

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

Crl. Appeal-S No.1133-SB of 2004 (O&M)

Date of Decision: August 04, 2015.

Varinder

.....APPELLANT(s).

VERSUS

State of Haryana

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Argued by: Mr. Kawaljyot Singh, Advocate
Amicus Curiae for the appellant (s).

Mr. Baljinder Singh Virk, D.A.G. Haryana.

SURINDER GUPTA, J.

This is appeal filed by appellant Varinder against the judgment dated 05.04.2004 passed in Sessions case No.28 of 2003 by Additional Sessions Judge, Panchkula whereby the appellant was convicted for the offence punishable under Section 366 and 354 of Indian Penal Code (IPC-for short) and sentenced vide order dated 07.04.2004 to undergo rigorous imprisonment for five years for the offence punishable under Section 366 IPC and to pay a fine of ₹5,000 and in default of payment of fine, to further undergo rigorous imprisonment for six months. He was further sentenced to undergo rigorous imprisonment for one year for the offence punishable under Section 354 IPC.

Prosecution case, in brief, is that prosecutrix, aged 8 years, studying in Ist class, after returning from school was playing in a Park near

Sheetla Mata Mandir where the appellant came and allured the prosecutrix

with an offer to buy ice-cream for her and also to take her for swings. The prosecutrix fell pray to the allurements and the appellant took her on his bicycle from the spot. Thereafter, he took her on a bus to a remote forest area of City Panchkula. When the prosecutrix inquired as to where she had been brought, he told her that he will take her for swings and ice-cream. He took her at a distance from the main road and made her to sit in his lap. He removed her underwear, started kissing her and tried to commit rape with her. The prosecutrix started crying which attracted two persons (army personnel) present nearby, to the spot. On seeing them, the appellant tried to run away but was caught. Those two persons, who had come to the spot, were Havildar Vijay Pardesi and Naik Ram Singh, who took the prosecutrix and the appellant to police. On statement of prosecutrix, ruqa (Ex.PA) was sent to the police station vide endorsement (Ex.PA/2) on which formal FIR (Ex.PF) was recorded. The appellant was arrested and after completion of investigation, challan was filed in the Court of Judicial Magistrate, Panchkula.

Finding a prima facie case for the offence punishable under Section 376 read with Section 511 IPC, which is exclusively triable by the Court of Sessions, learned Magistrate committed the case for trial to the Court of Sessions vide order dated 27.09.2003.

On finding a prima facie case for the offence punishable under Sections 366 and 376 read with Section 511 IPC, the appellant was charge-sheeted to which he pleaded not guilty and claimed trial.

In support of its case, the prosecution examined Havildar Vijay Pardesi of 268 Engineering Regiment, as PW1. Prosecutrix was examined as PW2. SI Bant Ram, Investigating Officer of the case appeared as PW7. To prove the age of the prosecutrix, Dr. Dalhitam Singh, Dental Surgeon,

General Hospital, Sector-6, Panchkula appeared as PW6, who stated that prosecutrix might be 8/9 years of age. Devinder Kaur Head Teacher, Govt. Primary School, Mani Majra appeared as PW4, who stated that the date of birth of prosecutrix was recorded in the school record as 28.05.1996. Dr. Yogesh Kumar, who had conducted medical examination of the appellant was examined as PW9. Constable Ram Saran Draftsman, who prepared the scaled site plan (Ex.PE) of the place of occurrence, appeared as PW5. SI Mohinder Lal, who had recorded the FIR (Ex.PF) appeared as PW6. Father of the prosecutrix appeared as PW8, while ASI Surinder Singh, who had partly investigated the case appeared as PW10.

The appellant when confronted with the entire evidence, produced against him, while recording his statement under section 313 Cr.P.C., denied the same and stated in his defence as follows:-

“I am innocent. This case has been registered against me due to enmity and I have never committed any such offence.”

The appellant did not produce any defence evidence.

The trial Court on appraisal of evidence held the appellant guilty of the offence punishable under Section 366 and 354 IPC but he was acquitted of charge for offence punishable under Section 376 read with Section 511 IPC. The observations of the trial Court to this effect contained in para Nos.18 and 19 of the judgment are as follows:-

“18. It stands established from the aforesaid evidence that on 18.7.2003 the accused had enticed the child out of the keeping of the lawful guardian without the consent of such guardian and thus committed the offence of kidnapping with the intention to force or seduce the child to illicit intercourse. The carrying of the child from a park in the residential area to a remote jungle area and

thereafter removing her undergarments and to start fondling with her clearly proves the intention of the accused. He had brought the said child to the said secluded area to satisfy his lust for sex. So, the intention to compel the child or to seduce her to illicit intercourse is proved from the aforesaid circumstances. So, the offence under section 366 IPC is fully established.

19. The prosecution has further proved that the undergarments of the prosecutrix were removed and the accused had laid down on her and attempted to commit rape. However, none of the witnesses state that the accused had also removed his clothes and there is no medical evidence to show that prosecutrix had suffered any injury on any part of her body. In the given circumstances the said evidence would fall short of the required ingredients for proving attempt to commit rape. It can only be described at the stage of preparation for committing the said offence. However, the aforesaid evidence is sufficient for proving the ingredients of proving the lesser offence under section 354 IPC. The removal of the clothes of the prosecutrix and her fondling fulfils the requirement of section 354 IPC and amount to an assault with an intention to outrage the modesty of the prosecutrix. As per section 10 IPC, the word woman denotes a female human being of any age. In AIR 1967 S.C. 63 State of Punjab Vs. Major Singh, the accused had caused injuries to the private parts of a female child of 7½ months. He was held guilty under section 354 IPC for the offence for outraging the modesty of a woman. The Apex Court observed as under:-

‘The essence of a woman’s modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. The body of a female of tender age is immature, and her sexual powers are dormant. She has not yet

developed a sence of shame and has no awareness of sex. Nevertheless, from her very birth she possesses the modesty which is the attributes of her sex.’

In view of the aforesaid discussion it is proved that the accused committed the offence under section 354 IPC and 366 IPC.”

Learned Amicus-Curiae appearing for the appellant has argued that there is material discrepancy in the prosecution case regarding the place where the testimony of prosecutrix was recorded. As per statement of Investigating Officer SI Bant Ram PW7, prosecutrix and PW1 Vijay Pardesi met the police party near Peer Baba Mor, where the statement of prosecutrix was recorded. However, Havildar Vijay Pardesi PW1 and prosecutrix stated that they were brought to the police station, where the statement of prosecutrix was recorded. He has further argued that prosecutrix has stated that she was playing in the park from where the appellant had taken her on a bicycle but no child from that park was examined to corroborate her statement. The appellant has alleged his enmity with the family of prosecutrix for his false implication. The prosecutrix was a girl of 8/9 years of age and it is highly improbable that she would have accompanied the appellant on his cycle and then in a bus to a far away place in the city of Panchkula and did not create any fuss till she was taken to a secluded area far away from the city.

Learned Amicus-Curiae has further argued that the appellant was a young boy of 23 years of age at the time of occurrence and has faced the agony of trial for the last about 12 years. He is first offender having no antecedents, as such, in case his conviction is maintained, a lenient view may be taken regarding his quantum of sentence.

Learned State counsel has argued that the testimony of

prosecutrix who appeared as PW2 is unblemished and unrebuted. She being a girl of tender age, had no mala fide motive or reason to depose against the appellant. PW1 Havildar Vijay Pardesi is an independent witness who was on his duty nearby and came to the spot on hearing the cries of prosecutrix. He had also no reason or motive to depose against the appellant. The father of prosecutrix had also supported the prosecution version. The mere fact that statement of prosecutrix was registered on a road side or in the police station is not a material fact for creating any suspicion about the credibility of the prosecution witnesses. The prosecution has fully proved its case beyond any shadow of doubt.

The case of the prosecution is based on the statement of prosecutrix PW2 and Havildar Vijay Pardesi PW1, who happened to reach the spot on hearing the cries of the prosecutrix. Havildar Vijay Padesi is an independent witness. He is an army personnel who at the relevant time was on duty at the residential house of a senior officer which was situated at a distance of 100 metres from the place where the appellant was apprehended. At the time of occurrence, this witness was present on the roof top of the house of Officer with Lance Naik Ram Singh Khangar. On hearing cries of a child, they were attracted to the place of occurrence and found that the appellant had removed the underwear of the child (prosecutrix) and was lying on her in an attempt to rape her. Appellant tried to flee from the spot but was caught and given two slaps and thereafter, the matter was reported to the police.

The prosecutrix while appearing as PW2 has also fully supported the prosecution case. She has stated that after returning from the school, she was playing with children in the park, where the appellant came. He had taken her to forest area and removed her underwear. Thereafter, he laid

down on her and tried to do 'bad act'. In the entire cross-examination of the prosecutrix (PW2) or PW1 Havildar Vijay Pardesi, nothing has come that both of them have any animus to depose against the appellant. The prosecutrix is a child witness whose testimony is unshattered and in the cross-examination she has not been suggested or attributed any reason to depose falsely. Father of the prosecutrix (PW8) has stated that after the incident, he reached the spot where his daughter narrated entire incident to him. This witness has also no animus to falsely implicate the appellant. The appellant was apprehended at the spot by two army personnel, who are neither known to the prosecutrix or her family or even to the appellant. It was on hearing cries of the prosecutrix, they rushed to the spot and nabbed the appellant, who was fondling with a girl of tender age.

The discrepancy in the prosecution case as to whether the statement of prosecutrix was recorded in the police station or at *Peer Baba Mor* is hardly immaterial to dent the statement of either of prosecutrix or of PW1 Havildar Vijay Pardesi. The presence of PW1 Vijay Pardesi at the spot, was quite natural. Otherwise, he is a person, who is employed with 268, Engineering Regiment of Indian Army and has no reason to falsely implicate the appellant. The trial Court on analysis of the evidence on file, has rightly reached the conclusion that the offence under Section 366 and 354 IPC are proved against the appellant.

I find no infirmity of fact and law in the findings recorded by the trial Court. Thus, the conviction of the appellant for the offence punishable under Section 366 IPC and 354 IPC is maintained. However, keeping in view the fact that the appellant was young boy of the age of 23 years at the time of occurrence and has suffered a prolonged trial for the last about 11 years, the sentence awarded to him for the offence punishable under Section

366 IPC is reduced from rigorous imprisonment for five years to rigorous imprisonment for three years.

The sentence awarded to him under Section 354 IPC and the sentence of fine shall remain intact. Both the sentences shall run concurrently.

The sentence of the appellant was suspended vide order dated 23.09.2004 and he was ordered to be released on furnishing bail bond and surety bond to the satisfaction of Chief Judicial Magistrate, Panchkula. His bail bond and surety bond are cancelled. He be taken into custody and be sent to jail to received the remaining part of his sentence.

The appeal is disposed of with the above modification of sentence.

August 04, 2015.
Sachin M.

(SURINDER GUPTA)
JUDGE