

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

CRA-S No. 266-SB of 2004

Date of decision: - 09.09.2015

Rajpal

...Appellant

Versus

State of Haryana

..Respondent

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

Present: Ms. Aditi Girdhar, Advocate-Amicus Curiae with
Mr. B.S. Sarota, Advocate,
for the appellant.

Mr. Tanuj Sharma, A.A.G., Haryana,
for the State.

SHEKHER DHAWAN

Present appeal against judgment of conviction dated 08.01.2004 and order of sentence dated 09.01.2004, passed by Additional Sessions Judge, Fast Track Court, Gurgaon.

2. Relevant facts of the case that on 15.08.2002, complainant Murti Devi reported to the police that her daughter-prosecutrix (name not disclosed) had gone to school on 14.08.2002 and had not come back. They had searched at their own level. Complainant further reported that Raj Pal (present appellant-convict) was earlier known to her family and had kidnapped prosecutrix by enticing her to some unknown place. Later on, prosecutrix was recovered and handed over to complainant after medical examination. Accused was also medico legally examined. Statement of

prosecutrix was recorded under Section 164 Cr.P.C. After completion of necessary investigation, challan was presented in the Court. Learned trial Judge after completing other various proceedings of the trial including framing of charge against the accused, recording of statement of prosecution, examination of accused under Section 313 Cr.P.C. and after considering the prosecution evidence, held appellant guilty and convicted and sentenced him for the offence under Sections 363, 366 and 376 IPC.

3. Learned counsel for the appellant mainly urged that the prosecution is not believable because prosecution has placed reliance upon statement of prosecutrix under Section 164 Cr.P.C. but that statement was recorded when she was in police custody and that was under the influence of the police and cannot be used to convict the accused. More so, as per statement of PW10 Dr. Renu Sharma, age of prosecutrix was 15 years. In such a cases, there is always a margin of 2 years and keeping in view margin of 2 years, prosecutrix was of the age of 17 years. As per school certificate (Ex.PE/2) her date of birth was 05.04.1989 On this point, reliance upon judgment from Co-ordinate Benches of this Court in cases **Naresh Kumar @ Nesha Vs. The State of Haryana, 2013(3) R.C.R. (Criminal) 315; Nibhu Vs. State of Haryana, 2015(1) R.C.R. (Criminal) 303; Arshad Vs. State of Haryana, 2011(1) R.C.R. (Criminal) 111 and Sagar Kumar Vs. State of Haryana, 2011(1) R.C.R. (Criminal) 620.**

4. While arguing further, learned counsel for the appellant also took the plea that the prosecutrix had gone into the company of appellant of her own and it was case of consent and that is why no injury mark on private parts of prosecutrix on medical examination. Learned trial

Magistrate completely ignored this fact. On this point, reliance has been placed upon judgment from Co-ordinate Bench of this Court in case **Dharmender and others Vs. State of Haryana, 2010(3) R.C.R. (Criminal) 179.**

5. Learned counsel for the appellant also took the plea that appellant has already undergone actual sentence of 2 years and 6 months. So, he be released from custody.

6. Learned State counsel took the plea that age of the prosecutrix was just 13 years because the alleged occurrence had taken place on 14.08.2002 and as per school certificate her date of birth was 05.04.1989. She was not in a position to give valid consent as per law. School certificate is Ex.PE/2. It had come in the statement of prosecutrix that accused had sexually assaulted her. Learned trial Judge has already considered all these facts while recording judgment of conviction and order of sentence. So, appeal against judgment of conviction and order of sentence be dismissed.

7. Having considered the rival submissions made by learned counsel for the parties, this Court is of the considered view that learned trial Judge has rightly placed reliance upon statement (Ex.PL/1) of prosecutrix recorded under Section 164 Cr.P.C. before the magistrate wherein she has deposed that accused committed the offence of rape on her and she was just of the age of 13½ years. She was enticed by accused and was taken to Delhi. Prosecutrix appeared as PW8 and stated the same facts before the Court. Her version has been fully supported and corroborated by testimony of her mother Murti Devi-complainant in this case. As per PW6, age of the prosecutrix was 14½ years and she was enticed and taken away by accused

from lawful guardianship and she was raped. Medical evidence by way of statement of PW-9 Dr. Dinesh available on file that accused was physically fit to do sexual intercourse. PW10 Dr. Renu Sharma deposed that age of the prosecutrix was 15 years and also opined on the basis of report (Ex.PF) that rape upon prosecutrix could not be ruled out. Remaining evidence supported and corroborated by testimony of prosecutrix herself, her mother and father, which is supported by medical evidence. Learned trial Judge has rightly appreciated the ocular and documentary evidence available on the file. The plea taken by learned defence counsel that prosecutrix was of the age of giving valid consent is not proved on the file because first of all the age of prosecutrix was just 13½ years on the basis of school certificate (Ex.PE/2). There are specific allegations by prosecution that she was sexually assaulted by accused and she was taken by appellant-accused without her consent. More so, she was not in a position to give valid consent, at the age of 13½ years. Even if the margin of 2 years is taken still prosecutrix in this case was not in a position to give valid consent. Otherwise also, it is not a case of consent because prosecutrix as well as mother of prosecutrix stated otherwise. Learned trial Judge has already considered all these facts while recording the judgment of conviction and there are no ground to set aside the said judgment of conviction and appeal against judgment of conviction stands dismissed.

8. As regards to appeal against order of sentence, learned trial Judge has already taken most reasonable view and ordered to undergo seven years RI-. The said order also does not call for any interference and appeal against order of sentence also without any merit.

9. Resultantly, the appeal stands dismissed.
10. Rajpal-accused is stated to be on bail. He be taken into custody to undergo the remaining part of his sentence.
11. A copy of this judgment be sent to the trial Court for strict compliance.

September 09, 2015

naresh.k

(SHEKHER DHAWAN)

Judge