

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

Crl. Appeal S-264-SB of 2004
Date of Decision : May 06, 2015

Mangal Singh

.....Appellant

VERSUS

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE T.P.S. MANN

Present : Mr. Ashwani Bhardwaj, Advocate

Mr. Praveen Bhadu, Asstt. A.G. Haryana

T.P.S. MANN, J.

The appellant was tried for committing offences punishable under Sections 363, 366 and 376 IPC. Vide impugned judgment and order dated 24.1.2004, learned Additional Sessions Judge, Rohtak convicted him under Section 376 IPC and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5,000/-. In default of payment of fine, he was ordered to undergo further rigorous imprisonment for a period of fifteen months. He was further convicted under Section 366 IPC and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.2,000/-. In default of payment of fine, he was ordered to undergo further rigorous imprisonment for a period of six months. He was also convicted under Section 363 IPC but no separate sentence was awarded since the offence punishable under

Section 366 IPC included the offence punishable under Section 363 IPC. Both the sentences imposed upon the appellant were, however, ordered to run concurrently. 95% out of the amount of fine, upon its realization, was ordered to be given to the prosecutrix.

According to the prosecution, on 15.1.2003 at about 3.30 p.m., when SI Om Parkash, alongwith some police officials, was present at Bus Stand Kansala in connection with patrolling, complainant-Prem Parkash Sharma, who was employed as a Peon in Government High School, Bakheta, met him and submitted written complaint to the effect that his eldest child i.e. the prosecutrix, aged about 16 years and a student of 10th class was missing from his house since 3.00/4.00 a.m. on 14.1.2003. He had searched for her in his relatives but could not locate her. He suspected the involvement of the appellant in forcibly enticing away the prosecutrix with an intention to marry her. The complainant, accordingly, sought action against the appellant and for tracing the prosecutrix.

Further case of the prosecution is that on the aforesaid complaint submitted by the complainant, SI Om Parkash made an endorsement and forwarded it to Police Station Sampla where FIR under Sections 363 and 366 IPC was registered against the appellant on 15.1.2003 at 4.35 p.m.

Special report sent through HC Jitender Singh was received by the Illaqa Magistrate on 15.1.2003 at 6.35 p.m.

During the investigation of the case, SI Om Parkash visited the house of the complainant and prepared rough site-plan. The house of the appellant was raided but he could not be found. However, a letter, written by the appellant to his mother was found from his books, was taken into possession. In the said letter, the appellant had expressed his deep love for the prosecutrix and their decision to go to some unknown destination and sought pardon. The investigation was verified by DSP Tika Ram, who also visited the spot. Subsequently, the investigation was handed over to ASI Kartar Singh, who on 20.1.2003 learnt that the appellant and the prosecutrix were present at new Bus Stand, Rohtak. Accordingly, he alongwith his fellow officials, reached there and apprehended them. The prosecutrix in her statement recorded under Section 161 Cr.P.C. stated that at about 3.00/4.00 a.m. on 14.1.2003 when she had come out from her house to urinate, the appellant was present there, who took her in his arms, gagged her mouth and forcibly brought her outside the village. He lured her to marry. He threatened that in case she raised an alarm, she would be killed. Due to the fear of the appellant, she accompanied him, who brought her to Delhi Railway Station. He took her inside a toilet of the railway

compartment and forcibly committed sexual intercourse with her against her consent after removing her salwar. She was, thereafter, taken to Jaipur where they wandered here and there. Ultimately, he brought her to Rohtak Bus Stand where they were apprehended by the police. On the said statement made by the prosecutrix, offence under Section 376 IPC was added to the FIR.

Further case of the prosecution is that the prosecutrix was taken to Civil Hospital, Sampla where she was medically examined by Dr. Ekta Maan, who noted her age as about 16 years and observed her condition as under:-

“General condition-fair, conscious, co-operative, well oriented to time, place and person. Menarche-two years back. Date of last menstruation period was 19.1.2003.

On external examination- no mark of injury was found over her breasts, abdomen, inner part of thighs, vulva, external genitalia i.e. labia majora and labia minora. Secondary sexual characters were normally developed.

Per vaginal examination- Hymen admitted two fingers easily. Fresh bleeding was coming out from vagina.

For her age determination, she was referred for ossification test.”

In the opinion of the doctor, possibility of sexual intercourse with the prosecutrix could not be ruled out. The appellant was also medically examined on 20.1.2003 by Dr.Satyawan, who did not find any abnormality nor any injury on his person. Secondary sexual characters were found present. External genitalia was normal in size and smegma was not present. In the opinion of the doctor, there was nothing to suggest that the appellant was not able to perform sexual intercourse. The prosecutrix was subjected to ossification test by Dr. R.K.Verma, who found that the prosecutrix was between 16 to 18 years of age. School leaving certificate of the prosecutrix was obtained from Government Girls Primary School, Bakheta where her date of birth was mentioned as 1.9.1987. The birth certificate was also obtained from the Registrar, Births and Deaths according to which also her date of birth was 8.9.1987.

Upon completion of the investigation, the appellant was challaned by SI Om Parkash. Subsequent to commitment of the case, the appellant was charged for the offences punishable under Sections 363, 366 and 376 IPC to which he pleaded not guilty and claimed trial.

In support of its case, the prosecution examined eighteen witnesses.

PW1 Dr. Ekta Maan deposed about the medico-legal

examination of the prosecutrix. PW2 Dr. R.K.Verma deposed about the ossification test whereas PW14 Dr. Satyawan, Medical Officer opined that the accused was fit to perform sexual intercourse.

Complainant-Prem Parkash appeared before the trial Court as PW4 and testified about the missing of his daughter from his house and submitting of written complaint to the police in this regard. He also testified that he suspected the involvement of the accused in enticing away his daughter, who was aged about 15½ to 16 years. Complainant's wife Santosh while appearing as PW7 corroborated the statement of the complainant. PW18 Satyavir Shastri, brother of complainant-Prem Parkash testified that on 14.1.2003 around 5.00 a.m., he was awakened by the complainant and his wife and told that their daughter i.e. the prosecutrix was missing from the house. He was also informed by them that they suspected the appellant to have enticed away the prosecutrix. He further stated that all of them went to the house of the appellant, who was found missing from his house. His mother disclosed that the previous evening, he was preparing a bag by putting clothes in the same. She also told them that the appellant was talking about his visit to some relative. The witness further testified that the prosecutrix was handed over to him and his wife on 20.1.2003 after her medical

examination. The prosecutrix herself was examined as PW5 and testified that she was enticed by the appellant when she had come out of her house on 13.1.2003 at about 3.00/4.00 a.m. for urination. The appellant gagged her mouth and dragged in the street and she was taken to Delhi in a train where the appellant subjected her to rape. She was also taken to Jaipur where they stayed for many days. Ultimately, when she was brought to Rohtak, she alongwith the appellant was apprehended by the police.

PW11 Bani Singh, Head Teacher, Government Girls Primary School, Bakheta proved certificate Ex.PL issued by him on the basis of original admission form of the prosecutrix where her date of birth was mentioned as 1.9.1987 when she was admitted in the said school in the first standard. PW15 Manohar Lal, Assistant Secretary, Certificate Branch, Haryana Education Board, Bhiwani proved the attested copy of the result/gazette sheet Ex. PU pertaining to Middle Examination as per which the date of birth of the prosecutrix was recorded as 1.9.1987. PW16 Veer Bhan, Statistical Assistant, Office of CMO, Rohtak testified that as per the original register of birth and death relating to village Bakheta , the prosecutrix was born on 8.9.1987.

The investigation part of the case was brought on record by PW3 Constable Sumit Kumar, PW6 ASI Jai Kishan,

PW8 HC Ram Bhagat, PW9 HC Jitender Singh, PW10 Constable Juglal, PW12 SI Om Parkash, PW13 ASI Kartar Singh and PW17 ASI Mahinder Singh.

When examined under Section 313 Cr.P.C. the appellant pleaded innocence and false implication due to enmity in order to spoil his career. According to him, 15/20 days prior to the occurrence, he had seen the prosecutrix with her boyfriend in a compromising position in the fields. When he brought this fact to the notice of the villagers, a dispute arose between his family and the family of the prosecutrix. When the prosecutrix remained absent from the village for a number of days, he was falsely roped in.

In defence, the appellant examined DW1 Vir Bhan Sharma, Station Superintendent, Railway Station, Rohtak.

After hearing learned counsel for the parties and on going through the evidence brought on the record, the trial Court believed the prosecution case and convicted and sentenced the appellant, as mentioned above.

This Court has heard Mr. Ashwani Bhardwaj, Advocate for the appellant and Mr. Praveen Bhadu, Assistant Advocate General, Haryana and scanned the evidence with their able assistance.

From the testimony of the prosecutrix, who was

examined by the prosecution as PW5, it is made out that she had tried to improve upon her case while deposing before the trial Court. In the Court, she testified that when she opened the door, the appellant was already there. This fact was not stated by her in her statement Ex.DA. She also stated that the appellant had threatened and misbehaved with her and, accordingly, she became afraid. This was also not so stated by her in her statement Ex. DA. What was mentioned in Ex. DA was that when she was taken outside the village, he lured her for marriage. It was her case that after she was taken outside the village, she alongwith the appellant boarded a train and reached Delhi. Afterwards, both of them reached Jaipur where they stayed for many days and then came to Rohtak in a Bus. According to her, when she was brought to Rohtak, she raised hue and cry and the police reached there. However, no such fact was got written by her in writing Ex.PW which was made in the Police Post in the presence of police officials where none else was present excepting her and the police. Though the prosecutrix had denied the suggestion that she had voluntarily accompanied the appellant yet the fact remains that she visited various places by travelling in public transport. It is not the case of the prosecutrix that the appellant was armed with any weapon and after threatening her with the same, taken her to different places. In

such a situation, she could have raised hue and cry especially while travelling from one place to another. Her not protesting to her abduction or being subjected to sexual intercourse is indicative of the fact that the prosecutrix had been a consenting party throughout. This is also apparent from the medical evidence as PW1 Dr. Ekta Maan, who while subjecting her to vaginal examination noticed that the hymen admitted two fingers easily. All the secondary sexual characters were normally developed and no external mark of injury was found on her breasts, abdomen, inner part of thighs, vulva and external genitalia. On the other hand, the prosecutrix had testified that it was her first act of coitus. She also stated that she had received injuries on her hands and legs during the act of coitus. Apparently, the medical evidence, as mentioned above, does not support her assertion that she was not a willing partner to the sexual intercourse. Thus, this Court has no other option but to hold that the prosecutrix had willingly left her house and stayed with the appellant for about a week and during the said period, she had consensual intercourse with the appellant.

However, it is still to be determined as to what was the age of the prosecutrix at the time of the occurrence. When her father Prem Parkash Sharma had submitted written complaint Ex.PF, he stated her age as about 16 years. When the

prosecutrix was medically examined, PW1 Dr. Ekta Maan noted her age as 16 years. However, she referred the prosecutrix for ossification test. PW2 Dr.R.K.Verma testified that on 21.1.2003, he radiologically examined the prosecutrix and on the basis of the observations mentioned in his report Ex. PD, he opined that the prosecutrix was about 16-18 years of age. However, that by itself is not sufficient to hold that the prosecutrix was more than 16 years of age on the date of the occurrence. As per the testimony of PW16 Veer Bhan, Statistical Assistant, Office of CMO, Rohtak, the date of birth of the prosecutrix in the original record of birth and death was recorded as 8.9.1987. In cross-examination, he stated that the entries were made on the basis of information given by the concerned Police Station. No suggestion was, however, put to him by the defence that the entry in question relating to the date of birth of the prosecutrix as 8.9.1997 had been wrongly made. PW11 Bani Singh, Head Teacher, Government Girls Primary School, Bakheta testified that he had brought the original admission form of the prosecutrix, who was admitted in his school in first standard and her date of birth was noted as 1.9.1987. Her name was entered in admission register at serial No. 112 on 16.4.1993. He also testified that as per the record, the prosecutrix passed her 5th standard examination and school leaving certificate was issued on 16.4.1998. He also

stated that the admission form was signed by the father of the prosecutrix. In cross-examination, he testified that there was no practice of taking affidavit regarding the age of the student at the time of admission or any other proof of age. Whatever age was stated orally, was written in the admission form and admission register. PW15 Manohar Lal, Assistant Secretary, Certificate Branch, Haryana Education Board, Bhiwani testified on the basis of result sheet of middle examination for the year 2001 that the date of birth of the prosecutrix was 1.9.1987. In cross-examination, he stated that he had no personal knowledge regarding the date of birth of the prosecutrix. However, it was not suggested to him that the aforementioned entry in the result sheet did not relate to the prosecutrix.

From the above evidence by way of testimonies of PW16 Veer Bhan, PW11 Bani Singh and PW15 Manohar Lal, it stands established that the prosecutrix was born in the month of September, 1987 and, therefore, on the date of the occurrence i.e. 14.1.2003, she was 15 years and 4 months of age. In any case, she was less than 16 years of age. Under these circumstances, the consent of the prosecutrix in having intercourse with the appellant does not absolve the appellant of committing the offences alleged against him.

That brings the Court to consider the sentence of

imprisonment which can be imposed upon the appellant.

Learned counsel for the appellant has relied upon the judgment of the Hon'ble Supreme Court in **State of Chhattisgarh Vs. Lekhram**, 2006(2) R.C.R.(Criminal) 475 wherein the sentence of imprisonment of three years imposed upon the convict therein for the offence under Section 376 IPC was reduced to the one already undergone i.e. one year and six months as the prosecutrix, who was minor, married and mature, was found to be a consenting party. Learned counsel for the appellant has also relied upon the judgment of the Delhi High Court in **Babloo Vs. State**, 2012(1) R.C.R. (Criminal) 455 where the conduct of the prosecutrix, who was below 16 years of age, showed that she willingly went with the accused and though the law required imposition of minimum sentence of seven years for the offence under Section 376 IPC, the Court reduced his sentence to that already undergone i.e. more than five years and eight months. It is submitted that the appellant has been facing the agony of criminal prosecution for the last more than 12 years. He has since got married and has two children. The appellant has already undergone a period of more than two years out of the sentence of seven years imposed upon him. Therefore, his sentence of imprisonment be reduced to that already undergone by him.

Learned State counsel has opposed the stand of the defence by submitting that for the offence under Section 376 IPC, the law requires imposition of minimum imprisonment for seven years and, therefore, no case is made out for awarding any lesser sentence. Learned State counsel has, however, produced the custody certificate, as per which the appellant has already undergone an actual period of two years and eleven days.

Once a person is convicted under Section 376 IPC, he is required to be awarded minimum sentence of imprisonment for seven years which may extend upto life. However, for adequate and special reason, the Court can award lesser sentence. The conduct of the prosecutrix, as mentioned above, clearly indicated that though she was minor yet she had willingly accompanied the appellant from one place to another. She had also consensual intercourse with him. Further, the sword of the criminal proceedings is hanging on the head of the appellant for the last more than 12 years. The appellant has since got married and has two children. There is no material on the record that while the appellant has remained on bail during the pendency of the appeal, he has misused the concession in any manner. Taking into consideration the totality of the circumstances, this Court is of the considered view that the substantive sentence of imprisonment imposed upon the appellant for the offence under

Section 376 IPC can be reduced to three years.

Resultantly, the conviction of the appellant for the offences under Sections 376, 366 and 363 IPC is upheld. His substantive sentence of imprisonment for seven years for the offence under Section 376 IPC is reduced to rigorous imprisonment for three years. The sentence of imprisonment for the offence under Section 366 IPC is maintained. The sentences of fine imposed upon the appellant for the offences under Sections 376 and 366 IPC alongwith their default clauses are upheld. Both the substantive sentences of imprisonment shall run concurrently. The entire amount of fine, upon its realization, be disbursed to the prosecutrix, as compensation.

The appeal is, accordingly, disposed of.

May 06, 2015
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(T.P.S. MANN)
JUDGE