In the High Court of Punjab and Haryana at Chandigarh

.....

(1) Criminal Appeal No.S-933-SB of 2004 (O&M)

.....

Date of decision:23.9.2015

Dhani Ram and another

...Appellants

v.

State of Haryana

...Respondent

....

(2) Criminal Appeal No.S-949-SB of 2004 (O&M)

.....

Rajbir

...Appellant

v.

State of Haryana

...Respondent

....

Coram: Hon'ble Mr. Justice Inderjit Singh

.....

Present: Mr. J.S. Bedi, Senior Advocate with Mr. Sunil Sihag, Advocate for the appellants in both the appeals.

Mr. Anmol Malik, Assistant Advocate General, Haryana for the respondent-State.

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Inderjit Singh, J.

This judgment will dispose of above two criminal appeals as these arise out of the same judgment of conviction and the order of sentence dated 21/24.4.2004 passed by learned Additional Sessions Judge, Sonepat.

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The above two criminal appeals have been filed against the impugned judgment of conviction and the order of sentence dated 21/24.4.2004 passed by learned Additional Sessions Judge, Sonepat, whereby accused-appellants Rajbir Singh, Dhani Ram and Seth have been held guilty and convicted for the offences under Sections 363, 366, 368 and 376(2)((g) of the Indian Penal Code (hereinafter referred to as `IPC'). They have been sentenced to undergo rigorous imprisonment for ten years each and to pay a fine of ₹4,000/- each and in default of payment of fine to further undergo rigorous imprisonment for six months each for the offence under Section 376(2)(g) IPC. They have also been sentenced to undergo rigorous imprisonment for three years each and to pay a fine of ₹3,000/- each and in default of payment of fine to further undergo rigorous imprisonment for four months each for the offence under Section 368 IPC. They have also been sentenced to undergo rigorous imprisonment for three years each and to pay a fine of ₹3,000/- each and in default of payment of fine to further undergo rigorous imprisonment for four months each for the offence under Section 366 IPC. They have also been sentenced to undergo rigorous imprisonment for two years each and to pay a fine of ₹2,000/- each and in default of payment of fine to further undergo rigorous imprisonment for three months each for the offence under Section 363 IPC. All the substantive sentences have been ordered to run concurrently.

The brief facts of the prosecution case are that the FIR in the present case has been registered on the statement Ex.PC of complainant Siri Chand. He stated that he has four sons and six daughters. The prosecutrix

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is the youngest of all, whose age is 14-15 years and she is primary pass. On 4.12.1998, as usual, she went to her bed in the `Verandah' of the house. But, in the morning at about 3.00 a.m. when his wife Raj Kali woke-up, she found the prosecutrix missing. Thereafter, she informed this fact to the complainant and complainant's son Ishwar. They started to search their daughter. Ramesh, who is the son-in-law of Pancha Jhimer informed that in the night at about 1.00 a.m. he saw Rajbir taking the prosecutrix on a bicycle while going towards Village Khewra. Then they searched the prosecutrix and according to the complainant, accused-Rajbir kidnapped his daughter from his lawful custody by alluring and enticing her for effecting marriage with the help of his relative Chander Pal and other co-accused. After necessary investigation, challan was presented in the Court.

On presentation of challan, the trial Court finding *prima facie* case against the accused, framed charges for the offences under Sections 363, 366, 368 and 376(2)(g) IPC, to which they pleaded not guilty and claimed trial.

In support of its case, the prosecution examined PW-1 Dr. S.K. Gosain, who mainly deposed regarding conducting the X-ray examination of the prosecutrix on 23.12.1998 and found the prosecutrix to be between 15½ to 17 years. PW-2 Constable Ramesh Kumar mainly deposed regarding preparing site plan Ex.PB on the demarcation of the prosecutrix. PW-3 ASI Pirthi Singh mainly deposed regarding recording the FIR Ex.PC/2 after receiving application Ex.PC with endorsement Ex.PC/1. PW-4 Constable Mushtaq Ahmed mainly deposed regarding delivery of special

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report to SP, DSP and Illaqa Magistrate. PW-5 Dr. Poornima Ahuja, who medico-legally examined the prosecutrix on 19.12.1998, found a small scab wound 1 cm x .25 cm present in between the hips in the upper part. Hymen was ruptured and after receiving the FSL report, she opined that possibility of sexual intercourse cannot be ruled out. PW-6 Siri Chand-complainant mainly deposed regarding missing of the prosecutrix from the house and reporting the matter to the Police.

PW-7 prosecutrix in the examination-in-chief stated that she herself had accompanied Rajbir with her own free will. No one had exerted any pressure upon her. Even Rajbir and Dhani Ram had never committed rape upon her nor Seth and Chander Pal had committed rape upon her. The witness was declared hostile and cross-examined by Public Prosecutor. In the cross-examination, she supported the statement given to the Police. In the cross-examination by Public Prosecutor, she stated her age as 18/19 years approximately on that day. Her statement was recorded on 8.2.2000. When she was cross-examined by learned defence counsel, she again stated that the above mentioned facts, which stated by her during the course of her cross-examination above, disclosed by her to the Police at the instance of her family members. In fact, she was made to toe the story of the Police under pressure, even earlier before the Magistrate. In fact, accused Rajbir, Dhani Ram and other two persons, namely, Chander Pal and Seth (POs) never committed rape upon her. She also stated that on that day she had deposed correctly and voluntarily in the Court. When she was again called for re-examination on the next date i.e. on 24.4.2002, she again changed the

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statement and deposed as per the prosecution version levelling the allegations against the accused. In cross-examination by counsel for the accused, she stated that as per the statement given on 8.2.2000, she accompanied Rajbir and that statement was got recorded by her under threat of accused Rajbir. She admitted that on 8.2.2000, she told the Court that she was willing to marry Rajbir-accused. Volunteered that this she stated under threat of the accused. In cross-examination, she also stated that Seth-accused is aged about 80 years and is grand-father of Rajbir accused in relation. In her further cross-examination on 19.1.2004, she stated that the letters Mark-1 to Mark-14 were not in her hand-writing. Even the signatures on these letters are not of her. She never wrote any letter to accused Rajbir.

PW-8 Ishwar, who is brother of the prosecutrix also deposed as per the prosecution version and also deposed regarding some recovery memo. PW-9 Partap Singh, Headmaster, Primary School, Toki Jagdishpur, brought the record from the school regarding school leaving certificate and copy of the same is Ex.P.13, which bears his signatures regarding its verification. However, the original bears the signatures of Smt. Prem Kuleri, District Primary Education Officer, Sonepat. He stated in the cross-examination that he has not brought the application form by virtue of which she was admitted in the school. He also stated that certificate was not issued in his presence. He did not know the prosecutrix personally, but she was studying in their school during his tenure as Headmaster. PW-10 ASI Kalender Singh is a formal witness, who tendered in evidence his affidavit

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Ex.P.14. PW-11 Dr. N.K. Batra, Medical Officer, ESI Hospital, Bhiwani, mainly deposed regarding the medical examination of Rajbir and found him fit and found nothing to suggest that he was unable to perform sexual intercourse. PW-12 Ramesh mainly deposed that he had seen Rajbir taking the prosecutrix on a bicycle towards Village Khewra. Next morning, he came to know in the village that daughter of Siri Chand was not present nor accused Rajbir was available in the village. PW-13 Raj Kali-mother of the prosecutrix mainly stated that the prosecutrix was enticed away by the accused under threat. PW-14 ASI Jorawar Singh deposed regarding the investigation of the case. PW-15 SI Mahabir Singh, SHO, mainly deposed regarding preparing of report under Section 173 Cr.P.C. PW-16 D.K. Sharma, Judicial Magistrate Ist Class, Faridabad, mainly deposed regarding the recording of statement Ex.P.15 of the prosecutrix. PW-17 Dr. Anil Kumar, Dental Surgeon, deposed regarding the determination of age of the prosecutrix.

At the close of prosecution evidence, the accused were examined under Section 313 Cr.P.C. and were confronted with the evidence of the prosecution but they denied the correctness of the evidence and pleaded themselves as innocent.

In defence, the accused examined DW-1 Kamal Kant Khandelwal, Handwriting and Fingerprints Expert, who mainly compared the handwriting and signatures on the letters with the standard signatures of the prosecutrix and gave the report that these are by one and the same person. DW-2 ASI Ram Kumar, Complaint Clerk, IG Office, Rohtak Range

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brought the record and stated that the complaint Mark-DA had not been received in their office. DW-3 Shri Mahabir Tyagi, Advocate mainly deposed regarding affidavit of the prosecutrix Ex.DA, which was attested by him. DW-4 Shri Pawan Rawal, Advocate deposed that he identified the prosecutrix when she executed the affidavit Ex.DA.

After going through the evidence on record, the learned trial Court vide its impugned judgment and order convicted and sentenced the accused-appellants for the offences as mentioned above. Aggrieved against the judgment, the present appeals have been filed.

At the time of arguments, learned counsel for the appellants argued that the prosecution has failed to prove its case against the appellants beyond a reasonable doubt. The statement of the prosecutrix cannot be relied upon as she had given the different statements at different times and is totally an unreliable witness. Learned counsel for the appellants further argued that two of the appellants, namely, Dhani Ram and Seth have not been medico-legally examined by the doctor which is necessary to prove that they were able to perform sexual intercourse. He argued that it was more important that Seth was aged about 80 years and Dhani Ram was aged about 56 years and they are brothers of grand-father of Rajbir co-accused. Learned counsel for the appellants further argued that the prosecution has relied upon the ossification test conducted by Dr. S.K. Gosain PW-1, who had determined the age of the prosecutrix between 15½ to 17 years. He argued that as per the medical jurisprudence, the age of the person found in the ossification test can be two years minus or plus. In that way, the age of

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the prosecutrix can also be 19 years. He argued that if any such doubt is there, then the benefit is to go to the accused/appellants. He further argued that only a school leaving certificate has been placed on record without any other document regarding the date of birth of the prosecutrix. Neither admission form has been brought nor there is any evidence on record on which the date of birth was mentioned. He also argued that neither the complainant nor the mother of the prosecutrix had deposed anything about the age of the prosecutrix and even on 8.2.2000, when the prosecutrix was examined i.e. after one year and about two months of the occurrence, she stated in cross-examination that she was of 18/19 years of age at that time. Therefore, he argued that the prosecutrix was major and remained with the accused Rajbir and had visited railway stations and travelled by trains to so many cities and never raised any hue and cry which shows that she was a consenting party. He further argued that the letters on which the signatures of the prosecutrix have been got compared from the Hand-writing & Fingerprint Expert also shows that it was love affair between the prosecutrix and Rajbir and he had gone herself with Rajbir. In cross-examination, the prosecutrix has also stated that she gave the statement in the Court that she wants to marry Rajbir. Therefore, he argued that there being merit in the appeals, the same should be allowed and the appellants should be acquitted.

On the other hand, learned Assistant Advocate General, Haryana appearing for the respondent-State argued that the case of the prosecution has been duly proved by leading cogent evidence. It is also

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duly proved with cogent evidence that the prosecutrix was minor at that time. He argued that there is no enmity or motive of the witnesses to depose against the accused-appellants. He argued that there being no merit in the appeals, these should be dismissed.

I have heard learned counsel for the appellants and learned Assistant Advocate General, Haryana appearing for the respondent-State and have gone through the record.

From the record, I find that first of all from the evidence on record, it is clear that appellants-Seth and Dhani Ram are stated to be brothers of grand-father of Rajbir and Seth was of 80 years of age and Dhani Ram was stated to be 56 years of age. They have not been medico-legally examined to determine whether they were able to perform sexual intercourse or not. It is more necessary in the present cases keeping in view their age. Therefore, against Dhani Ram and Seth a reasonable doubt exists in the present cases. Further more, the version also does not look probable that the brothers of grand-father of Rajbir-appellant will connive with Rajbir and will take active participation in the commission of rape and commit rape along with Rajbir upon the prosecutrix. This fact is further supported and corroborated from the fact that the prosecutrix while appearing in the Court had given different versions at different times. In her examination-in-chief, she had not levelled any allegation against the accused when she was declared hostile, she was cross-examined by the Public Prosecutor, she admitted the material facts given in the statement recorded under Section 161 Cr.P.C. to the Police and when she was cross-examined on that very day

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by the appellants, then she supported the accused-appellants again and stated that the above stated statement in cross-examination as well as the statement given to the Police was at the instance of her family members. When she was again re-called for further examination on the next date after about more than two months, then she again stated that she gave the statement in the Court on 8.2.2000 at the instance of accused-Rajbir. So, the statement of the prosecutrix cannot be relied upon being unreliable witness giving one statement at one time and another statement at another time. If any threat was given by Rajbir-accused/appellant, she should have informed the Court at that time, but there is no such evidence on record regarding this threat. She admitted in her statement that she gave statement on 8.2.2000 in the Court that she wants to marry Rajbir. If she is giving this statement in the Court, then, in no way, it can be held that any threat was given by Rajbir to her. The prosecutrix remained with Rajbir for a long period as the date of occurrence is 4.12.1998 and she was recovered on 19.12.1998 after 15 days and had visited so many places including the railway stations etc. and so many persons were available there, but she had not raised any hue and cry which shows that she was a consenting party and herself had gone with Rajbir. This fact is supported and corroborated by the letters written by her to Rajbir, the signatures on those letters had been duly proved by DW-1 Hand-writing & Fingerprints Expert. It is also in the cross-examination of the Investigating Officer that Rajbir's house is opposite to the house of the prosecutrix and it is not even in the statement of PW-Ramesh that when he saw the prosecutrix going on the bicycle of Rajbir at 1.00 a.m. in the night,

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she was taken forcibly or she was resisting to go with him. All this evidence shows that she was a consenting party.

Now coming to the age of the prosecutrix, PW-1 had given the age on the basis of ossification test from 15½ to 17 years and as per medical jurisprudence the age can be two years more or two years less which is determined on the basis of ossification test. In that way, the age can even be about 19 years. She also stated in her statement that she was 18/19 years on 8.2.2000, when the prosecutrix gave the statement in the Court. The mother of the prosecutrix no where had given the evidence from where the age of the prosecutrix can be determined. The father of the prosecutrix stated that she was about 15½ years of age at that time, but there is nothing on the record to believe this statement. There is no corroboration by any cogent evidence. Even the school leaving certificate is not supported by any record on the basis of which this date has been mentioned. Even admission form was not produced by the prosecution.

Therefore, keeping in view the statement of PW-1 Dr. S.K. Gosain and the statement of the prosecutrix that she was about 18 to 19 years of age when she gave the statement on 8.2.2000, a reasonable doubt exists and the prosecution has failed to prove the fact that the prosecutrix was minor at that time by leading cogent evidence. The benefit of doubt is to go to the accused-appellants.

Learned counsel for the appellants has placed reliance on the judgment of the Hon'ble Supreme Court in Ujjagar Singh v. State of Punjab, 2008 (1) R.C.R. (Cr.) 305, in which it is held that accused was not medically

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examined to ascertain his capacity to perform sexual intercourse, therefore, the conviction was set aside.

Learned counsel for the appellants has also placed reliance on the judgment of this Court in Nibbu v. State of Haryana, 2015 (1) R.C.R. (Cr.) 303, in which the prosecutrix accompanied the accused appellant various places. She stayed with the accused for number of days without raising any grievance against the accused appellant. It was held that the prosecutrix was a consenting party, therefore, the conviction was set aside.

Learned counsel for the appellants further placed reliance on the judgment of the Hon'ble Supreme Court in Babloo Pasi v . State of Jharkhand and another, 2008 (4) R.C.R. (Cr.) 756, wherein it was held that voters list is a public document under Section 35 of the Evidence Act, but entry would not be admissible unless it is shown on what material the entry in voters list was made. It was also held that the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.

Learned counsel for the petitioner for the appellants further placed reliance on the judgment of the Hon'ble Supreme Court in Alamelu and another v. State Rep. By Inspector of Police, 2011 (1) R.C.R. (Cr.) 498. It has been observed in this judgment that as per the opinion of the doctor age of the prosecutrix could be from 17 to 19 years with a variation of two years. Judicial notice can be taken that the margin of error in age ascertained by radiological examination is two years on either side. In the instant case the expert evidence does not rule out the possibility of the girl

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being a major. The age of the prosecutrix recorded in school record would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

I have gone through the law laid down in the above mentioned judgments, which fully apply to the facts of the present cases.

The prosecution has also not proved the birth certificate nor the date of birth has been proved by bringing the admission record of the first school attended by the prosecutrix. Even the entry in the Panchayat register nor any other documentary evidence has been produced except the school leaving certificate.

Therefore, from the above discussion, I find that a reasonable doubt exists in the prosecution case and by giving benefit of doubt to the appellants, I find merit in the appeals filed by them. Therefore, the same are accepted. The appellants are acquitted of the charges as framed against them. The impugned judgment of conviction and the order of sentence are set aside.

As the sentence of the appellants has been suspended and they are on bail, their bail/surety bonds stand discharged.

September 23, 2015. **(Inderjit Singh)**
Judge

hsp

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