

Court No. - 15

Case :- CRIMINAL APPEAL No. - 537 of 2008

Appellant :- Shakeel And 2 Ors.

Respondent :- State of U.P.

Counsel for Appellant :- Anil Srivastava, Kanchan, Rajesh Kumar

Counsel for Respondent :- Govt. Advocate

Hon'ble Mohd. Faiz Alam Khan, J.

1. Heard Shri Arvind Kumar Maurya holding brief for Ms. Kanchan, learned counsel for the appellants as well as learned AGA for the State and perused the record.

2. The instant appeal has been preferred by appellants- **Shakeel, Mohammad Vaish and Imran** against the judgment and order dated 29.02.2008 passed by the Additional Sessions Judge/ Fast Track Court No. 32, Barabanki, in Sessions Trial No.364 of 2007, arising out of Case Crime 348 of 2005, under Sections 363, 366, 376 IPC, Police Station Zaidpur, District Barabanki, and has been sentenced to undergo rigorous imprisonment of 2 years pertaining to Sections 363 IPC and fine of Rs. 2000/- each and in default of payment of fine further 2 months rigorous imprisonment and 3 years rigorous imprisonment pertaining to Section 366 IPC and fine of Rs. 5000/- each and in default of fine 6 months rigorous imprisonment, respectively.

4. The prosecution case in brief, as is emerging from the record is that an FIR has been lodged by the father of the prosecutrix/ victim, Mohd. Shameem in the Police Station Zaidpur, District Barabanki alleging that on 6/7.11.2005 the appellants had enticed away his sister who had also taken some jewellery and cash with her.

5. On the basis of this written information, FIR at case Crime No. 348/2005 under Sections 363, 366 IPC was lodged and the investigation started.

6. The Investigating Officer during the course of investigation has recovered the victim from the custody of appellant-Shakeel and after getting her statements recorded and after under Sections 161 and 164 Cr.P.C. and after preparation of site plan etc. the charge sheet was filed against the appellants/ accused persons under Sections 363, 366, 376 IPC.

7. The charges against the appellants were framed under Sections 363, 366, 376 IPC, to which they denied and claimed trial.
8. The prosecution in order to prove its case beyond reasonable doubt has produced P.W.1- victim, P.W.2- father of the victim, P.W.3- mother of the victim and also relied on documentary evidence, charge sheet Ext. Ka-11, Chick FIR Ext. Ka-3, G.D. Kayami Ext. Ka-4, Seizure Memo Ext. Ka-5, Naksha Nazri Ext. Ka-6, Medical report Ext. Ka-7,8,9 and 10, statement of the prosecutrix under Section 164 Cr.P.C. Ext. Ka-2.
9. After conclusion of evidence of the prosecution the statement of accused persons / appellants were recorded under Section 313 Cr.P.C. wherein they denied all the evidence produced by the prosecution and has stated that the victim against her will was being married to some other boy and her age at that point of time was seventeen and half years and she had accompanied the appellant- Shakeel on her own free wish and will and now she has solemnized marriage with him and they have also been blessed with a girl child and they have been falsely implicated in this case.
10. The trial court after appreciating the evidence available on record found the case of the prosecution proved beyond reasonable doubt with regard to Section 363 and 366 IPC while did not find the prosecution case proved for the offence under Section 376 IPC and thus acquitted all the accused persons from committing offence under Section 376 IPC and convicted the appellants for committing the offence under Sections 363, 366 IPC and sentenced them in the manner described in the 2nd paragraph of this judgment.
11. Learned counsel for the appellants while drawing attention of this Court towards the conclusion drawn by the trial court pertaining to the age of the prosecutrix/ victim, vehemently submits that the manner in which the age of the prosecutrix has been assessed by the trial court may not be substantiated by any procedure prescribed by law.
12. Elaborating further, it is submitted that when it was evident on record that two contradictory documents have been issued by the same Authority i.e. Executive Officer, Nagar Panchayat Zaidpur, Barabanki in the shape of birth certificate issued by the local authority and Pariwar Register wherein two different years of birth of the prosecutrix were shown as 14.1.1990 and 1986 then the trial court should have taken the age of the prosecutrix as assessed through ossification process i.e. 17 years as true and having regard to the two years variable either side the

prosecutrix was appearing as major at the date and time of the incident and when she has not alleged any accusation against the appellant there was no material/ evidence to have convicted the appellants, more so when the prosecutrix has not deposed anything against them.

13. It is further submitted that the prosecutrix/ victim was the main/ star witness of this crime and when she has not supported the version of the prosecution there was no occasion for the trial court to have convicted the appellants. In this regard the statement of the prosecutrix testified before the trial court as P.W.1 has been highlighted.

14. Learned AGA on the other hand submits that it was established beyond doubt before the trial court that the prosecutrix at the relevant point of time was aged below 18 years and when she has been taken out of the legal guardianship the appellants have committed offence under Sections 363, 366 IPC and there is no illegality committed by the trial court in convicting the appellants under Sections 363 and 366 IPC.

15. Having heard learned counsel for the parties and having perused the record, it appears to be an admitted situation that the prosecutrix neither in her statement recorded before the Magistrate under Section 164 Cr.P.C. nor in her statement recorded before the trial court as P.W.1 has levelled any allegations against the appellant no.1/ Shakeel, rather she stated to be in love with him and also that she has gone with him with her own free wish and will and consent and also that they had solemnized marriage (Nikah) and they have also been blessed with a child. The trial court significantly did not find the case of the prosecution proved for commission of offence under Section 376 IPC on the ground that sexual relations have been established by the prosecutrix with the appellant no.1- Shakeel with her free wish and will and she was aged about more than 16 year at the relevant point of time.

16. The trial court has also noticed in its judgment that the Executive Officer, Nagar Panchayat Zaidpur, Barabaki has issued two documents i.e. birth certificate as well as copy of the Pariwar Register. In birth certificate the date of the prosecutrix is shown as 14.12.1990 while in the Pariwar Register her year of birth has been shown as 1986. By the year of birth shown in the Pariwar Register she is coming of the age of 19 years at the relevant date and time of the alleged incident while as per the birth certificate issued by the Executive Officer, Nagar Panchayat she is coming of the age of 15 years at the date and time of the incident. Noticing this glaring contradictions in the year of birth of victim in both the documents the trial court

at page no.5 of its judgement did not believe/ rely on these documents and found them as totally unreliable and thereafter has noticed that the prosecutrix in her statement recorded before the trial court has shown her age as 19 years while in her statement recorded under Section 164 before the Magistrate she stated her age of 16 years and thereafter also had taken some corroboration from the statement of the accused recorded under Section 313 Cr.P.C. to conclude that at the relevant point of time the prosecutrix was aged about 17 and half years and thus was minor and has enticed away from the legal guardianship for the purpose of marriage.

17. It also appears to be an admitted situation the the prosecutrix was subjected to ossification test and having regard to the certificate issued on 16.12.2005 her bone age was assessed as 17 years and having regard to the two years variable either side to the age determined through ossification process the prosecutrix may be of 15 years or of 19 years at the date and time of the incident, as the case may be.

18. In the considered opinion of this Court the trial court has failed to appreciate the evidence produced before it in right perspective, so far as the same was concerned for adjudicating the age of the prosecutrix. When the trial court has opined that two documents issued by the Executive Officer Nagar Panchayat were not reliable the natural course was available for the trial court was to rely on the medical evidence wherein the age of the prosecutrix was assessed as 17 years and having regard to the fact that she has stated her age before the trial court at the time of recording of her evidence as 19 years, she should have been declared as major at the date and time of the incident and since she has not alleged any allegation against the appellant no.1- Shakeel or any other appellants the natural corollary of this for the trial court was to acquit the appellants of charges framed under Sections 363 and 366 IPC also.

19. It is also to be recalled that the prosecutrix has been testified before the trial court and she has not levelled any allegation against the appellants including the appellant no.1- Shakeel and has categorically stated to have accompanied him with her consent and she was in love with him and also solemnized marriage with him and also that they have been blessed with two children.

20. Thus for the reasons mentioned herein before the impugned judgment and order passed by the trial court is liable to be interfered.

21. In result the appeal is **allowed** and the judgement and order

dated 19.2.2008 is set-aside. The appellants- **Shakeel, Mohammad Vaish and Imran** are acquitted of all the charges wherein they were convicted by the trial court i.e. 363 and 366 IPC. They appear to be on bail. Thus, they need not to surrender unless wanted in any other criminal case. Their sureties are discharged.

22. Appellants, however, within three weeks from today shall appear before the trial court and file their personal bonds with two sureties each of the amount of Rs. 25,000/- under Section 437-A of Cr.P.C. for their presence before the Hon'ble Supreme Court in case the order of this Court is assailed by filing S.L. or Criminal Appeal, as the case may be.

23. A copy of this order, along with the trial court record be immediately sent to the trial court, for compliance.

Order Date :- 5.8.2024

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