan Sarkar (P.W.4), Deepak Kumar Sah (P.W.5), Ashish Majumdar (P.W.6) and the Investigating Officer Sameer Singh (P.W.7).

15. P.W.1 is brother of the victim and is also a tempo driver. He stated in his evidence that his brother, on 25.04.2012, left his house with the tempo, but did not return. The tempo was found in a secluded place near Galudih. He further stated that on 25.04.2012, Bapi Namata and Sunil Kushwaha were seen travelling in the tempo of his brother. He stated that Bapi and Sunil were also not found and they were friends of his brother.

In cross examination, he stated that the deceased used to leave his house at 08.00 / 08.30 a.m. and used to return in the evening by 07.00 p.m. He stated that when the deceased did not return, so he requested his father to inform the police. He stated that the police had recorded his statement on 27th. In paragraph 26, he stated that he has informed the police that this appellant and Sunil were seen travelling in the tempo of his brother. Nothing more could be extracted from his statement.

P.W.2 is Mahadev Dey, who is the informant of this case. He stated that his son used to earn his livelihood by plying tempo. He stated that his son went out with the tempo, but did not return. He further stated that Bapi and Sunil were also found missing from their house when he went to their house in search of his son. He stated that Bapi was apprehended by the police and he confessed that the deceased was murdered and he further stated that at Dimna Chowk, when police apprehended Bapi, Bapi confessed that he committed murder of the deceased and his dead body was thrown in West Bengal. The First Information Report which was lodged by him was marked as Exhibit 1. He also stated that in the tempo of the deceased, Bapi and Sunil were seen traveling. In cross examination he did not say anything much.

P.W.3 is one Deepak Mazumdar. He stated that he was standing near Dimna Chowk, when police caught Bapi and Bapi confessed that he committed murder of the deceased. In cross examination also nothing important was recorded.

P.W.4 is one Swapan Sarkar. He stated that when he was standing beside the road in his village, he saw the deceased driving his tempo. On query, he stated that his tempo has been hired and he is going to Bara Bazar. He stated that he saw two persons sitting in the tempo. He further stated that on the next day he could come to know that Sumit is missing. He further stated that Bapi was arrested and Bapi confessed that they had committed murder of Sumit. He identified Bapi and Sumit, stating that in the tempo these two persons were sitting when he saw them. He further stated

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that in the police station, the appellant has stated that due to some love affair, entire incident had taken place. In cross examination, he stated that Bapi was confined in the police station. In cross examination in paragraph 10, he admits that whatever he said in Court as a witness, he had not narrated the same to the police.

P.W.5 is Deepak Kumar Sah. He is the signatory to the seizure of the tempo. He has identified his signature, which was marked as Exhibit 2.

P.W.6 is Satish Mazumdar. He is also a signatory to the seizure of the tempo. His signature was marked as Exhibit 2/1. In Court, he identified the tempo which was Material Exhibit 1.

P.W.7 is the Investigating Officer. He stated about lodging of the First Information Report and details of the investigation. He stated about recovery of tempo and also the fact of apprehending the appellant. He also stated that he had gone to Bara Bazar Police Station and from there he could gather that after recovery of a dead body near the forest, Bara Bazar Police Station Case No. 52 of 2012 was instituted under Section 302/34 of the Indian Penal Code and Sections 201/34 of the Indian Penal Code on 27.04.2012. He also stated that he had taken this appellant to the place of occurrence where the dead body was found. He stated that he had recorded the statement of witnesses. In paragraph 24 of his cross examination, he specifically stated that none of the witnesses had stated before him that they had seen Bapi Namata and Sunil traveling in the tempo of the deceased.

16. After closure of the evidence, the statement of this appellant was recorded under Section 313 of the Code of Criminal Procedure. The appellant did not chose to adduce any evidence in his defence.

17. The Trial Court, after hearing the arguments of the parties and after going through the evidence, by a judgment of conviction dated 8th September, 2023 and order of sentence dated 13th September, 2023 convicted the appellant for committing offence under Section 364 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for 10 (ten) years and fine of Rs.50,000/- and in default of payment of fine to undergo further rigorous imprisonment of 01 (one) year.

18. Challenging the aforesaid conviction and sentence, the appellant has preferred this appeal.

19. We have gone through the evidence and the entire records.

20. As mentioned earlier, the case is only under Section 364 of the Indian Penal Code. Section 364 of the Indian Penal Code reads as follows: -

364. Kidnapping or abducting in order to murder. – Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

21. From the aforesaid Section, it is quite clear that there has to be an element of kidnapping or abduction of any person to attract Section 364 Indian Penal Code. The word “kidnapping” is defined under Section 359 of the Indian Penal Code, which reads as follows: -

359. Kidnapping. – Kidnapping is of two kinds: kidnapping from India and kidnapping from lawful guardianship.

22. From the aforesaid provision, kidnapping is of two types. The first one being kidnapping from India and the second, kidnapping from lawful guardianship. Kidnapping from India is defined in Section 360 of the Indian Penal Code and kidnapping from lawful guardianship is defined in Section 361 of the Indian Penal Code. Sections 360 and 361 of the Indian Penal Code read as under: -

360. Kidnapping from India. – Whoever conveys any person beyond the limits of India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from India.

361. Kidnapping from lawful guardianship. – Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

23. There is no application of Section 360 of the Indian Penal Code in the present case, as it is not a case that any one was kidnapped from India.

In the instant case, deceased was not a minor and was above 18 years and of sound mind, thus, this is not a case of kidnapping from lawful guardianship. Thus, Section 361 of the Indian Penal Code also has got no application.

24. The word 'abduction' is defined in Section 362 of the Indian Penal Code, which reads as follows: -

362. Abduction. – *Whoever by force, compels, or by any deceitful means, induces, any person to go from any place, is said to abduct that person.*

25. From the definition of the word "abduction" in Section 362 of the Indian Penal Code it is clear that there has to be an element of force, compulsion or deceitful means or any inducement, which would directly or indirectly force a person to go with the abductors. Thus, if any force is applied upon a person or a deceitful mean is resorted to, which compels a person to go from any place to another, it will be termed as "abduction".

26. In this case the allegation is that the deceased was abducted by this appellant and another person. Thus to come within the definition of "abduction" and to establish the case of the prosecution, the prosecution has to prove that there was application of force, which compelled the deceased to move from one place to another, or by any deceitful means and by some inducement he was compelled to move from one place to another or under some compulsion he was forced to move from one place to another. We do not find any material from the oral evidence led by the prosecution that there was any deceitful mean or inducement by this appellant, which forced or compelled the deceased to move from one place to another. Further, we do not find from evidence of witnesses that any force was applied by this appellant, which forced the deceased to move from one place to another. The only material in this case is that witnesses, P.W.1, P.W. 2, P.W.3 and P.W.4 have stated that the deceased was driving the tempo and this appellant and another were sitting in the said tempo. None of the witnesses have whispered about any force being applied, which compelled the deceased to move from one place to another. Further, there is no evidence, which would suggest that by any deceitful means the deceased was forced to move from one place to another. In absence of any evidence, which could suggest that force was applied or any deceitful means was adopted, basic ingredients of the definition of "abduction" as envisaged in Section 362 of the Indian Penal Code is not attracted. When the basic ingredients are not attracted, an accused cannot be convicted of offence under Section 364 of the Indian Penal Code.

27. Further, we find that the investigating officer has categorically stated in paragraph 24 of his evidence, in cross examination, that during investigation, none of the witnesses had stated before him that they had seen

this appellant as a passenger in the tempo which was being driven by the deceased. This statement is thus, fatal for the prosecution. This statement clearly suggests that for the first time before the Court, these witnesses have stated that they had seen the deceased driving the tempo in which this appellant and another were sitting. This is a major development in the prosecution case, which has been done for the first time while deposing in Court. Thus, this statement is not believable.

28. So far as arrest and confessional statement of the appellant is concerned, the same has got no evidentiary value, as admittedly, the said statement was given by the appellant when he was in custody of the police. The aforesaid statement, thus, cannot be looked into.

29. Considering what has been discussed above, we find that basic ingredients of “kidnapping” and “abduction” are missing in this case. When the basic ingredients and components are missing, there cannot be conviction under Section 364 of the Indian Penal Code. The Trial Court, thus, has wrongly convicted the appellant under Section 364 of the Indian Penal Code in absence of the basic ingredients. Thus, we have no other option than to set aside the impugned judgment of conviction and order of sentence and acquit the appellant from the charges. The impugned judgment of conviction dated 8th September, 2023 and order of sentence dated 13th September, 2023 passed by the Additional Session Judge-II, East Singhbhum at Jamshedpur in Sessions Trial No.377 of 2012 are, accordingly, set aside. This appeal stands allowed. The appellant be released forthwith, if not wanted in any other case. Pending interlocutory applications, if any, excluding I.A. No. 1337 of 2024 stand disposed of.

30. Let the Trial Court Records be transmitted to the Court concerned along with a copy of this judgment.

I.A. No. 1337 of 2024

31. This interlocutory application has been filed, praying for suspension of sentence and releasing the appellant on bail.

32. When the facts of the case, which are gathered from the evidence and materials on record suggest, so far as this appellant is concerned, the case is of acquittal, then we feel for the interest of justice, it would not be proper to suspend the sentence and release him on bail and keep this appeal pending for hearing for a decade.

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33. A litigant should get what he deserves. When he deserves acquittal, he should be acquitted. Granting him bail after suspending the sentence, which is, in fact, interim in nature, is not the relief, which he is entitled. This is one of such case, where the case is of acquittal, thus, we have already acquitted the appellant by our judgment, considering all the materials hereinbefore.

34. Since, we have already acquitted the appellant, this interlocutory application has lost its force. Thus, this interlocutory application (I.A. No.1337 of 2024) is dismissed as infructuous.

(Ananda Sen, J.)

(Subhash Chand, J.)

High Court of Jharkhand, Ranchi
Dated, the 9th April, 2024
Kumar/Cp-03