

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRA-S-146-SB of 2003
Date of decision: 12.08.2015

Krishana Appellant

Versus

State of Haryana Respondent

CORAM: HON'BLE MR. JUSTICE R.P. NAGRATH

1. *Whether Reporters of the 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?*

Present: Mr. Rahul Vats, Advocate
for the appellant.

Mr. S.S. Pannu, DAG, Haryana.

R.P. NAGRATH, J.

Charges against the appellant are that on 08.04.1999, he kidnapped a minor girl from lawful guardianship of her parents with an intent that she may be compelled to illicit intercourse and also that the appellant committed forcible sexual intercourse with the girl, for offences under Sections 363, 366 and 376 of Indian Penal Code (IPC). The prosecutrix was 14 years old at the time of occurrence. First Information Report (FIR) was lodged with the police by Mohan Lal, the parental uncle of the girl. Father of the prosecutrix was a deaf and dumb person and working in a factory. The complainant made statement Ex. PB to the police on 17.04.1999 and by that time the girl had not been recovered.

2. It was stated that father of the prosecutrix and one more brother of the complainant were residing jointly in a house at Sant Nagar whereas the complainant is resident of Sector 16, Faridabad.

The prosecutrix had three younger brothers aged about 11 years, 8 years and 4 years respectively. On the fateful day both the parents of prosecutrix had gone to attend their duty. When they returned home in the evening at about 07.00 p.m. they found the prosecutrix missing. The eldest brother of the prosecutrix informed them that the appellant had come to the house at about 06.00 p.m. and took the prosecutrix along. The aforesaid facts were also conveyed to the complainant by the family of prosecutrix and he reached there. The appellant was suspected to be behind kidnapping of the girl on the pretext of marriage.

3. The police party recovered the girl from a numbered *Jhuggi* (hutment) at Sant Nagar near railway crossing on 19.04.1999, in the presence of complainant and the other uncle of prosecutrix for which memo Ex. PC was prepared. The girl was taken to the hospital for her medical examination. The appellant was also arrested. The vaginal swab and underwear of the appellant contained in parcels sealed with the seal of doctors were handed over to the police for which memo Ex. PA was prepared. The girl was then handed over to the complainant on the same day.

4. Human semen was detected in the swab and also the underwear of the appellant vide report Ex. PJ of the Forensic Science Laboratory (FSL). Rough site plan (Ex. PG) of the place from where the girl was statedly kidnapped was prepared on 17.04.1999 i.e. before the recovery of the girl. The scaled site plan was prepared by draftsman posted in the S.P. office on 10.05.1999 in respect of the place from where the girl was recovered.

5. After the girl was recovered on 17.04.1999, she was

produced before the Magistrate for recording her statement under Section 164 Cr.P.C.

6. Version of the prosecutrix in the said statement under Section 164 Cr.P.C. was that Raju her classmate and the neighbourer came to her house at about 05.00 p.m. on 08.04.1999 and gave her *Batasas* (sweets) which she ate and felt giddiness and fell asleep. After sometime the prosecutrix was to go for fetching milk but was feeling quite unwell and told her aunt to fetch milk. Raju aforesaid again came to the house and asked the prosecutrix to follow him. She started following Raju and when she regained consciousness she found herself in a train. The appellant was sitting beside her in the train but Raju was not there. On being asked, the appellant told the prosecutrix that she was being taken to her house. The appellant, however, took the prosecutrix to his native place on false pretext. She started weeping and insisted upon to come back to her home. The appellant also used to serve her food there after which the prosecutrix used to feel drowsiness. It was further stated that while the prosecutrix was in unconscious state and so could not say what the appellant used to do with her. According to the said version, the police reached the village of appellant from where she was brought back to her house.

7. The case was committed to the Sessions Court for trial. The prosecution examined 10 witnesses in support of its case.

8. During his examination under Section 313 Cr.P.C., the appellant denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded that the complainant party was on inimical terms towards him and

therefore, a false case has been foisted. The appellant did not lead any evidence in defence.

9. Learned trial Court convicted the appellant of all the three charges framed against him and awarded the sentence to undergo rigorous imprisonment for ten years and to pay fine of ₹ 5000/-, in default to further undergo rigorous imprisonment for six months, under Section 376 IPC. The appellant was also sentenced to undergo three years of rigorous imprisonment and fine of ₹ 3000/-, in default to further undergo rigorous imprisonment for three months under Section 366 IPC and to further undergo rigorous imprisonment for two years and to pay fine of ₹ 2000/-, in default to further undergo rigorous imprisonment for two months under Section 363 IPC. The substantive sentences of imprisonment were to run concurrently.

10. I have heard learned counsel for the appellant, learned State counsel and have gone through the records quite extensively with their able assistance.

11. The conviction of the appellant has been challenged *inter alia* on the grounds:-

- (i) That the prosecution has not been able to prove age of the girl to be less than 16 years; and
- (ii) that this was a case of the girl having eloped with the boy of her own free will and they had sexual intercourse with mutual consent.

12. Learned State counsel on the other hand, vehemently, contended that there was adequate proof of age of the girl to be 14 years at the time of occurrence and therefore, her consent would be

immaterial.

13. The first question, therefore, would be to determine age of the prosecutrix. Learned counsel for the appellant submitted that there was no authentic proof of age of the girl and there is all probability of the girl being more than 16 years of age. It was submitted that the only authentic evidence in the facts of this case would have been the ossification test.

14. It has been throughout the version of prosecution that age of the girl was 14 years as also mentioned in the statement of complainant Ex. PB made before the police on 17.04.1999. The prosecutrix herself has categorically stated her age to be 14 years and there was no cross-examination conducted on her to dispute this version.

15. The complainant as PW-3 and mother of the prosecutrix as PW-4 have also consistently stated about the prosecutrix to be 14 years old at that time. There is no cross-examination of these witnesses to attack the aforesaid assertion. So there was no possibility of the appellant raising a contention that age of the prosecutrix could be above 16 years simply by referring to the statement made by PW-5 Dr. Meenu Kapoor, who medically examined the girl on 19.04.1999.

16. PW-5 stated that the girl was about 14 years old but she was referred to X-ray and Dental examination for age verification. It is not the prosecution story that such an examination was conducted. In cross-examination, PW-5 stated that she cannot affirm or deny that age of the prosecutrix was about 20 years. Such an answer does not support the contention of appellant in any way

in the absence of any challenge to age of the prosecutrix during examination of the prosecutrix herself, her mother and the uncle.

17. The most crucial would be the school record of the girl to authenticate the version brought-forth by the aforesaid witnesses. PW-10 Tej Pal Singh, Teacher in the Government High School, Fatehpur Chandela brought the summoned record relating to admission of the prosecutrix in the school. The prosecutrix was admitted on 17.04.1996 vide admission No. 2151 and as per record date of birth of the prosecutrix is 19.04.1985. Therefore, on 08.04.1999, the girl was even below 14 years of age. As per certificate Ex. PK issued by the Headmistress of the Government High School, the prosecutrix was studying in the 8th standard in April, 1999. In cross-examination PW-10 stated that as per record, date of birth of prosecutrix was recorded on the basis of primary school certificate of Fatehpur Chandela. It would be seen that this entry in the Government High School was made in the school record about 3 years before the present occurrence and there was no scope of manipulating the date of birth in school record.

18. Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the “2007 Rules”) were framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 of the Rules referred to hereinabove reads as under:-

“12. Procedure to be followed in determination of

Age.- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall

determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the

reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) & (6) xx xx xx xx xx”

19. Hon'ble Supreme Court in **Jarnail Singh vs. State of Haryana, 2013 (7) SCC 263** held as under:-

“20.Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision

should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in Sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of

birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

21. *Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW - PW6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied upto class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW-PW6, on the next available basis, in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW4), to prove the age of the prosecutrix VW PW6. Satpal*

(PW4) was the Head Master of the Government High School, Jathlana, where the prosecutrix VW - PW6 had studied upto class 3. Satpal (PW4) had proved the certificate Exhibit-PG, as having been made on the basis of the school records indicating, that the prosecutrix VW - PW6, was born on 15.5.1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view, that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW-PW6. It would also be relevant to mention, that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW-PW6. The deposition of Satpal-PW4 has not been contested. Therefore, the date of birth of the prosecutrix VW-PW6 (indicated in Exhibit P.G., as 15.7.1977) assumes finality. Accordingly it is clear, that the prosecutrix VW-PW6, was less than 15 years old on the date of occurrence, i.e., on 25.3.1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW-PW6 was a minor on the

date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW-PW6 had accompanied the accused-appellant Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.”

20. The facts of **Jarnail Singh's case (supra)** are exactly similar to the present case. From the above discussion, I find that learned trial Court was quite correct in determining age of the prosecutrix to be 14 years at the time of incident.

21. If that be the position, there was no scope at all for challenging the conviction in terms of Section 375 IPC which says that a man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman with or without her consent, when she is under sixteen years of age.

22. The prosecutrix was examined as PW-2. She stated that while she was present in her house at about 05.00 p.m. on 08.04.1999 that Raju her classmate and a neighbourer came there and offered *batasas* (sweets). She then reiterated the version which she stated before the Magistrate under Section 164 Cr.P.C. From the cross-examination of prosecutrix it appears that she was taken by train journey to the native village of the appellant which is West Bengal. There was elaborate cross-examination of the prosecutrix. She stated that while travelling in the train she was served with some eatables because of which she felt drowsiness. She did not raise any protest before the co-passengers travelling in the train

because she was kept under the impression that she was being taken to her house by the appellant. However, the fact of the matter is that the girl remained in the company of appellant for about 11 days before she was recovered. It could thus be safely inferred that she had gone with the appellant with her own consent and not in the manner tried to be suggested by the prosecutrix.

23. Anyhow, the fact that appellant took the prosecutrix to native village or that ultimately they came back and stayed in *Jhuggi* from where they were recovered was not disputed. PW-2 in cross-examination stated that she stayed in village of the appellant for 4 or 5 days. There were 2-3 men and 2-3 women in the house of appellant but was unable to state the exact relation of those members with the appellant.

24. PW-2 further stated in cross-examination that the appellant was residing in her neighbourhood for the past about 1 or 2 years. She denied the suggestion that she wrote love letters to the appellant. Some pieces of torn papers were shown to the prosecutrix but she denied her signatures over those papers. It was also suggested to PW-2 that she was recovered from the house of appellant and rather stated that when she was recovered she was staying in the *jhuggi* which is at a short distance from her house. It was ultimately suggested that PW-2 accompanied the appellant of her own free will. From the aforesaid statement of the prosecutrix and admission as discussed above there is no scope of suspicion in the version of prosecutrix having been allured to leave her house to stay with the appellant who had sexual intercourse with her.

25. The medical evidence further supports the prosecution

case. The prosecutrix was medically examined on 19.04.2015, soon after she was recovered from the *jhuggi*. PW-5 (doctor) has stated that hymen was torn with irregular and healed margins. Vagina admitted two fingers loosely.

26. PW-3 the complainant stated that after he made the statement Ex. PB to the police, Raju, the classmate of the prosecutrix, informed on the next day that he had taken the prosecutrix in a three-wheeler and left her at Delhi border, where the appellant met them. From there the appellant took the prosecutrix alongwith him.

27. PW-8 SI Udey Raj has also supported the version of PW-3 about recovery of the girl from the said *jhuggi* on 19.04.1999. Despite cross-examination nothing has appeared to bring suspicion to the aforesaid story.

28. In view of the abundant and cogent evidence it is proved that the appellant had sexual intercourse with the prosecutrix who was just about 14 years old. That would fulfill the ingredient of offence of rape and learned trial Court rightly convicted the appellant of the said charge and also the offence of kidnaping under Section 366 IPC. There was no need for recording separate conviction under Section 363 IPC as that is covered within the higher offence under Section 366 IPC. The finding of conviction of appellant recorded by the trial Court under Sections 366 and 376 IPC is thus upheld.

29. Coming to the quantum of sentence, I find from the facts and circumstances of the case that award of 10 years of imprisonment under Section 376 IPC is quite on the higher side.

There was no external mark of injury on the person of prosecutrix. Rather the girl remained in the company of appellant for about 11 days before she was recovered. The appellant was only 20 years old at the time of occurrence. Keeping in view the age of appellant and the aforesaid circumstances, I am of the view that ends of justice would be met if the sentence is reduced to the period of 7 years, the minimum sentence provided under Section 376 IPC, from 10 years of rigorous imprisonment by increasing the amount of fine from ₹ 5000/- to ₹ 20,000/- and in default of payment of fine, to further undergo rigorous imprisonment for 8 months. The sentence awarded to the appellant under Section 366 IPC and the amount of fine is, however, maintained. Since it has been held above that there was no need of separate conviction under Section 363 IPC, the sentence awarded by the trial Court under that provision, therefore, stands set aside. If the fine is recovered, the same shall be disbursed to the victim.

30. The appeal is dismissed on merits but partly allowed on the quantum of sentence.

August 12, 2015
jk

(R.P. NAGRATH)
JUDGE