

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

CRA-S-1657-SB of 2010 (O&M)

Date of decision: 09.09.2015

Niranjan

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present: Mr. Jagdish Rai, Advocate/Amicus curiae
for the appellant.

Mr. Arun Luthra, AAG, Haryana
for the State.

Jitendra Chauhan, J.

The convict, Niranjan son of Chiranji Lal has filed this criminal appeal assailing his conviction and sentence ordered by learned Sessions Judge, Faridabad, vide judgment dated 16.02.2010, and the order of sentence dated 18.02.2010. The appellant was convicted under Sections 363, 366-A and 376 of the Indian Penal Code (for short 'IPC') and sentenced to undergo rigorous imprisonment for three years with fine of Rs.500/- and in default of payment of fine, to further undergo rigorous imprisonment for three months under Section 363 IPC. He was further sentenced to undergo

rigorous imprisonment for five years with fine of Rs.500/- and in default of payment of fine, to further undergo rigorous imprisonment for three months under Section 366-A IPC and further he was sentenced to undergo rigorous imprisonment for ten years with fine of Rs.1000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months under Section 376 IPC.

The case of the prosecution as set out from the judgment of the Trial Court is as under:-

“On 05.12.2007, FIR of this case was lodged on the basis of complaint Ex.PF filed by the complainant Ranji Gouri. In the above mentioned complaint, the above named complainant had alleged that he is living as a tenant in Subedar Colony Ballabgarh and that on 29.11.2007, his daughter (prosecutrix) was taken away by Niranjana Kumar, resident of Chandaali out of his lawful guardianship. That she was enticed by Niranjana Kumar and that he had searched for his daughter but could not get any clue about her whereabouts. The complaint Ex.PF was endorsed by SI Keshav Ram with his endorsement Ex.PF/1 and was sent to the police station. In the police station on the basis of this information, the formal FIR of this case Ex.PF/2 was lodged and in this context another endorsement was recorded on the information slip, by the author of the FIR, as Ex.PF/3. The investigation of the case taken by the police. During the course of investigation, the investigating officer recovered the prosecutrix from

the custody of the accused and in this context prepared the memo Ex.PG. The above named investigating officer arrested the accused and got him examined medico-legally vide application Ex.PH. The investigating officer also got the prosecutrix examined medico-legally and collected the medico-legal reports of the accused vis-a-vis prosecutrix, Ex.PH/1 and Ex.PJ/1 respectively. The investigating officer also inspected the spot and prepared the rough site plan of the place of occurrence and handed over the custody of the prosecutrix to her aunt Smt. Sunita vide receipt Ex.PL and got the statement of prosecutrix recorded under Section 164 Cr.P.C., and collected the statement Ex.PY. On completion of usual formalities of investigation, the report under Section 173 Cr.P.C., prepared and presented in the Court.”

On presentation of challan, the trial Court finding a prima facie evidence against accused-appellant, framed charges for the offences punishable under Sections 363, 366-A and 376 of the Indian Penal Code. The accused pleaded 'not guilty' and claimed trial.

In support of its case, the prosecution examined the following witnesses:-

PW-1, EASI Ali Mohd., tendered his affidavit Ex.PA in support of his examination in chief.

PW-2, Lady Constable Jagwati, testified Ex.PB, four

pullanda handed over to her by the doctor after medical examination of accused and Ex.PC, pullanda containing sample seal, swab of the prosecutrix, which were taken into custody by this witness, after their medical examination.

PW-3, Prosecutrix herself narrated her tale.

PW-4, Sarwan Kumar, Draftsman, deposed regarding preparation of scaled site plan Ex.PE at the demarcation of SI Keshav Ram.

PW-5, SI Keshav Ram, Investigating Officer, corroborated the sequence of investigation being carried out by him.

PW-6, Dr. Narinder Kaur, who was posted at B.K. Hospital, Faridabad, stated that on 29.11.2007, she conducted the medico-legal examination of the prosecutrix, and proved the medico-legal report as Ex.PJ/11.

PW-7, Constable Satvinder, tendered into evidence his sworn affidavit Ex.PO.

PW-8, HC Satish Kumar, deposed that on 11.12.2007, he remained associated with the investigating officer in the investigation of this case and on that day, the prosecutrix was recovered from the company of the accused Niranjana from Bus Stand, Ballabgarh.

PW-9, Dr. Suresh Kumar, who was posted as Medical Officer, Civil Hospital, Ballabgarh, conducted the medico-legal

examination of accused/appellant and proved the medico-legal report as Ex.PH/1.

PW-10, Sunita, deposed that the prosecutrix was abducted by the accused and she had gone to the police station with Ranjeet to report the matter.

The statement of the accused under Section 313 Cr.P.C., was recorded. He pleaded innocence and alleged false implication. However, he did not lead any evidence in his defence.

After hearing the Public Prosecutor for the State, the Counsel for the accused, and after going through the evidence on record, the trial Court convicted and sentenced the accused/appellant, as stated hereinbefore.

Feeling aggrieved, against the judgment of conviction and sentence delivered by the trial Court, the instant appeal was filed by the accused/appellant which was admitted on 16.07.2010.

The learned amicus curiae has contended that the learned trial Court has grossly erred in fact as well as in law while convicting and sentencing the appellants/accused. He states there is no cogent evidence on record to prove that the prosecutrix was minor at the relevant time. No ossification test was conducted to determine her age. The learned counsel refers to the medico-legal report Ex.PJ/1 of the prosecutrix, wherein the doctor PW-6, Narinder Kaur, referred the case of the prosecutrix for Dental and Radiology

Department for age verification, However, no age verification test was carried out as suggested by PW-6, Dr. Narinder Kaur. Neither the birth certificate or the school certificate was produced by the investigating agency to prove the age of the prosecutrix. Therefore, the learned counsel has contended that the prosecutrix was major at the relevant time.

The learned amicus curiae has further referred to the first version of the prosecutrix Ex.PX recorded under Section 161 Cr.P.C., and states that while recording the statement of the prosecutrix her age was not mentioned by the Investigating Officer. The learned counsel has further referred to the statement of the prosecutrix Ex.PY, recorded under Section 164 Cr.P.C., wherein her age was recorded as 20 years and further she has specifically admitted that she had gone with the appellant/accused with her own free will due to the ill-treatment meted out to her by her aunt at home. In fact, the prosecutrix persuaded the appellant being her friend to go to Nepal. She has also admitted that the appellant/accused had not committed any wrong act with her. Therefore, the learned counsel has submitted that the appellant/accused neither had abducted nor committed rape upon the prosecutrix.

He further referred to the statement of PW-6 Dr. Narinder Kaur, who medico-legally examined the prosecutrix and

stated that no external mark of injury was found all over the body. The prosecutrix was major at the time of occurrence and it was a consent case. The prosecutrix travelled from one place to another with her own free will due to the ill treatment meted out to her by her aunt and it is not established on record that she was under any threat, therefore, the prosecutrix was the consenting party. She being major remained with the accused/appellant for 8/9 days with her own free will. Had it been the case of abduction, she would have raised an alarm. Furthermore, the complainant, Ranjit Gouri, who lodged the complaint Ex.PF, regarding the incident was not examined by the prosecution to prove the contents of her complaint.

He further contended that there is no credible evidence against the appellant, rather the facts on record go to establish the false implication of the accused in the instant case.

The learned amicus curiae relied upon **Kapil Dev Vs. State of Haryana**, 2015(2) RCR (Criminal) 660, **Aasu Vs. State of Haryana**, 2011(2) RCR (Criminal) 512, **Sunil Vs. State of Haryana**, 2010(1) SCC 742 and **Alamelu and another Vs. State Rep., by Inspector of Police**, 2011(2) SCC 385.

On the other hand, the learned State counsel contended that the case of the prosecution has been duly proved beyond a reasonable shadow of doubt. The prosecutrix has supported the prosecution version. Her statement is duly supported and

corroborated by medical evidence and material collected during investigation. The prosecutrix was recovered from the custody of the accused. He referred to the statement of the prosecutrix wherein, her age was mentioned as 15 years and therefore, there is cogent evidence on record to show that the prosecutrix was minor at the time of occurrence. She was less than 16 years of age. The learned State counsel argued that the offence under Sections 363 and 366-A IPC are duly proved. The prosecutrix being minor at the relevant time, therefore, the consent of prosecutrix is immaterial. She was kidnapped from the custody of her natural guardian without the consent of her natural guardian. Learned State counsel further contended that the contradictions, if any, do not materially affect the case of the prosecution, therefore, this is not a case where any benefit could be given to the accused.

It is further contended that from the testimony of PW-6 Dr. Narinder Kaur, the prosecution version is fully established. He referred to Ex.PD, the FSL report, wherein it has been specifically mentioned that human semen was detected on exhibit-3. Therefore, learned State counsel prays for the dismissal of the present appeal.

I have heard learned counsel for the parties and with their able assistance, have gone through the evidence on record minutely and carefully.

The main argument raised by learned amicus curiae is

that the prosecutrix being major at the time of occurrence, was a consenting party. In her statement under Section 164 of Cr.P.C. Ex.PY, of the prosecutrix recorded on 12.12.2007, by the Judicial Magistrate 1st Class, she had stated that she had gone with the appellant/accused with her own volition. She stayed with the appellant/accused for 8/9 days in a temple. The appellant/accused had not committed any wrong act with her.

In her statement Ex.PY, under Section 164 of Cr.P.C., the age of the prosecutrix appeared to be 20 years. As per the statement she went with the accused on her own sweet will and remained for 8/9 days with him. It is nowhere stated in her first version Ex.PX, recorded under Section 161 Cr.P.C., on 11.12.2007 and in her second version, recorded under Section 164 Cr.P.C., on the next very day of the alleged occurrence i.e. on 12.12.2007, that she was abducted by the accused without her consent or the accused had threatened her. She roamed around with the appellant/accused at various public places on her own. The prosecutrix travelled from one place to another and it is not established on record that she was under any threat, therefore, the prosecutrix in the considered opinion of the Court was the consenting party.

This Court in Aasu Vs. State of Haryana, 2011(2) RCR (Criminal) 512, has held as under:-

“10. After perusing the record I feel that the

prosecution has failed to prove the age of the prosecutrix. Amin, PW5, the father of the prosecutrix while appearing as a witness did not state even a single word about the age of the prosecutrix. The mother of the prosecutrix was neither cited nor examined as a witness. Both the parents of the prosecutrix are the best and material witnesses to prove the age of the prosecutrix. The birth entry record of the Chowkidar was not produced. The prosecution withheld the best available evidence from the Court, regarding the age of the prosecutrix. Therefore, it is not proved on the basis of any document that the prosecutrix was below the age of 18 years.”

Further, Hon'ble Supreme Court in **Alamelu and another Vs. State Rep., by Inspector of Police**, 2011(2) SCC 385, while acquitting the accused held that prosecution failed to prove that prosecutrix was minor at the time of abduction.

In the first version of the prosecutrix in her statement under Section 164 of Cr.P.C., which is voluntary, without any coercion or duress, there is no allegation of rape against the accused/appellant. The tutored version deposed in the Court is being ignored as there are material improvements in the statement of the prosecutrix. At every stage of journey or stay, there were chances of escape, but she remained a loyal companion of the accused/appellant. If she would have made any hue and cry or resistance, at public places, it might have attracted the attention of a

large number of people from the locality. The stay of the prosecutrix with the appellant itself was so long that belies the case of the prosecution.

It is a settled proposition of law that the sole testimony of prosecution can be relied upon, but that can only be done where the conscience of Court is satisfied with regard to the truthfulness of the prosecutrix version and there is no shadow of any doubt over the veracity of her statement before the Court. But, in this case, there are material contradictions in the first version recorded under Section 164 of Cr.P.C., and the statement of prosecutrix PW-3 before the Court, therefore, this Court feels that the multiple statements made by the prosecutrix being absolutely irreconcilable cannot be relied upon for recording sentence.

Coming to the point of age of the prosecutrix, On 11.12.2007, the prosecutrix was medico-legally examined by PW-6, Dr. Narinder Kaur and on general examination of the prosecutrix, no external mark of injury was found all over the body. Further, she was referred to Dental and Radiology Department for age verification. However, neither any Radiological examination was carried out nor any document i.e. Birth certificate, school certificate was obtained or produced by the prosecution to establish that the prosecutrix was minor at the relevant time. In her statement recorded under Section 164 Cr.P.C., Ex.PY, her age was noticed as 20 years, however, in her statement recorded before the trial Court, it reads as 15 years. No ossification/age verification test was conducted of the prosecutrix, despite the fact that she was referred to

Radiology Department for age verification by PW-6, Dr. Narinder Kaur, which also proved fatal to the prosecution case. If two views are possible with regard to a particular circumstance, the benefit may be given to the accused of the favourable circumstance. Otherwise, also collective reading of the evidence go to establish that the prosecutrix was major at the relevant time. So, the consent of the prosecutrix is to be given weight while weighing the evidence in golden scale of justice. The age of the appellant at the relevant time as reflected in the MLR Ex.PH/1 i.e. 23 years. In Sunil Vs. State of Haryana, 2010(1) SCC 742, it has been held that the accused could not be convicted on the basis of approximate age.

For the reasons recorded above, it is held that the prosecution has failed to prove its case against the accused/appellant beyond a reasonable shadow of doubt. The benefit of doubt is extended to the appellant.

Accordingly, the present appeal is accepted, the judgment of conviction dated 16.02.2010 and order of sentence dated 18.02.2010, passed upon the accused/appellant Niranjana, are set aside. He stands acquitted of the charges leveled against him by giving him the benefit of doubt. He is in custody. He be released forthwith, if not required in any other case. The appeal stands allowed.

09.09.2015

sumit.k

(JITENDRA CHAUHAN)
JUDGE

Whether to be referred to reporter: Yes

