

Neutral Citation No.-2023:AHC:237386

Judgment reserve on 01.11.2023

Judgment delivered on 15.12.2023

In Chamber

Case :- CRIMINAL APPEAL No. - 2988 of 2011

Appellant :- Raju Musalman

Respondent :- State of U.P.

Counsel for Appellant :- B.R.J. Pandey, Arun K. Singh-I, Indrajeet Kumar Shukla, Noor Mohammad, Raja Ram Kushwaha, Santosh Kumar Giri

Counsel for Respondent :- Govt. Advocate

Hon'ble Ram Manohar Narayan Mishra, J.

1. The instant Criminal Appeal has been preferred by the accused appellant against judgment and order dated 29.04.2011 passed by learned Special Judge (SC/ST Act), Mirzapur in S.T. No.146 of 2008 State Vs. Raju Musalman, arising out of Case Crime No.111 of 2008 under Sections 363, 366, 376 of IPC, Section 3(1)(2) of SC/ST Act, Police Station Lalganj, District Mirzapur. By the impugned judgment and order learned Special Judge convicted the appellant/accused for charge under Section 363, 366 and 376 IPC and Section 3(1)(2) of SC/ST (PA) Act and sentenced him to five years rigorous imprisonment alongwith fine of Rs.500 for charge under section 363 IPC, seven years rigorous imprisonment alongwith fine of Rs.1,000/- for charge under section 366 IPC, ten years rigorous imprisonment alongwith fine of Rs.2,000/- for charge under section 376 IPC and one year rigorous imprisonment alongwith fine of Rs.1,000/- for charge section 3(1)(2) of SC/ST Act the sentence and fine is coupled with default stipulation.

2. Heard Sri Indrajeet Kumar Shukla, learned counsel for the appellant and Sri Yogendra Singh, learned A.G.A. for the State and perused the material available on record.

3. Learned counsel for the appellant submitted that accused has already been released from jail custody after serving out the sentence awarded in the impugned judgment.

4. The factual matrix of the case in brief are that FIR in the present case was lodged at the instance of Ram Narain on 27.02.2008 at 18:45 hours on the basis of written report produced by him before Superintendent of Police, Mirzapur dated 18.02.2008 stating that he belonged to Schedule Caste (Dharikar), his sister aged about 13 years was studying in Class VIIth. She went to school on 29.11.2007 and got missing from the school. He made search of her and on 01.12.2007, he came to know in the village Dighuli, Police Station Lalganj, District Mirzapur that Raju Musalmaan son of Bhagnu Musalmaan (muslim by caste) has enticed away his minor sister and took her to his home and stayed with her overnight there, and thereafter he escaped from his place alongwith victim girl. The whole family of Raju Musalmaan was hand in glove with Raju in kidnapping of his minor sister. Father of informant filed written information in this regard on 01.12.2007 and 15.12.2007 at Police Station Lalganj as well as Reporting Chowki (OP) Baraundha, but the report was not lodged; his daughter took away Rs.10,000 cash and ornaments of her mother alongwith her. The accused Raju Musalmaan has confined her minor daughter in his home. The FIR was lodged under Section 363, 366 and 376 IPC and Section 3(1)(12) of SC/ST (PA) Act, at Police Station concerned.

5. Sri R.V.Rai, Circle Officer PW7 who has conducted the investigation of the case. According to the statement of the witnesses the victim was recovered after after lodging of FIR. The Investigating Officer collected school leaving certificate of the victim of Class Vth in which her aged is mentioned as 10.03.1995. She left school on 30.06.2005 after clearance of Class Vth examination and same date of birth was mentioned in the scholar register also. Thus, according to her

date of birth mentioned in academic record she was found to be aged about 12 years 8 months and 9 days on the date of incident. The victim escaped from the house of the accused after 2 to 2 ½ months of kidnapping. The Investigating Officer recorded her statement under Section 161 Cr.P.C. in which she has stated that accused Raju Musalmaan is her neighbour, he took her away 2 ½ to 3 months ago from her home by enticing her on the pretext of marriage; in the evening of that day he took her to his home from there he had taken her to Mirzapur via Barautha and both are resided in a rented house there. He committed filthy act with her in the night, the people in neighbourhood could not know his misdeeds, he used to sleep with her in the night and would go to Mirjapur City in the day for stitching work, she cooked food in the morning and both of them used to dine together, after some time Raju Musalmaan took her to his relative home, where his mother and sister resided. She escaped from home of Raju Musalmaan after getting opportunity and went to her parental place.

6. Medical examination of the victim was conducted in District Women Hospital at Mirzapur on 07.03.2008, wherein the doctor has opined that as per radiological examination her age is more than 16 years and less than 17 years. According to the opinion of lady doctor the vagina of victim admitting two fingers, no cut, tear or marks of injury was found, no bleeding was present on the date and time of examination dated 29.02.2008. The vaginal sperm was prepared and sent for pathological report, no live or dead spermatozoa were found. According to ultrasound report sack of 24mm gestation was found, however embryo was not formed, heart beat of foetus was not detected.

7. The Investigating Officer filed chargesheet after investigation against appellant in aforesaid sections in the court with prayer to prosecute the appellant for said charges. Learned trial judge and learned

Special Judge framed charges under Section 363, 366 and 376 IPC and Section 3(1)(12) of SC/ST (PA) Act, the accused denied the charges framed and claimed to be innocent. The prosecution examined PW1 Sarita (victim), PW2 (Ram Narain informant), PW3 Dr. Sumanlata Agarwal, PW4 Dr. D Dwivedi, PW5 Constable Pradyumn Singh, PW6 Doodh Nath (Head Master Primary School Badgada Haliya) and PW7 R.V.Rai Circle Office, Police (Investigating Officer). The trial court recorded statements of the appellants under Section 313 Cr.P.C., in which he stated that the witnesses of fact have wrongly deposed against him. The prosecution story is falsely created due to enmity, he did no offending act. His tailoring shop was situated in the house of informant, the girl was pregnant, her father exerted pressure on him to marry his daughter and when he declined to marry her, the father of victim got a false case registered against him, no defence evidence was adduced.

8. The learned trial court heard submissions of learned counsel for the accused and learned ADC (criminal) appearing for the prosecution and on appreciation of the evidence gave a finding that accused enticed away the victim girl who was minor at the time of incident, took her away from lawful guardianship of her father with intent that she may be compelled to marry the accused against her will or in order that she may be forced or seduced to intercourse.

9. Learned trial court also observed that the informant and victim belonged to scheduled caste (Dharikar). The accused who is Muslim by religion did not come within definition of scheduled caste. She had opened a tailoring shop in the vicinity of informant. He seduced, enticed away and kidnapped minor daughter of the informant knowing that she belongs to scheduled caste. The accused committed sexual intercourse with minor girl during the period of her kidnapping, thus offence under Section 363, 366 and 376 IPC and Section 3(1)(12) of

SC/ST (PA) Act are proved against the accused. The learned trial court accordingly convicted and sentenced the accused appellant as aforesaid.

10. Feeling aggrieved by the impugned judgment and order, the appellant preferred present criminal appeal under Section 374(2) Cr.P.C before this Court in the year 2011. The accused was enlarged on bail during trial, but he was taken into custody after his conviction recorded by the trial court in impugned judgment on 29.04.2011, a report has been received in present appeal from Superintendent District Judge, Mirzapur on 08.06.2022 in present appeal, wherein it is stated that victim Raju Musalmaan son of Bhaganu Musalmaan convicted and sentenced in S.T. No.146 of 2008 by Special Judge POCSO Act, in judgment dated 29.04.2011 was released from jail custody on 17.03.2018 after undergoing complete sentence of imprisonment and depositing fine of Rs.4,500/-, through Treasury Challan.

11. Learned counsel for the appellant submitted that the finding of guilt recorded by learned trial court for aforesaid offences against the appellant is perverse and liable to be set-aside. The FIR in the case was lodged after three months of the incident, which gives ample scope for embellishment, concoction and afterthought in prosecution version. The accused appellant was falsely implicated in the case, as accused was working in the house of informant and doing work of weaving and sewing and during that period the victim got pregnant due to illicit relationship with some other person. Her father forced him to contract marriage with the victim, which transpires from evidence of PW1. The accused/appellant was having no relationship with the victim prior to the incident of alleged kidnapping. The witnesses of facts are closely associated and no independent witness has been examined during trial in support of prosecution case.

12. The trial court misappreciated the evidence on record and wrongly convicted and sentenced the appellant contrary to the established principles of appreciation of evidence in criminal trial.

13. Per contra, learned A.G.A. submitted that from evidence on record this fact is established that victim was minor at the time of incident according to school records, her age was found as 12 years and some months and even in her medical age which was ascertained after three months of the incident being more than 16 years and less than 17 years, which is based on physical appearance and radiological examination of the victim. This is established law that consent of minor for sexual intercourse is not a consent in the eye of law as per definition of rape given under Section 375 I.P.C.

14. By the evidence of victim as well as other witnesses, this fact has been proved beyond doubt that accused/appellants enticed away the victim and kidnapped her from lawful guardianship who was a minor and kept her with him for more than 2 ½ months. She was having signs of pregnancy at the time of his medical and ultrasound examination as appeared from evidence of doctor during trial. There is no factual or legal error in the impugned judgment, appeal is devoid of merit. He lastly submitted that the appellant is already released from jail custody after undergoing sentence awarded in the impugned judgment and appeal deserves to be dismissed.

15. I have gone through the statements of witnesses recorded during trial. PW1 is victim who stated in her evidence that the incident occurred on 29.11.2007 and she was studying in Subhash Chandary Chowdhary, Inter College in Class 7th, at that time she was around 12 years of age. Accused Raju Musalmaan is present in the court who was living beside her house by erecting a thatchet, he used to do sewing work in said enclosure, he seduced and kidnapped her from school on

the pretext of solemnizing marriage with her, she accompanied her believing his assurance to be true. He took her to Mirzapur from her home and kept her in the house of the relative from 2 ½ to 3 months, he used to commit filthy act with her during that period against her will and forcefully he used to do such act regularly in the night. When he went out side of the said house he would confine her in the room and locked her. He would also frighten her by brandishing a knife, people in neighbourhood would also threaten her and warn her to keep mum. The accused took her to his home after 2 ½ to 3 months from where she was recovered by police, as her family members had lodged an FIR against the accused. She got pregnant due to frequent rape committed by accused, which miscarriage. She was not married, she belonged to schedule caste (Dharikar).

16. In cross-examination PW1 stated that when Raju Musalmaan took her away, no other person met them on way when she reached her home back, she was pregnant of 2 ½ to 3 months. He kidnapped her in the night around 7 to 8 pm and her parents were not present in the house in the said night, he assured that she would marry her she walked on foot with the accused when she left her home. The foetus got miscarried suomotu; this was of Raju Musalman. The accused did not make physical relationship with her prior to her kidnapping on said date. She denied defence suggestion in cross examination that due to her getting pregnant, her parents got her eloped with Raju Musalman, she also stated that at the time when she went with Raju Musalmaan she was around 13 years of age. She also stated that during cross examination she is presently married and pregnant.

17. PW2 Ram Narain informant and brother of the victim has proved written report as Ext. Ka1 which is basis of lodging of FIR during his evidence, he was not present on the date of incident. He immediately rushed back to his home on getting information from his wife

telephonically. He visited home of accused in the evening, but these people had escaped therefrom.

18. PW3 Dr. Sunita Agarwal has proved medico legal examination of the victim and stated in her evidence that there is no mark of injury was found, neither any external or internal injury was found on the person of the victim, not cut, laceration or mark of injury was found in her private parts, uterine was soft and enlarged, she appeared to be pregnant.

19. PW7 Investigating Officer who has proved site plan and chargesheet as Ext. Ka 10 and 11 during his evidence before the court.

20. From perusal of the evidence on record, I find no factual or legal error in finding of court below that victim was minor at the time of incident. The accused enticed and seduced her to accompany him on the pretext of marriage, on the date and time of incident she was confined in house in Mirzapur. She was kept in a house in Mirzapur by the accused for 2 ½ to 3 months, where he used to establish physical relationship with her in the night. The victim appeared pregnant when she came back to her home from company of the accused. The consent of a minor victim of sexual offence is no consent under eyes of law. The accused was well known of the fact that victim belonged to scheduled caste; the victim has stated on oath that accused kidnapped her from home on the pretext of solemnizing marriage with her and subjected her to illicit sexual intercourse for a period of more than 2 ½ months frequently by keeping her in a room at Mirzapur. Therefore, on the strength of evidence on record, the conviction and sentence recorded by the court below is liable to be affirmed.

21. The appeal is devoid of merit and deserves to be dismissed. Criminal Appeal is **dismissed**. The impugned judgment and order

passed by the learned court below in S.T. No.146 of 2008 vide impugned judgment and order dated 29.04.2011 is affirmed.

22. The appellant has already undergone since awarded in impugned judgment, as per report of Superintendent District Judge, he need not surrender.

23. Let a certified copy of this judgment be forwarded to trial court for necessary action alongwith lower court record.

Order Date :- 15.12.2023

Ashish/-