

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-212-SB-2004
Date of decision: 03.12.2015

Mahavir SinghAppellant(s)

Versus

State of PunjabRespondent(s)

CORAM:- HON'BLE MR.JUSTICE DARSHAN SINGH

- 1. Whether reporters of local newspapers may be allowed to see judgment? Yes
- 2. To be referred to reporters or not? Yes
- 3. Whether the judgment should be reported in the Digest? Yes

* * *

Present: Mr. Deepak Goel, Advocate for the appellant.
Dr. Deepa Singh, Additional Advocate General, Punjab.

DARSHAN SINGH, J.

1. The present appeal has been preferred against the judgment of conviction dated 4.12.2003 vide which accused appellant-Mahavir Singh was held guilty and convicted for the offences punishable under Sections 366/376 of the Indian Penal Code (in short 'the IPC) and the order on the quantum of sentence of the even dated vide which he was sentenced as under:

Sr.No.	U/s	RI	Fine	In default of payment of fine, further RI
1	366 IPC	3 years	₹ 500	15 days
2	376 IPC	7 years	₹ 1000	1 month

2. The catalogue of the facts giving rise to this prosecution

are that on 29.5.2002, the prosecutrix, daughter of complainant Charanjit Kaur, aged about 16 years, was found missing from her residence at Kailash Nagar, P.S. Focal Point, Ludhiana. Complainant-Charanjit Kaur, her mother, who was working as a Sweeperess in Oswal Hospital, Ludhiana searched her at near and dears but to no avail. That on 1.8.2002, she learnt that appellant Mahavir, resident of near Sangeet Cinema, who had visited their house for 2-3 occasions, had kidnapped her daughter by alluring her for marriage. She reported the matter to the police vide her statement Ex.PW-3/1, on the basis of which, the formal FIR Ex.PW8/1 was registered and investigation was carried out for the offences punishable under Sections 363/366 IPC. The Investigating Officer inspected the spot and prepared the rough site plan of the place of occurrence.

3. On 3.8.2002, the Investigating Officer conducted raid at the house of Jaswinder Pal Kaur, wife of Harbhajan Singh and recovered the prosecutrix. He recorded the statement of the prosecutrix wherein she disclosed that the present appellant visited their house to enquire about the health of her mother and told her that he wanted to marry her. The said proposal was not accepted by her and out of fear she did not disclose the incident to her mother. That on 29.5.2002 at about 10.00 A.M., accused-appellant-Mahavir came to their house while she was alone and asked for a cup of tea. She prepared two cups of tea one for herself and other for Mahavir. Mahavir then asked her to bring water. She went out of the room to

bring water leaving her cup of tea there. After taking tea, she felt giddy and became unconscious. When she gained conscious at night, she found herself naked in a room with accused appellant Mahavir. She asked him to let her go but the accused proposed her to marry. In order to save her honour, she decided to live with him. During this period Mahavir repeatedly committed rape upon her and proclaimed that he would solemnize marriage with her. On the basis of her statement, the Investigating Officer again inspected the spot and prepared the rough site plan of the occurrence. The Investigating Officer recorded the statement of the witnesses. The prosecutrix was got medico legally examined and her custody was handed over to complainant-Charanjit Kaur, her mother. The Investigating Officer also collected the certificate regarding the date of birth of the prosecutrix. The vaginal swabs and other articles were sent to the Chemical Examiner. Accused appellant was arrested in this case on 7.8.2002. He was also got medico legally examined. On completion of the formalities of investigation, the report under Section 173 Cr.P.C. was presented in the Court.

4. The case was committed to the Court of sessions for trial by the learned Chief Judicial Magistrate, Ludhiana vide order dated 19.9.2002.

5. Accused appellant was chargesheeted for the offences punishable under Sections 366/376 IPC by the learned trial Court vide order dated 18.10.2002 to which the appellant pleaded not guilty and claimed trial.

6. In order to substantiate its case, the prosecution examined as many as 8 witnesses.

7. When examined under Section 313 Cr.P.C., the accused pleaded false implication. In the defence evidence, he examined Dr. Ashok Ranwant, Radiologist, Civil Hospital, Ludhiana as DW-1 who has proved his opinion Ex.DW1/1 declaring the age of the prosecutrix between 18 to 19 years. Thereafter, the defence evidence was closed.

8. On appreciating the evidence on record and contentions raised by the learned counsel for the parties, the accused appellant was held guilty and convicted by the learned trial Court for the offences punishable under Sections 366/376 IPC and was awarded the sentence as mentioned in the upper part of the judgment.

9. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred.

10. I have heard Mr. Deepak Goel, Advocate, learned counsel for the appellant, Dr. Deepa Singh, learned Additional Advocate General, Punjab. and have meticulously gone through the record of the case.

11. Initiating the arguments, learned counsel for the appellant contended that the version of the prosecutrix that she was served some intoxicant is totally demolished from the statement of PW-4 Dilbagh Singh who has stated that the prosecutrix was sitting in normal condition when she was being allegedly taken by the accused. He further contended that the prosecutrix had left her

house on 29.5.2002 and was recovered by the police on 3.8.2002. She stayed with the appellant for more than two months but at no point of time she had raised any protest and had been even performing the domestic duties. She has been meeting with other residents of the locality and never made any effort to escape. Thus, he contended that the prosecutrix was a consenting party. So, no offence of rape is made out against the appellant. To support his contentions, he relied upon cases **Shiv Singh and another versus State of Haryana 2002 (3) RCC 363, Pawan Kumar versus State of Haryana 2015 (1) RCR (Criminal) 701, Raj Kumar @ Raju versus State of Haryana 2015 (2) RCR (Criminal) 627, Subeg Singh and others versus State of Punjab 2015 (1) RCR (Criminal) 636 and Nibbu versus State of Haryana 2015 (1) RCR (Criminal) 303**. Even the learned trial Court has given this finding that the prosecutrix was a consenting party.

12. He further contended that the appellant has been convicted simply on this ground that the prosecutrix was below 16 years of age. He contended that there is no legal evidence on record to establish the age of the prosecutrix. The school certificate Ex.PW1/1 is only a photostat copy and has not been legally proved. This certificate was issued by one Krishna Devi of Government Primary School. Sherpur Kalan, Ludhiana but she has not been examined. Mere marking of this document as exhibit will not dispense with the formal proof. So, this school certificate cannot be taken into consideration. He further contended that there is no

material on record to show on what basis the date of birth has been mentioned in the school certificate. The person who has got admitted the prosecutrix in the school has not been examined. The statement of PW1 Smt. Harpreet Kaur, Headmistress, Government High School is ambiguous as in both the schools it is shown that the prosecutrix has passed the 5th class. He further contended that the best evidence with respect to the age of the prosecutrix i.e. the Birth Certificate which is admitted to be available with the complainant has been withheld. He contended that as per the medical evidence i.e. the ossification test got conducted by the Investigating Agency itself, the age of the prosecutrix was 18 to 19 years. Thus, he contended that the prosecutrix was major at the time of the incident. To support his contentions, he relied upon cases **Jaipal Singh versus State of Haryana 2003 (2) RCR (Criminal) 310 (D.B)**, **Lakhi Ram versus State of Haryana 1998 (2) RCR (Criminal) 318** and **Om Parkash @ Mitha @ Prem 1997 (1) Recent Criminal Reports 741**. He further contended that as the prosecutrix was consenting party, so, the ingredients of the offence of kidnapping/abduction are also not made out. Thus, he pleaded that the conviction of the appellant has been wrongly recorded.

13. On the other hand, learned State counsel contended that the prosecutrix was below 16 years of age on the date of occurrence. The school certificate Ex.PW1/1 shows the date of birth of the prosecutrix to be 20.7.1986. She contended that there is no rebuttal to the school certificate produced by the prosecution. The medical

opinion given by DW-1 Dr. Ashok Ranwant, Radiologist, Civil Hospital, Ludhiana, cannot be relied upon in the face of the school certificate as the medical evidence is not a sure test to determine the age. Thus, she contended that as the prosecutrix was below 16 years of age on the date of occurrence, so, her consent will be immaterial. Moreover, she contended that the prosecutrix has categorically stated that the accused had administered her intoxicant. She became unconscious and then she was taken away by the accused appellant and rape was committed upon her. She has also stated that the accused used to lock her in the room. So, there can be no consent.

14. I have duly considered the aforesaid contentions.

15. As per the findings of learned trial Court in para No.10 of the impugned judgment, after taking into consideration the facts and circumstances of the case, the learned trial Court observed that the prosecutrix had a soft corner for the accused and was a consenting party. So, the learned trial Court has given a categoric finding that the prosecutrix was a consenting party. This Court also has no reason to differ with the aforesaid findings of the learned trial Court on appraisal of evidence and material available on record.

16. The version of the prosecutrix that some intoxicant was administered to her by mixing it in her cup of tea and she became unconscious is not proved. PW-4 Dilbagh Singh is the witness who had seen the accused-appellant in the company of the prosecutrix in the last week of May, 2002. He deposed that he had seen the

prosecutrix accompanied with accused Mahavir, present in the Court, in a three wheeler at Cheema Chowk in May, 2002. So, he has been projected as a witness by the prosecution to show that the prosecutrix was taken away by the appellant. In the cross-examination, he categorically stated that the prosecutrix was sitting in normal condition and she was not unconscious. Thus, the theory of the prosecution that the prosecutrix was unconscious while she was taken away by the appellant stands contradicted from the statement of PW-4 Dilbagh Singh. This version of the prosecutrix also stands falsified from her subsequent conduct as she resided with the appellant for about two months without raising any protest. Thus, the version of the prosecution that the appellant had administered intoxicant to the prosecutrix and she became unconscious while she was taken away by the appellant, is totally unreliable and is not proved.

17. It is pertinent to mention that the prosecutrix was taken away by the appellant on 29.05.2002 and she was recovered by the police on 03.08.2002. So she resided with the appellant for more than two months. The cross-examination of the prosecutrix reveals that she was a consenting party. In the cross examination, the prosecutrix deposed that she did not call any relation or raise hue and cry at the time of sexual intercourse for the first time or even at the subsequent attempts, she did not show any resistance or raise hue and cry. She further deposed that the accused used to let her out of the room when she was to answer the call of the nature. She

used to go alone to answer the call of nature. The latrine was on the ground floor. The owner of the house occupied the ground floor. She further deposed that she did not speak to them about the incident on any occasion. She further deposed that the appellant had informed her about the occupant of the ground floor to be the owner. She further admitted that Mahavir used to work in a factory and he used to go for his work in the morning and he used to come back in the evening but she voluntarily stated that he used to lock her inside the room. She further deposed that somebody else had teased her in the rented premises and because of that they had shifted their residence from there. She admitted that Jaswinder Kaur was their landlady from where she was recovered. She admitted that Jaswinder Kaur was admitted in the hospital and on 27.07.2002, she along with Mahavir and her husband Harbhajan Singh had gone to meet her in the hospital. She further categorically admitted that she along with Mahavir had been attending the business meetings. She further admitted that she along with Mahavir had also gone to the hotel situated next to the railway station. She further admitted that she used to prepare food as long as she remained with the appellant. She further categorically admitted that the day they got the house on rent, they went there as husband and wife. She further admitted that they stayed at that premises as husband and wife and that place was situated in thickly populated area. She further admitted that they had all the household articles in the rented premises. The aforesaid admissions by the prosecutrix in the cross examination show that she

was willingly residing with the appellant in the rented premises. She was performing the duties of household lady. She used to cook the food for the appellant. They were having all the household articles. They were also jointly performing the social obligations as when their landlady was admitted in the hospital, they jointly visited the hospital to see her. She along with the appellant has also been attending the business meetings. She had also visited the hotel along with the appellant but at no point of time, she had raised any protest, hue and cry nor tried to escape from the custody of the appellant. Her version that the appellant used to lock the premises also stands totally belied from the aforesaid admissions. Thus, it is established that the prosecutrix was a consenting party and resided in the company of the appellant willingly for a period of more than 2 months till she was recovered by the police.

18. The conviction of the appellant has been recorded by the learned trial Court simply on the ground that the prosecutrix was below the age of 16 years of age at the time of commission of the offence. To arrive at this conclusion, the learned trial court has heavily relied upon the school certificate Ex.PW1/1 i.e. the only documentary evidence produced by the prosecution with respect to the age of the prosecutrix. The statements of the prosecutrix and her mother Charanjit Kaur with respect to the date of birth of the prosecutrix are not convincing and reliable. The prosecutrix has stated in the cross-examination that her elder sister is aged about 18 years but she does not remember as to how many years after her

birth she took birth but she stated that she was born on 20.07.1986. She further stated that she does not remember the age when she joined the first standard. She further deposed that she does not know if her mother got entered her birth in the Municipal Corporation. She could not tell as to where she was born. PW-3 Charanjit Kaur has simply stated in her examination-in-chief that the prosecutrix is aged about 16 years and had studied upto 5th class. In the cross-examination, she deposed that her elder daughter is about 18 years of age but she does not remember her date of birth. She admitted that the entry regarding her birth as well as the birth of the prosecutrix was got incorporated in the Municipal Corporation record. Thus, PW-3 Smt. Charanjit Kaur, the mother of the prosecutrix, has nowhere stated the exact date of birth of the prosecutrix. In the instant case, there is very marginal difference of age even as per the school certificate. As per the school certificate, the age of the prosecutrix comes to 15 years 10 months and 9 days on the date of occurrence i.e. 29.05.2002. So, there is very marginal deficiency in attaining the age of 16 years by the prosecutrix.

19. The whole case of the prosecution is based upon the school certificate Ex.PW1/1 which has been marked exhibit in the statement of PW-1 Harpreet Kaur, Head Mistress, Govt. High School, Sherpur but surprisingly she is not the person who had issued the certificate Ex.PW1/1. She has herself stated that this school certificate was issued by Krishna Devi. The perusal of the school certificate Ex.PW1/1 shows that the same was issued by one Smt.

Krishna Devi, Teacher, Govt. Primary School, Sherpur Kalan, Ludhiana whereas PW-1 Harpreet Kaur is the Head Mistress, Govt. High School, Sherpur. Thus, the concerned person, who had issued the certificate Ex.PW1/1, has not been examined.

20. It is settled preposition of law that mere marking a document as exhibit will not dispense with the formal proof of the contents thereof. The Hon'ble Supreme Court in case **Sait Taraje Khimchand and others 1971 AIR (SC) 1865** has authoritatively laid down that mere marking of a document as an exhibit does not dispense with its proof. The same legal position has been reiterated by the Hon'ble Apex Court in case **Alamelu v. State Represented by Inspector of Police, 2011 (1) RCR (Criminal) 489**. That was also a rape case wherein the school certificate of the prosecutrix was produced to prove her age. The Hon'ble Apex Court in this authority held that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by the admissible evidence. In the instant case, the official, who has issued the certificate Ex.PW1/1, namely, Smt. Krishna Devi has not been examined. It is only a photostate copy. The original school leaving certificate issued by the Govt. Primary School, Sherpur has not been produced on record. Even the record of Govt. Primary School, Sherpur on the basis of which this school certificate has been issued, has not been produced. So, the school certificate Ex.PW1/1 is not legally proved.

21. In case **Alamelu and Vs. State Represented by**

Inspector of Police (Supra), the Hon'ble Apex Court has further laid down as under:

“The transfer certificate has been issued by the Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.”

22. In view of the aforesaid ratio of law laid down by the Hon'ble Apex Court, the school certificate will only have the evidentiary value to prove the age if it is shown on the basis of what material the age has been recorded therein. The person who had made the entry or gave the date of birth has to be examined. In the instant case, from the statement of PW-1 Harpreet Kaur, it does not come out that on the basis of what material the date of birth has been mentioned in the school certificate Ex.PW1/1. It is also not known as to who has got admitted the prosecutrix in the school and had got recorded the said date of birth. As already mentioned, Smt.

Krishna Devi, the concerned official, who has issued the certificate Ex.PW1/1, has not been examined. It is also not known as to who had made the entry in the record of the school with the respect to the admission of the prosecutrix in the Govt. Primary School, Sherpur Kalan, Ludhiana. In these circumstances, the school certificate Ex.PW1/1 has no evidentiary value.

23. Moreover, the statement of PW-1 Harpreet Kaur is itself contradictory. She deposed that she has brought the summoned record i.e. the register regarding the school leaving certificate of the prosecutrix. As per the said certificate, the prosecutrix left the school on 05.09.2000 after passing 5th class. The school certificate was issued on 05.09.2000 and as per the school record, the date of birth was 20.07.1986. She further deposed that she has also brought the original record pertaining to the record of 5th standard for the year 1988-89. The said record contains the school leaving certificate of 5th class of the prosecutrix. As per the said certificate, her date of birth is 20.07.1986. This was issued by the Primary School by Smt. Krishna Devi. The attested copy of the same is Ex.PW1/1. In the cross examination, she deposed that she has no personal knowledge about the age of the prosecutrix. The perusal of the school certificate Ex.PW1/1 shows that the prosecutrix was admitted in Govt. Primary School, Sherpur Kalan, District Ludhiana on 27.05.1998 and had left that school on 31.03.1999. In the certificate, it is shown that she was studying in 5th standard and had passed the same. So as per the certificate Ex.PW1/1, the prosecutrix has passed the 5th standard

from Govt. Primary School, Sherpur Kalan but PW-1 Harpreet Kaur has stated that she had left their school on 05.09.2000 after passing 5th class whereas as per the school certificate Ex.PW1/1, she has already cleared 5th class on 31.03.1999. So the school certificate Ex.PW1/1 is contradicted from the statement of PW-1 Harpreet Kaur. Such document cannot be made a basis to arrive at any conclusion. Moreover, the school certificate Ex.PW1/1 shows that the prosecutrix was admitted in Govt. Primary School, Sherpur Kalan, District Ludhiana only on 27.05.1998 and she left that school on 31.03.1999 i.e. within a year and was studying in 5th class. So, this certificate is not a certificate issued by the school first attended by the prosecutrix. On that account also this certificate does not carry much evidentiary value.

24. The prosecution has also withheld the best evidence from the Court with respect to the age of the prosecutrix. PW-3 Smt. Charanjit Kaur, the mother of the prosecutrix, has admitted that the entry regarding the birth of the prosecutrix was got incorporated in the Municipal Corporation record and perhaps the birth certificate issued by the Corporation is lying at their house. The Investigating Officer has not made any effort to collect the birth entry/certificate of the prosecutrix from the record of the Municipal Corporation which was the best evidence with respect to the age of the prosecutrix. DW-1 Dr. Ashok Ranwant, Radiologist, Civil Hospital, Ludhiana, who has carried out the radiological examination of the prosecutrix, has given the opinion Ex.DW1/1 that the age of the prosecutrix was

between 18 to 19 years. Thus, the school certificate Ex.PW1/1 cannot be taken into consideration as it has not been legally proved and it also does not carry any evidentiary value to determine the age of the prosecutrix. The best evidence on the point of the age of the prosecutrix has been withheld. Thus, the prosecution has not been able to establish that on the date of occurrence, the prosecutrix was below 16 years of age. It has also been established that she was a consenting party. So, no offence of rape is made out against the appellant.

25. The appellant has also been convicted for the offence punishable under Section 366 IPC. In order to establish the ingredients of the offence of kidnapping, the prosecution is duty bound to establish that the victim was taken away or enticed away by the accused out of keeping of the lawful guardianship of such minor without the consent of such guardian.

26. The Hon'ble Apex Court in case **S. Varadarajan Vs. State of Madras, AIR 1965 SC 942** had held as under:

“There is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361. Where the minor leaves her father's protection knowing or having capacity to know the full import of what she

is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Some more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

27. In case **Dharmender and others Versus State of Haryana 2010 (3) RCR (Criminal) 179** the prosecutrix was 17 years of age. It was alleged that she was kidnapped and forcibly raped. It was found that she did not raise any alarm nor complain to any one while travelling in the bus and train. The Hon'ble High Court held that the prosecutrix had knowledge and capacity of having full import of what she was doing and that was a case of elopement of the prosecutrix with the accused. Similarly, in case **Sukh Ram Vs. State of Haryana 2010(4) RCR (Criminal) 875** the prosecutrix had love affairs with the accused and eloped with him. She was 16 years and 8 months of age and was having knowledge and capacity of understanding the full import of his action. The accused was acquitted by the Hon'ble High Court. Again in case **Jagdish Vs. State of Haryana 2011 (1) RCR (Criminal) 324** it was held that if some person takes away the minor without any criminal intention it cannot be said to have committed an offence.

28. The Division Bench of Hon'ble Delhi High Court in case

Mahesh Singh Vs. State Govt. of N.C.T. And others, 2006(1) RCR

(Criminal) 653 has laid down that where a girl of 17 years of age accompanied the boy on her own volition the offence of kidnapping was not made out. The girl of 17 years is on the verge of majority and had reached the age of discretion. Thus, in view of the consistent rule of law laid down in the cases referred above, the prosecutrix in this case has willingly accompanied the appellant and resided with him for a period of more than 2 months. So, it is a case of elopement and the ingredients of the offence of kidnapping are not established.

29. Thus, keeping in view my aforesaid discussion, the prosecution has not been able to establish the commission of offence of rape and kidnapping by the appellant. Hence, the conviction of the appellant recorded by the learned trial Court and the sentence awarded to him cannot be sustained in the eyes of law.

30. Consequently, the present appeal is hereby allowed. The conviction of the appellant as recorded by the learned trial Court and the sentence awarded to him is hereby set aside. The accused-appellant stands acquitted of the charges.

December 03, 2015
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(DARSHAN SINGH)
JUDGE

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Present: Mr. Deepak Goel, Advocate for the appellant.

Dr. Deepa Singh, Additional Advocate General, Punjab.

DARSHAN SINGH, J.

