

**IN THE HIGH COURT OF PUNJAB AND HARYANAAT
CHANDIGARH**

Crl. Appeal-S No. 128-SB of 2004(O&M)

Date of Decision: February 23 , 2015.

Sunil Patel

..... APPELLANT (s)

Versus

State of Haryana

..... RESPONDENT (s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Parminder Singh, Advocate
for the appellant.

Mr. G.S.Chahal, Addl.A.G., 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?

LISA GILL, J.

Appellant – Sunil Patel has filed the present appeal impugning judgment of conviction dated 27.11.2003 and order of sentence dated 28.11.2003 passed by the learned Additional Sessions Judge (Adhoc), Fast Track Court, Karnal whereby he has been convicted and sentenced to undergo rigorous imprisonment for seven years each, besides, pay a fine of ₹1,000/- each and in default thereof, to further undergo rigorous imprisonment for six months for the offences punishable under Sections 366/376 IPC and to undergo

rigorous imprisonment for five years, besides, pay a fine of ₹500/- and in default thereof, to further undergo rigorous imprisonment for six months for the offence punishable under Section 363 IPC.

As per the prosecution version, FIR No.54 dated 26.03.2003 (Ex.PD/2) was registered on the statement (Ex.PD) of the complainant, Smt. Ram Kali. Complainant – Ram Kali stated that her husband was working in defence security core. She has five children, eldest of them is the prosecutrix aged about 17 years and 10 months. Her daughter (prosecutrix) was matriculate and was employed in a cardboard factory since the last one month. She worked there for the month of February 2003 but was presently at home. On 21.03.2009, complainant – Ram Kali had gone to village Jamalpur to attend the marriage of daughter of her mother's sister. On returning from the marriage on 23.03.2003, she found her eldest daughter (prosecutrix) missing. On inquiry from her younger daughter, Neelam, who had stayed back, it came to light that Ram Phal son of Mehar Singh of their village had come to their house on 22.03.2003. Her daughter had gone with him and did not return thereafter. When she asked Ram Phal, it is revealed that Ram Phal had come to their house to call her daughter (prosecutrix) on the asking of appellant – Sunil Patel. It is stated that her daughter (prosecutrix) did not come back thereafter. It was stated that her daughter had been enticed away and kidnapped by appellant – Sunil Patel in order to marry her. Ram Phal and Sunita, who were working at the factory facilitated the kidnapping of her daughter. Initially, a case under Sections 363/366A IPC was registered.

Prosecutrix was recovered alongwith the appellant on 06.04.2003

from the Railway Station, Panipat. Statement (Ex.PF) of the prosecutrix was recorded on 08.04.2003. Site Plan (Ex.PJ) was prepared. Medical examination of the prosecutrix as well as the appellant was conducted. Thereafter, rough site plan (Ex.PJ/2) of the alleged place of occurrence was prepared at the instance of the prosecutrix, who was handed over to her parents. Matriculation Certificate (Ex.PJ/5) of the prosecutrix was taken into possession vide recovery memo Ex.PJ/4. Clothes, swabs etc. of the prosecutrix were sent to Forensic Science Laboratory, Madhuban.

On completion of investigation, Challan/report under Section 173 Cr.P.C. was presented only against the present appellant – Sunil Patel. Case was committed to the court of Sessions on 11.05.2003. Charge was framed against the appellant-accused on 05.06.2003 to which he pleaded innocence and claimed trial.

Prosecution examined as many as eleven witnesses to prove its case.

Statement of the appellant was recorded under Section 313 Cr.P.C. wherein he denied the charges framed against him and pleaded false implication. DW1 Gulshan Rai, Assistant Director (Documents), Forensic Science Laboratory, Madhuban was examined by him in defence. Letters Mark D1 to Mark D18 and affidavit Mark D19 were produced.

Learned trial court on appreciation of the evidence and keeping in view the facts and circumstances of the case, convicted appellant-Sunil Patel on finding him guilty for the commission of offences punishable under Sections 363/366/376 IPC and sentenced him as aforementioned.

Aggrieved by the said judgment of conviction and order of sentence, the present appeal has been preferred.

Learned counsel for the appellant submits that it is a clear-cut case of consent on the part of the prosecutrix. There is no question of kidnapping her and subjecting her to rape by the appellant. It is contended that the age of the prosecutrix was more than 18 years on the date of alleged occurrence i.e. 22.03.2003. It is submitted that the Matriculation Certificate (Ex.PJ/5) which shows the date of birth of the prosecutrix to be 10.05.1985 cannot be relied upon as it has not been proved in accordance with law. Moreover, even as per this certificate, she was 17 years and 10 months at the time of alleged occurrence. Furthermore, prosecutrix had herself executed an affidavit dated 31.03.20003 (Mark D19) claiming her age to be 21 years. The evidence on record clearly points to the fact that she had left with the accused out of her own free will and volition and had got married with the appellant. She had left with the appellant on 22.03.2003 and gone to village Bishanpur in Bihar. They came back to Delhi and were ultimately apprehended at Panipat Railway Station. She never raised any alarm throughout this period while travelling or staying at various places with the appellant though, she was having ample opportunities to do so as is apparent from her own testimony. It is contended that she had written letters Mark D1 to D18 to the appellant expressing her love and affection for him.

Furthermore, the prosecution has not examined material witnesses i.e., the father and sister of the prosecutrix, owner of the cardboard factory and many others thereby, withheld the best evidence available with it. Therefore, an

adverse inference necessarily has to be drawn and the benefit of doubt be given to the accused. It is vehemently urged that there is no injury on the person of the prosecutrix and a perusal of the medical record shows that she was not subjected to rape. It is contended that the evidence on record, specifically the site plan (Ex.PE) reveals that there is no element of force on the part of the appellant.

On the other hand, learned counsel for the State submits that the appellant has been rightly convicted and sentenced by the trial court. The evidence on record clearly points to the complicity of the appellant in the commission of the offence. The matriculation certificate of the prosecutrix has been duly proved on record and corroborated by the statements of prosecutrix and her mother PW8 Smt. Ram Kali. Prosecutrix herself supported the prosecution version and there is no question of the appellant being falsely implicated. The question of consent does not arise as she was below 18 years of age at the time of alleged occurrence. It is, therefore, prayed that the judgment of conviction and order of sentence be maintained.

I have heard learned counsel for the parties and gone through the record.

As per the statement of prosecutrix recorded under Section 164 Cr.P.C., appellant-Sunil Patel gave a telephonic call to her on 22.03.2003 and requested her to do some work at cardboard factory alongwith him and to take the money earned. Thereafter appellant came to the house of the prosecutrix. She was taken to the broken down quarter in the factory where she was subjected to rape by the appellant against her will and consent. He thereafter

said that he wanted to marry her and he had sufficient agricultural land. They came to the Karnal railway station in a tempo at 10.00 p.m. at night and thereafter went to his home at village Bishanpur in Bihar. They stayed there for 7/8 days. His family members asked him as to whom he had brought home, on which the appellant replied that he had married her. He had sexual intercourse with her for 7/8 days against her consent over there. Thereafter, she told him that she was not feeling settled at that place and should be brought back, on which Sunil told that there was a factory at Panipat where they would seek employment and we would stay there. Thereafter, they came to Panipat and she was recovered at the railway station upon her uncle spotting her there. The police thereafter arrested the appellant and she was brought to Karnal.

Before the learned trial court she, however, deposed that she used to work in the cardboard factory near the village and appellant also used to work there. Her mother had gone on 21.03.2003 to village Jamalpur to attend a marriage. She and her sister were present at their home. On 22.03.2003 Ram Phal came to their house and asked her sister Neelam to call the prosecutrix. Ram Phal said that someone was calling her and when she came out of the house, appellant-Sunil Patel was standing in the street outside her house. He told the prosecutrix that there was some work to be done in the factory and requested her to come with him in the factory. On entering the factory, she was taken to a quarter inside the factory and she was raped against her consent and will. Appellant promised to marry her stating that his family owns sufficient agricultural land and he would keep her comfortably in his house. She was induced to accompany him. They went to Karnal railway station by hiring a

tempo. They then proceeded to village Bishanpur in Bihar by train. It took them two days to reach Bishanpur. She was taken to a room in village Bishanpur. Nobody was present in that room. She was kept there for 7/8 days and rape was committed upon her against her will and consent. She told the appellant-accused that she was feeling homesick and asked him to take her back. Appellant brought her to Panipat by stating that he would work in a factory near Panipat and they could then live there. When they reached Panipat Railway Station, the police alongwith her uncle, Rajpal was present there. She was recovered from the company of appellant-accused.

Prosecutrix admits that she knew the appellant being a co-worker at the factory. She admits that she had left her home at about 2/2.30 p.m. on 22.03.2003 and they had gone to the railway station, Karnal at 10/10.30 p.m. in a tempo, which had been hired. It is admitted that there were some lady passengers present in the train. It took two days for them to reach village Bishanpur. A lady used to visit the room to supply food to them in the room in which they were staying. Tea was however prepared in the room itself. She never disclosed anything to the said lady though she tries to explain that by saying that she was unable to disclose the incident to that lady as she was not known to her and further due to language problem she did not even attempt to escape. Letters Mark D1 to D18 are denied to have been written by her. She also denied the suggestion that her parents had got her engaged with another boy at Ambala and due to this reason she eloped with the appellant. While admitting that she signed on certain papers on the day they reached the village of the appellant, it is stated that they were obtained by force. She admits her

signatures on affidavit Mark D19.

It is relevant to note that her age is recorded to be 18 years at the time of her deposition on 18.08.2003 before the trial court. She does not make a mention of her age in her testimony.

Complainant, Ram Kali (PW8) while reiterating the version in the FIR has, however, admitted in her cross examination that appellant – Sunil had once visited their house though, to call upon their son. It is admitted that there was a telephone connection in their home.

PW11 Piare Lal ASI, the Investigating Officer in this case admits that he never recorded the statement of Ram Kali's aunt neither was there any investigation conducted to find out whether any marriage had been solemnized at village Jamalpur. He has not verified if the prosecutrix's mother had gone to attend that wedding as alleged. Date of birth of the prosecutrix was not verified by him.

It is relevant to note here that PW11 Piare Lal ASI admits having gone to Bihar with Rajpal on 02.04.2003. Village of appellant was visited from where he came to know that appellant-Sunil and prosecutrix had visited and stayed there for about 7/8 days. Police at Bihar was intimated while going to the village of appellant – Sunil. However, no statement of the Sarpanch/Panch/Nambardar or anyone in the village was recorded. No site plan of the place where appellant is stated to have committed rape upon the prosecutrix was prepared. Railway tickets were not produced on record. He, however, admits that the local police at Panipat was not intimated when the appellant was arrested at the railway station. It is also admitted that when the statement of the

prosecutrix was recorded under Section 164 Cr.P.C., her parents and other relatives were present with her.

The first and foremost question to be determined is the age of the prosecutrix in this case. As per the prosecution, her date of birth is 10.05.1985 as per Matriculation Certificate (Ex.PJ/5). Even as per the said certificate, the prosecutrix was above the age of 16 years at the time of alleged occurrence. Section 375 IPC, which defines the term “rape” as it stood before the amendment by the Criminal Law (Amendment) Act, 2013 read as under:-

“Rape – A man is said to commit "**rape**" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First – Against her will.

Secondly – Without her consent.

Thirdly With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly – With or without her consent, when she is under sixteen years of age.”

The occurrence, in this case, pertains to the year 2003 i.e., when the relevant age of the victim was sixteen years for determining the question of element of consent. Even as per the matriculation certificate, the prosecution

was aged 17 years and 10 months at the time of alleged occurrence. Furthermore, the facts point to consensual act on the part of the prosecutrix. She had the ample opportunity to seek help and escape at the time of travelling to Bihar, during her stay at Bihar and travelling back to Panipat. She, however, never made any attempt to seek help or to escape which shows that she had left with the appellant out of her own free will and volition. Though she has denied the letters Mark D1 to D18, she admits her signature on affidavit Mark D19.

Ex.D19 is an affidavit sworn by her stating that she has solemnized marriage with the appellant out of her own free will and volition at a Mandir according to Hindu rites. It is pertinent to note that an effort was made to have the letters Mark D1 to D18 compared with and examined by the Handwriting Expert at Forensic Science Laboratory, Madhuban. However, DW1 Gulshan Rai, Assistant Director (Documents) has deposed that they could not be compared with the admitted handwriting of the prosecutrix as original documents are required for examination and furthermore, a fee of ₹550/- is chargeable which has to be remitted in the form of pay-order in the name of Deputy Director, FSL Madhuban.

The version given by her in her statement under Section 164 Cr.P.C. is at variance with the version given by her before the learned trial court. In her statement under Section 164 Cr.P.C. she had stated that she was taken by the appellant to his family at Bihar where she stayed for about a week whereas, before the trial court she states that she stayed with the appellant in one room.

There is also a discrepancy as to who had called her on 22.03.2003.

In her statement under Section 164 Cr.P.C., she states that Sunil called her on telephone on 22.03.2003 to come to the cardboard factory for work. Then he came to her house and both went to the factory. In her deposition before the court, she stated that Ram Phal asked her sister to call her on which she came out and thereafter, accompanied to the factory. This shift is obviously to make a statement in line with her mother's version. It is on her asking that she was brought back to Panipat by the appellant, when she revealed to him that she was homesick. Element of force is conspicuous by its absence.

A perusal of the evidence on record does not indicate the kidnapping of the prosecutrix by the appellant or her subjection to forcible sexual intercourse by him. As per site plan (Ex.PE), the quarter is situated outside the boundary wall of the factory. Therefore, the version put forth that she had been taken in the factory by the appellant is not borne out. It is admitted by PW6 Constable Veer Shakti Singh that there was no verification of the ownership of the agricultural fields from the revenue record. Nothing could be revealed about the name of the factory or the owner of factory.

Apart from the above, the conduct of the complainant is also unnatural inasmuch as it is her case that her daughter went missing on 22.03.2003 despite there being a telephone at their residence, no information was given by her other daughter, Neelam who was present at the house. Complainant was alleged to have returned on 23.03.2003 but still no effort was made to report her daughter (prosecutrix) being missing and it is only on 26.03.2003 that her statement was recorded. Non-examination of Raj Pal, the uncle of the prosecutrix, who is alleged to be present at the time of recovery of

the prosecutrix at Panipat as well as her sister, Neelam and father, does create a dent in the prosecution version. They are material witnesses in order to prove the case of the prosecution. There is no explanation as to why they have not been examined.

The prosecution has indeed failed to prove the case against the appellant beyond the shadow of reasonable doubt. The evidence on record creates a doubt in the mind of the court regarding the commission of offence by the appellant. In this situation, appellant is entitled to benefit of doubt.

Keeping in view the entirety of facts and circumstances of the case, the impugned judgment of conviction dated 27.11.2003 and order of sentence dated 28.11.2003 passed by the learned Additional Sessions Judge (Adhoc), Fast Track Court, Karnal are hereby set aside.

The appellant is acquitted of the charges against him.

Consequently, this appeal is allowed.

February 23 , 2015.
'om'

(LISA GILL)
JUDGE