

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CRA-S No.553-SB of 2000 (O&M)
Date of decision: 07.01.2015**

Bhoop SinghAppellant

Versus

State of HaryanaRespondent

CORAM: HON'BLE MR. JUSTICE JITENDRA CHAUHAN.

Present: Mr. Jobanpreet Singh, Advocate
for the appellant as *amicus curiae*.

Mr. Ajay Gulati, DAG, Haryana.

1. *Whether Reporters of local papers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not?*
3. *Whether the judgment should be reported in the Digest?*

JITENDRA CHAUHAN J. (Oral)

1. Appellant, namely, Bhoop Singh, has filed this appeal against the judgment dated 24.05.2000, passed by the learned Additional Sessions Judge, Hisar, vide which, the appellant was convicted under Sections 363, 366 and 376 of Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of *three* years and to pay a fine of Rs.500/- and in default of payment of fine

to further undergo rigorous imprisonment for a period of *one* month under Section 363 IPC, sentenced to further undergo rigorous imprisonment for a period of *five* years and fine of Rs.1000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of *two* months under Section 366 IPC and further sentenced to undergo rigorous imprisonment for a period of *seven* years and fine of Rs.2000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of *four* months under Section 376 IPC.

2. The brief facts of the case in hand, recorded by the learned trial Court are that, on 24.11.1998, Attar Singh, Assistant Sub Inspector (PW-10) along with other police officials was present at Hansi Chowk, Barwala for patrolling and crime checking. Complainant Dev Dutt (PW-12) met the police party there and moved application Ex.PK. It was submitted by the complainant in his application that he had five children out of which four were daughters and youngest child was the son. Madhu was the eldest and younger to Madhu was the prosecutrix (PW-13), who was aged about 14 years and was student of 8th class. His children including the prosecutrix used to stay and sleep in the Nohra where his uncle Veer Bhan also used to sleep. On the intervening night of 23/24.11.1998, the prosecutrix and other children after doing study

work slept in the Nohra as usual. At about 1/1.30 a.m., when his uncle Veer Bhan woke up he found the prosecutrix missing from her cot. Then, he informed him about that fact. He and his family members searched for the prosecutrix in the night but could not know about her whereabouts. He suspected that the accused had kidnapped his daughter.

3. After completion of investigation, the challan against the accused-appellant was presented before the Judicial Magistrate Ist Class, Hisar. Since, the offence was triable by the Court of Sessions, therefore, the case was committed by learned Judicial Magistrate Ist Class, Hissar, to the Court of learned Sessions Judge for trial vide order dated 20.02.1999. The charge was framed against the accused-appellant vide order dated 08.03.1999, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined Satnarain Gupta as PW1, Ajit Singh, Patwari as PW2, Dr. Arun Gupta as PW3, Constable Jagdish Kumar as PW4, Ranjana Sabharwal as PW5, Dr. Himani Gupta as PW6, Dr. B.L. Bagri as PW7, Constable Dharambir as PW8, SI Kailash Chander as PW9, ASI Attar Singh as PW10, HC Mukat Ram as PW11, Dev Dutt as PW12, the prosecutrix as PW13 and ASI Hawa Singh as PW14.

5. After the conclusion of evidence of prosecution, the

statement of appellant-accused was recorded under Section 313 Cr.P.C. and the entire incriminating evidence which the prosecution produced against him was put to him to tender explanation for the same. The appellant-accused pleaded his innocence and he also stated that he has been falsely implicated in the present case. However, no defence evidence has been led by the appellant-accused.

6. The learned trial Court, after hearing learned counsel for the parties and after appreciating the evidence on record, convicted and sentenced the appellant-accused as under:-

Under Section 363 of IPC	Rigorous imprisonment for a period of three years and fine of <i>Rs.500/-</i> and in default of payment of fine to further undergo rigorous imprisonment for a period of <i>one</i> month.
Under Section 366 of IPC	Rigorous imprisonment for a period of five years and fine of <i>Rs.1000/-</i> and in default of payment of fine to further undergo rigorous imprisonment for a period of <i>two</i> months.
Under Section 376 of IPC	Rigorous imprisonment for a period of seven years and fine of <i>Rs.2000/-</i> and in default of payment of fine to further undergo rigorous imprisonment for a period of four months.

7. Feeling dissatisfied with the judgment of conviction and order of sentence dated 24.05.2000, the accused/appellant has preferred the present appeal, which was admitted on 21.08.2000.

8. The learned amicus curiae for the appellant contends that the appellant has been falsely implicated in the present appeal. The

house of the prosecutrix was $\frac{1}{2}$ K.m. away from the house of appellant where he used to live, hence, the appellant had not kidnapped the prosecutrix and it is impossible for a boy having age of 20 years to commit rape with a girl having age of 18 years without her consent. The appellant is innocent and is the only bread-earner in his family. The learned amicus curiae for the appellant further contends that PW3-Dr. Arun Gupta, conducted the radiological examination of the prosecutrix for determining her age and submitted his report Ex.PC. According to the report submitted by PW3-Dr. Arun Gupta, the age of the prosecutrix was found to be 15 to 17 years and there could be variation of two years on either side because ossification test is not a sure test for determination of the age. Thus, the age of the prosecutrix could be 19 years and benefit of this fact must be given to the accused-appellant. He further contends that PW12-Dev Dutt, the complainant, stated during his cross-examination that there must be an entry in the record of the Chowkidar regarding birth of the prosecutrix. However, the prosecution did not produce the birth certificate of the prosecutrix which could be the authentic proof of her date of birth. The school certificate Ex.PA, cannot be taken as conclusive evidence of the age of the prosecutrix, because generally parents get entered less age of their children in school record. The statements of the prosecutrix and

her father regarding her age cannot be attached much importance because they made statements keeping in view of the date of birth mentioned in the school record. Thus, the school certificate and the oral evidence of the prosecution is not sufficient to prove that the prosecutrix was below 18 years of age at the time of the offence. As per ossification test, the age of the prosecutrix could be 19 years. Therefore, it is clearly established that the age of the prosecutrix was more than 18 years at the time of the alleged commission of offence. As per the statement of the prosecutrix she was not dragged but was otherwise taken away by the accused. She walked on foot with the accused for about 3 to 4 K.ms. and when she was raped for the first time in Shamlat land her clothes were not torn. From fields she accompanied the accused to village Daulat Pur on foot, from Daulat Pur to Ratia in a jeep and stayed there for 15 minutes at the house of the friend of the accused. From Ratia to Railway Station, Tohana, they travelled in taxi and then from Tohana to Jind and then to Delhi in a train. From Delhi to Bela they travelled in a bus and stayed there for one night at the house of Nandu and from there they went to Assas and stayed there at the house of Ram Murti for 30 to 45 days and the wife and the daughter of the Ram Murti were also residing in that house. The prosecutrix also admitted that the accused had purchased a suit for her. The statements of PW12 Dev Dutt and

PW14 Hawa Singh, Investigating Officer of the present case also indicate that two suit cases and one bag were also recovered at the time of the recovery of the prosecutrix from the custody of the accused. PW12 Dev Dutt stated that there were two suits and one saree in the suit cases and bag. PW14 Hawa Singh stated that there were two sarees, two gents suits and one lady suit. All these circumstances are sufficient to prove that the prosecutrix was a consenting party, otherwise, she could not have accompanied the accused without raising any resistance. She had sufficient opportunity to complain to a number of the persons available at different places. Moreover, the medical evidence shows that she was habitual to intercourse and there was no mark of injury on her person. These facts are sufficient to establish that the prosecutrix accompanied the accused, stayed with him for a period of 40 days and had sexual intercourse with him out of her own free will and consent. Therefore, no offence is made out against the accused-appellant and he is entitled for acquittal.

9. On the other hand, the learned State Counsel submits that the prosecutrix was kidnapped by the accused and the appellant-accused committed rape upon her. As the age of the prosecutrix was less than 18 years on the date of kidnapping her consent to accompany the accused was immaterial. The statement of PW6 Dr.

Himani Gupta, is to the effect that the possibility of rape cannot be ruled out. According to the report of Forensic Science Laboratory (Ex.PY), semen was found on underwear and Salwar of the prosecutrix which were taken into possession at the time of her medico-legal examination. Learned State Counsel further contends that for determination of age, a number of ossification tests as mentioned in Modi's Medical Jurisprudence and Toxicology can be carried out, but despite that PW3, Dr. Arun Gupta opted to conduct only three tests. He has not given any reason as to why the other tests were not carried out. Moreover, the age of the fusion of head of radius in female is 14 years as per Modi's Medical Jurisprudence and Toxicology and in the report Ex.PC also the duration of fusion has been mentioned as 14 years. Only the head of radius was found fused, whereas the lower end of radius and lower end of ulna were not fused. Therefore, as per tests conducted by the Radiologist the age of the prosecutrix could be at the most 14 years. PW3 Dr. Arun Gupta has not clarified in his report as to on what basis he opined that the age of the prosecutrix was about 15 years to 17 years when there was no fusion of lower end of radius and lower end of ulna. Thus, the report of Radiologist Ex.PC, supports the evidence of prosecution that the age of the prosecutrix was about 14 years. This evidence and the statement of the prosecutrix are sufficient to prove

that the prosecutrix was subjected to sexual intercourse by the accused. As the prosecutrix was below 16 years of age, therefore, her consent for sexual intercourse with the accused does not come to the rescue of the accused.

10. I have heard the learned counsel for the parties and have gone through the record with their able assistance.

11. In the instant case, the prosecutrix was allegedly kidnapped by the accused on the intervening night of 23/24.11.1998, when she came out of her Nohra for the purpose of urinating and then the accused committed rape upon her for the first time in the fields, then took her to different places and continued to commit rape upon her repeatedly till 13.01.1999, when she was recovered from his custody at Bus Stand, Narwana. It is pertinent to note that the prosecutrix in her statement under Section 164 of the Code of Criminal Procedure Ex.PE, has not stated that any threat was extended to her by the accused when he requested him to leave her and allow her to go to home. In her testimony, she stated that she requested the accused-appellant to leave her so that she may go to her home, then the accused-appellant threatened to kill her. Such a statement is an after-thought and an improvement in the case of the prosecution. The house of the prosecutrix was ½ K.m. away from the house of accused-appellant where he used to live and if, the

prosecutrix did not want to accompany the accused, she would not have walked on foot for a long distance of 3/4 Kms. She could raise alarm while passing through the village Daulat Pur as the day had broken and the number of persons of the village Daulat Pur were roaming when they reached the village. Moreover, there was no mark of injury on the person of the prosecutrix and as per the statement of PW6, Dr. Himani Gupta, hymen was ruptured and she was habitual to intercourse. PW3-Dr. Arun Gupta, conducted the radio-logical examination of the prosecutrix for determining her age and submitted his report Ex.PC. According to the report submitted by PW3-Dr. Arun Gupta, the age of the prosecutrix was found to be 15 to 17 years and there could be variation of two years on either side, because ossification test is not a sure test for determination of the age. Thus, the age of the prosecutrix could be more than 19 years and benefit of this fact must be given to the accused-appellant. He further contends that PW12-Dev Dutt, the complainant, stated during his cross-examination that there must be an entry in the record of the Chowkidar regarding birth of the prosecutrix. However, the prosecution did not produce the birth certificate of the prosecutrix which could be the authentic proof of her date of birth. The school certificate Ex.PA, cannot be taken as conclusive evidence of the age of the prosecutrix, because generally parents get entered age of their

children in school record by imagination. The statements of the prosecutrix and her father regarding her age cannot be attached much importance because they made statements keeping in view of the date of birth mentioned in the school record. Thus, the school certificate and the oral evidence of the prosecution is not sufficient to prove that the prosecutrix was below 18 years of age at the time of the offence. As per ossification test, the age of the prosecutrix could be 19 years. Therefore, it is clearly established that the age of the prosecutrix was more than 18 years at the time of the alleged commission of offence. Under such circumstances, it can be said that the prosecutrix could be a consenting party to accompany the accused and have sexual intercourse with him, otherwise, she could not have accompanied the accused without raising any resistance. She had sufficient opportunity to complain to a number of the persons available at different places. Moreover, the medical evidence shows that she was habitual of intercourse and there was no mark of injury on her person. These facts are sufficient to establish that the prosecutrix accompanied the accused, stayed with her for a period of 40 days and had sexual intercourse with him out of her own free will and consent. Therefore, the prosecution has failed to prove its case against the accused-appellant beyond reasonable doubt and he is entitled for acquittal.

12. Keeping in view, all the facts and circumstances the present appeal is allowed. The judgment and order dated 24.05.2000, passed by the learned Additional Sessions Judge, Hisar, is hereby set aside and the accused-appellant is acquitted of the charge.

07.01.2015.
yakub

(JITENDRA CHAUHAN)
JUDGE