

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

**Crl. Appeal S-1062-SB of 2012
Date of decision 01.07.2015**

Radhey Mohan

..... Appellant

Versus

U.T., Chandigarh

..... Respondent

CORAM: HON'BLE MR. JUSTICE MAHAVIR S. CHAUHAN

Present: Mr. Sidakmeet Sandhu, Advocate (Legal Aid counsel)
for the appellant.

Mr. Amandeep Singh Gill, Asstt. PP
for the UT, Chandigarh.

MAHAVIR S. CHAUHAN, J.(Oral)

Having been convicted and sentenced to undergo rigorous imprisonment for a period of 07 years with fine amounting to Rs. 5,000/- and in default of payment of fine to undergo further imprisonment for 02 months under Section 367 of the Indian Penal Code 1860 (for short “IPC”) and rigorous imprisonment for a period of 07 years with fine amounting to Rs. 5,000/- and in default of payment of fine to further undergo imprisonment for 02 months under Section 377 IPC, vide judgment/order dated 30.01.2012 passed by the Court of learned Additional Sessions Judge, Chandigarh (hereinafter referred to as “the trial Court”), convict Radhey Mohan has brought this appeal to seek reversal of the aforesaid judgment/order and his acquittal.

Put as concisely as one may, case of the prosecution suggests that on 02.04.2011 complainant Jaskaran Singh Dhaliwal (PW-1) while returning from Sector 18, Chandigarh in his car when reached near park of

Sector 18, heard screams of a child. He went inside the park and found that the appellant was committing unnatural offence with the victim, a 11 years old mentally retarded, deaf and dumb child. He informed the police control room and ultimately made a written complaint Ex. P-1, based whereupon a formal First Information Report, Ex. P-6, came to be recorded.

Investigating Officer, SI Sawroop Singh on receipt of information went to the spot, recorded statements of the witnesses, prepared rough site plan of the place of occurrence(Ex. P-7), arrested the appellant and got the victim and the appellant medically examined by Dr. Neena Chaudhary (PW-6).

On completion of investigation, a report in terms of Section 173(2) of Code of Criminal Procedure, 1973 (for short "the Code") was prepared and presented before the learned trial Court

The matter having been committed to the Court of Session, learned Additional Sessions Judge, Chandigarh on appraisal of the report along with its enclosures and hearing the prosecutor and defence found a prima facie case punishable under Sections 367 and 377 IPC, to be made out against the appellant. A charge was, accordingly, framed to which the accused pleaded not guilty and claimed to be tried.

To substantiate the charge against the appellant, prosecution examined Jaskaran Singh Dhaliwal (PW-1) to bring on record oral account of occurrence; Sahdri (PW-2) mother of the victim to bring on record the factum of victim having been taken away by the appellant from Bus Stand, Chandigarh at about 7/8 P.M. on 02.04.2011; Dr. Neena Chaudhary (PW-6) to state on oath that she medico legally examined the victim and the appellant on 03.04.2011 vide medico legal reports Ex. P-10 and Ex. P-11,

respectively; SI Sawroop Singh, I.O. (PW-5) to bring on record various facets and stages of the investigation besides formal witnesses namely, Constable Anuj (PW-3) and HC Satpal (PW- 4).

On completion of evidence of prosecution, all the inculcating circumstances appearing therein were put to the appellant, so as to have his explanation vis-a-vis the same, as required by Section 313 of the Code. Appellant denied all the circumstances as false and incorrect and reiterated plea of his innocence and false implication.

Appellant did not lead any evidence in defence.

On hearing the prosecutor and the defence and appraisal of the evidence available on record, learned trial Court reached a conclusion that the prosecution was able to prove guilt of the appellant beyond reasonable doubt and, accordingly, convicted and sentenced him as hereinbefore stated.

I have heard learned counsel for the parties besides examining the record requisitioned from the learned trial Court.

Learned counsel appearing for the appellant has argued with vehemence that prosecution has failed to bring any evidence to substantiate its plea that the victim was kidnapped from lawful custody of his guardian with a view to cause grievous hurt or to satisfy sexual lust and also the factum of the victim having been subjected to unnatural offence. According to the learned counsel, Sahdri (PW-2) has stated that her mother had told her that the victim had been taken away by the appellant from the bus stand but she has not been examined as a witness and evidence of Sahdri (PW-2) cannot be relied upon in this respect, it being hear-say. It has also been pointed out by the learned counsel for the appellant that medical evidence is conspicuous by absence of any opinion that the victim was subjected to

unnatural offence by the appellant. It has also been contended that the victim, who was the best witness to throw light on the occurrence has been withheld from the witness stand.

Per contra, learned State counsel has argued with equal vehemence that in the evidence of PW-1 it has been specifically revealed that he saw the victim being subjected to unnatural offence and evidence of Sahdri as regards kidnapping of the victim from the bus stand is admissible and reliable in so far as she derived the information from her mother and the information was found to be correct when she saw the victim naked at the park in the company of the police and the appellant.

Nothing more has been urged on either side.

The occurrence has been brought on record by Jaskaran Singh Dhaliwal (PW-1). Indisputably, he is not connected either with the appellant or with the victim in any manner. To put it otherwise, Jaskaran Singh Dhaliwal (PW-1) is an independent witness, having no axe to grind by falsely implicating the appellant. Making of complaint Ex. P-1 by this witness has remained undisputed. The only argument to dislodge the evidence of the witness namely, Jaskaran Singh Dhaliwal (PW-1) is that he did not know the appellant. As per his own saying the place of occurrence was a dark place and that being so, he cannot be expected to have identified the appellant and recognized his face. However, a perusal of evidence of Jaskarn Singh Dhaliwal (PW-1) would show that he has described the occurrence in a vivid manner and has been able to stand the test of cross-examination successfully. It is not that he left the appellant and the victim on the spot, instead he called the police and the appellant was apprehended on the spot. It is true that in the medical evidence brought on record by Dr.

Neena Chaudhary (PW-6), there is no mention of unnatural offence having been committed qua the victim but it has been very specifically stated by her that on medical examination of the appellant nothing was found to suggest that he was incapable of performing the sex act. Coupled with this fact, when evidence of Sahdri (PW-2) and Jaskaran Singh Dhaliwal (PW-1) is taken into consideration it comes out that the offence of Section 377, IPC, is clearly made out against the appellant.

Non-examination of the victim of the crime, in my considered opinion, is inconsequential insofar as it has come on record that he was mentally retarded and was unable to speak and hear. Learned Public Prosecutor gave him up faced with the handicap that he was unable to understand the language of signs even. Otherwise as aforesaid, the occurrence has been fully proved in the evidence of Jaskaran Singh Dhaliwal (PW-1).

Even otherwise requirement of law as contained in Section 134 of Indian Evidence Act, 1872 (for short "Evidence Act") is not to multiply the number of witnesses. The provision says that it is not necessary to examine a particular number of witnesses in order to prove a particular fact. The Section, in a way, recognizes a well known maxim that the evidence has to be weighed and not counted.

As regards the offence of Section 367, IPC, though Sahdri (PW-2) has stated that she did not see the appellant taking the victim away and was told by her mother, who has not been examined as a witness, but it has also come in her evidence that on receipt of information about disappearance of her son (victim) she went to Sector 18 park and found the police officials there along with the victim, who was completely naked, and

the appellant there. This aspect fortifies the statement of the witness that the victim was taken away by the appellant from the keeping of his grandmother (mother of PW-Sahdri).

In view of above, I do not find any reason to interfere with the well reasoned judgment of conviction recorded by the learned trial Court. However, the order on quantum of sentence, in my view needs to be modified because sentence awarded to the appellant seems to be on the higher side. I am told that the appellant is in custody since 03.04.2011, the date of his arrest. From this it comes out that the appellant has already spent in custody a period of 04 years and 03 months approximately. In my view, ends of justice would be well served if the substantive sentence awarded to the appellant is restricted to the period already spent by him in custody. Sentence as regards fine is also reduced to Rs. 500/- under Section 367, IPC and to an equal amount under Section 377, IPC.

With the aforesaid modification in the order on quantum of sentence, the appeal fails and is dismissed.

[Mahavir S. Chauhan]
Judge

July 01, 2015
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