

Neutral Citation No. - 2023:AHC-LKO:81350-DB

**High Court of Judicature at Allahabad
(Lucknow)**

Reserved on:27.10.2023

Delivered on:12.12.2023

Court No. - 9

Case :- CRIMINAL APPEAL No. - 184 of 2019

Appellant :- Kusuma

Respondent :- State Of U.P. And Anr.

Counsel for Appellant :- Diwakar Pratap Pandey

**Counsel for Respondent :- Govt. Advocate, Anil Kumar
Tiwari, Sujeet Kumar Sahu**

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per : Rajan Roy, J.)

1. Heard Shri Diwakar Pratap Pandey, learned counsel for the appellant, Shri Anil Kumar Tiwari, learned counsel for the private respondent and Shri Sanjay Kumar, learned A.G.A. for the State.

2. This is an appeal by the victim under Section 372 Cr.P.C. challenging the judgment and order dated 12.10.2018 passed by Additional Session Judge/ F.T.C.- Ist, Faizabad in Sessions Trial No. 428 of 2016 arising out of Case Crime No. 396 of 2016 lodged at Police Station - Rudauli, District- Faizabad by which Court below has acquitted the respondent no 2 of the charge under Section 376/366/506 IPC.

3. The prosecution case in nutshell is that on 15.09.2016 at about 04.00 p.m. the respondent no. 2- Gaya Prasad enticed and took away the minor daughter of the informant. The victim had taken some jewellery along with her. An F.I.R. was lodged in this regard on 21.09.2016 at 06.30 p.m. bearing Case Crime No. 396 of 2016, under Section 363, 366 IPC. The girl was recovered and her statement under Section 164 Cr.P.C was recorded. She was also medically examined. Based on the evidence collected a charge sheet was filed under Section 366, 376 and 506 IPC against Gaya Prasad. The trial Court framed charges as the accused denied the same and was put to trial.

4. The trial Court ultimately acquitted the respondent no. 2 on the ground that the victim was major on the date of incident and she had gone away with the accused of her own free will.

5. Before proceeding further it is necessary to mention that during the course of hearing it transpired that the trial Court while acquitting the respondent no. 2 had taken into consideration Paper No. 17अ/12, which is on record and which was a medical examination report pertaining to the victim regarding determination of her age, however, this document was not proved. Consequently, it was not exhibited before the trial Court, yet, the trial Court had relied upon it. As, we found it to be material to the trial and ultimate determination as to the guilt of the respondent no 2 and as, it was already on record, therefore, we summoned Dr. Pramod Kumar, the then Chief Medical Officer, Faizabad who had signed the said report as a witness in exercise of our power under Section 311 Cr.P.C., as, the appellate Court has the same powers as the trial Court in this regard for just and effective rendering of justice. The said Officer appeared before the Court on 20.09.2023 and we recorded his testimony as CW-1 with an opportunity to respondent no. 2 counsel to cross-examine.

6. On 20.09.2023 we passed the following order:-

"Vide our order dated 11.08.2023, we had summoned Dr. Pramod Kumar, the then Chief Medical Officer, Faizabad, as court witness for the reason that while perusing records of the learned trial court, we found that paper No.077/12 regarding determination of age of the victim was not exhibited by the learned trial court.

Pursuant to our aforesaid order dated 11.08.2023, today, Dr. Pramod Kumar has appeared in person, who has been identified by Sri Umesh Chandra Verma, learned A.G.A.

The statement of Dr. Pramod Kumar has been recorded by this Court in open Court as C.W.-1, who has proved the report regarding determination of age of victim, paper No.077/12, which has been exhibited as Ex. Ka-10. He has been cross examined by counsel for the appellant.

List/ put up this case on 05.10.2023. "

7. In view of the aforesaid background, we now proceed to consider the appeal.

8. Only contention raised by the appellant's counsel before us was that ingredients of Section 366 IPC were made out and therefore, acquittal by the trial Court was erroneous.

9. As already mentioned hereinabove the medical examination report Paper No. 73/3/12 had been proved by its signatory Dr. Pramod Kumar the then Chief Medical Officer whom we had summoned as

Court Witness No. 1 and the said witness had clearly stated that he had mentioned the age of the victim as 19 years in the said report on the basis of X-ray Plate and X-ray Report. The said document has been exhibited as Ex. K-10. Based on the aforesaid document which has been proved by the CW-1 and the testimony CW - 1 it is proved that the appellant was major on the date of the incident.

10. The trial Court has considered oral evidence, especially, the testimony of PW-1 mother of the alleged victim as also the victim PW-2. It has come in the testimony of PW-2 that she had gone to the Railway Station alone on the telephone of respondent no. 2, though, she has also stated about a threat being extended by the respondent no. 2. She has however stated that on the Railway station there were 150-200 people. Policemen were also present. She has stated that respondent No. 2 went to purchase tickets, meaning thereby, she was alone when he had gone there, but, inspite of it, she did not raise any alarm. She has stated that when she alighted from the train at Surat police was present, apart from the crowd which was present. She went to the quarter which was locked. The key was taken from a neighbour. In fact, the neighbour opened the lock. There were people residing near that quarter. She has stated that she remained in the room for three days. She has also stated about eating food. In fact, she has stated that she herself used to cook food. She has then stated that she returned from Surat which took three days. When she came to the Railway Station for the return journey it was quite crowded. However, she did not raise any alarm. She stayed with the accused for six days after the incident dated 15.09.2016. In these circumstances it is highly unnatural that a major girl would not raise any alarm if the respondent no. 2 had forcibly taken her away. It is also highly improbable and unnatural that merely on a threat being extended by the respondent no. 2 on telephone, the victim would leave her home and go to the Railway Station alone in a Taxi and thereafter, she would remain with

the accused for six days and during this period she was on the Railway Station at least on two occasions which was crowded and police personnel were also present and there must have been moments when she would have been alone, such as, when the respondent no. 2 may have gone to answer nature's call or as stated by her to purchase the ticket, yet, she did not raise any alarm. Ultimately she was found on 21.09.2016. There is much contradiction in the prosecution evidence in this regard, as also with regard to the time of going away. Looking into the facts and evidence on record, we do not find any error on the part of the trial Court in acquitting the respondent no. 2.

11. From the sequence of events and evidence on record it appears that the ingredients of Section 366, 376, 506(2) IPC are not at all made out. The testimony of the victim is not at all reliable in this regard. The respondent no. 2 is a married person and as per the PW-2, he has three children. He has a grocery shop in front of the house of the victim. The trial Court has rightly opined that it is highly unnatural and improbable that a person, who has small shop in front of the house of the victim and is father of three children, would threaten her to run away with him and the victim would go along with him without any protest or alarm being raised and would remain with him for six days and then allege rape or other offences as mentioned hereinabove. The trial Court has rightly opined that this could not have happened without the willingness of the girl, who was a major. Various other inconsistencies and contradictions have been pointed out by the trial Court, which, we do not find to be erroneous.

12. The view taken by the trial Court is a possible view, especially in view of the medical examination report which has been proved before us, therefore, we see no reason to interfere with the judgment of the trial Court acquitting the respondent no. 2.

13. The appeal is accordingly **dismissed.**

14. The original records shall be remitted back to the trial Court for necessary action, if any.

(Ajai Kumar Srivastava-I,J.) (Rajan Roy, J.)

Order Date :-12.12.2023

R.K.P.