

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-D-872-DBA of 2002

DATE OF DECISION: JANUARY 7, 2015

STATE OF HARYANA

...APPELLANT

VERSUS

AJAY AND OTHERS

...RESPONDENTS

**CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL.
HON'BLE MR. JUSTICE DARSHAN SINGH.**

1. Whether the judgement should be reported in the digest? Yes

PRESENT: MR. DHURV DAYAL, DAG, HARYANA
FOR THE APPELLANT.

MR. DINESH ARORA, ADVOCATE
AND MR. GURWINDER SINGH, ADVOCATE,
LEGAL AID COUNSEL FOR THE RESPONDENTS.

M. JEYAPPAUL, J.

1. Aggrieved by the acquittal recorded by the trial Court, the State of Haryana has preferred the present appeal.

2. It is the case of the prosecution that on 8.7.2000 at about 6.00 a.m., daughter of Radhey Sham was kidnapped by the accused along with yet another person in a car. Accused Ajay and Vijay committed rape upon the prosecutrix.

3. The prosecutrix was examined as PW7. She has deposed that on 8.7.2000 at about 6.00 a.m. when she was returning to her gher (cow shed), accused Vijay who was standing near the white car pushed her inside the car by gagging her mouth. Accused Ajay and Nitu @ Anuj were found inside the car. All of them took her to a room in the fields by gagging her

mouth with chunni. During night accused Vijay committed sexual intercourse with her against her wishes. During the night of next day accused Ajay committed rape upon her. When the accused having consumed liquor were in deep sleep, the prosecutrix opened the door and managed to run away and reached her house at about 11.00 p.m. on 10.7.2000.

4. PW8 Radhey Shyam proceeded alongwith his daughter to the police station on 11.7.2000 and lodged a complaint with PW12 SHO Jagpal Singh.

5. PW1 Dr.G.N.Aggarwal conducted an ossification test to assess the age of the prosecutrix. On the basis of x-ray, he opined that the prosecutrix was approximately 16-17 years old. PW11 Hukam Chand, Headmaster, Government Girls High School, Bhalot, having brought the admission register of his school and the original School Leaving Certificate of the prosecutrix deposed that as per the school records, the prosecutrix was born on 5.3.1985.

6. PW9 Dr.Neeta Mehta, medico-legally examined the prosecutrix and deposed that there was no external mark of injury found on the person of the prosecutrix. The hymen was found ruptured and healed. The vagina could admit two fingers easily. Though she found no evidence of sexual assault clinically, she opined based, on the FSL report, that sexual intercourse with the prosecutrix could not be ruled out.

7. PW12 SHO Jagpal Singh arrested the accused on 17.7.2000 and subjected them to medico-legal examination. Though he had not recorded the statements of the villagers, he deposed that the villagers informed him

that there was no possibility of such occurrence having taken place in the kotha.

8. PW13 Dr.Vimal Kumar Sharma medico-legally examined accused Ajay and Vijay and opined that there was nothing to suggest that they were not able to perform sexual intercourse.

9. In their statements under Section 313 Cr.P.C., accused Ajay and Vijay have submitted that they were innocent, but due to enmity of the complainant with their family, a false was foisted on them. It was also submitted that the prosecutrix eloped with one Sandeep Sagar. Even after the registration of the case, the prosecutrix eloped with the same boy. The prosecutrix belonged to the same Gotra of the accused. They treated her as their sister. It is further submitted that the police had rightly found them innocent.

10. On the side of the defence, DW1 Satyawar, the owner of kotha of the tubewell was examined. He deposed that during night, he used to stay in the tubewell. No such occurrence had taken place, he deposed.

11. The trial Court determined the age of the prosecutrix at 17½ years as spoken to by the prosecutrix. The trial Court noted down different versions projected by the prosecutrix in her various statements recorded under Section 161 Cr.P.C. PW12 by SHO Jagpal Singh. The trial Court believed the defence version projected through DW1. The evidence of PW12 SHO Jagpal Singh who conducted the investigation was elaborately discussed by the trial Court to come to the conclusion that no case was made out as against the accused. Finding that the prosecutrix has come out with

an artificial version without any semblance of truth, the trial Court chose to acquit all the accused.

12. Learned DAG, Haryana vehemently submitted that the evidence of the prosecutrix was not properly appreciated by the trial Court. It is his submission that the trial Court had unjustifiably ignored the evidence of PW11 Hukam Chand who brought the admission register and the School Leaving Certificate to speak about the age of the prosecutrix. Adverting to the evidence of the prosecutrix who was examined as PW7, in the background of the FSL report, he would submit that the prosecution has proved its case.

13. Mr.Dinesh Arora, Advocate assisted by Mr.Gurwinder Singh, Advocate, legal aid counsel appointed by us from the Legal Aid Panel, argued vehemently that no case was made out as against respondent No.3 Nitu @ Anuj. Referring to the evidence of PW12, they submitted that the Investigating Officer himself had come to the conclusion that no case was made out as against accused Ajay and Vijay. A false case has been foisted on accused Ajay and Vijay on account of previous enmity the complainant had with the family of those accused. The prosecutrix also had come forward with totally incongruous versions in her various statements recorded under Section 161 Cr.P.C. by PW12. Even the place of occurrence was changed in the subsequent statements suffered by the prosecutrix. It is their submission that the trial Court has rightly disbelieved the version of the prosecutrix.

14. PW1 Dr. G.N.Aggarwal who conducted ossification test on the

prosecutrix, came to the conclusion that the prosecutrix was 16-17 years old at the time when the occurrence took place. Even as per the version of PW1, ossification test would suggest only the approximate age of the person concerned. Mild variation from the age fixed based on the ossification test is not only recognized by the medical field, but also by the ratio laid down by the Hon'ble Supreme Court.

15. PW11 Hukam Chand was the Headmaster of the school where the prosecutrix last studied. The admission register and the School Leaving Certificate brought by PW11 for giving evidence were not at all put to challenge. Further, there was no reason for the prosecutrix and her father to fabricate the age at the time when the admission was made in the school. As per the admission register and the School Leaving Certificate issued by the school, the prosecutrix was born on 5.3.1985.

16. In our considered view, the trial Court should have accepted the evidence of PW11 who has deposed based on the admission register and the School Leaving Certificate of the prosecutrix. Even otherwise, PW1 has fixed the age of the prosecutrix at 16. As per school records, the age of the prosecutrix was 15 years and 4 months at the time when the occurrence took place. When the school records have been produced to establish clinchingly the age of the prosecutrix, in our considered view, it is totally unsafe to rely upon the approximate age given by the Doctor based on the ossification test conducted on the prosecutrix.

17. The trial Court conveniently omitted to refer to the assertion of the prosecutrix that she was born on 5.3.1985. The age in terms of years

approximately given by the prosecutrix before PW9 Dr. Neeta Mehta cannot be taken as a gospel truth. In the face of the above voluminous evidence to establish clinchingly the age of the prosecutrix, we have no hesitation to hold in the above facts and circumstances, that the prosecutrix was below 16 years of age at the time when the occurrence took place, but unfortunately, the trial Court had erred in fixing her age at 17½ years.

18. The prosecutrix has come out with a graphic account that accused Ajay and Vijay having wrongfully restrained her, when she was proceeding to her house, kidnapped her to the tubewell room of DW1 by gagging her mouth and committed rape upon her. At the time when she was kidnapped, she was criminally intimidated.

19. The prosecutrix had clearly given the names of accused Ajay and Vijay in the statement she originally suffered before the police. Based on the information furnished by the prosecutrix, her father had specifically mentioned the names of accused Ajay and Vijay in the complaint as well.

20. Of course, it is found that the family of accused Ajay and Vijay was not on speaking terms with the prosecutrix's family. But when there was no recent occurrence which precipitated the enmity between the family, the question of false implication does not arise at all.

21. Accused Ajay had committed rape upon her during night when the prosecutrix was in their confinement and accused Vijay also committed rape upon her during the night of the next day when the prosecutrix continued to be in their confinement. The prosecutrix has also deposed that against her wishes, the accused Ajay and Vijay committed rape upon her.

Though the prosecution has established that the prosecutrix was below 16 years, even assuming that she was above 16 years as contended by the defence, the act of the accused Ajay and Vijay fall under the scope of rape as they had intercourse with the prosecutrix against her consent.

22. Coming to the medical evidence it is found that PW9 Dr.Neeta Mehta based on the FSL report had come to the conclusion that the possibility of rape cannot be ruled out.

23. The FSL report Ex.PH would establish that human semen was detected on the salwar, shirt and shamiz recovered from the prosecutrix. The FSL report Ex.PJ would establish that human semen was detected on the underwear recovered from accused Vijay and Ajay. No explanation was forthcoming from those accused as to how human semen was found in their underwears. The above scientific evidence also would corroborate the testimony of the prosecutrix.

24. In our view, there is no reason to disbelieve the evidence of the prosecutrix in the face of above medical and scientific evidence available on record. Further, her evidence is found to be quite natural and believable. In our considered view, the trial Court has completely misread the evidence and come to a wrong conclusion.

25. The trial Court embarked upon an elaborate discussion as regards the evidence of PW12 SHO Jagpal Singh who investigated the case. On a thorough perusal of the records, we are of the considered view that PW12 despite his position as Investigating Officer had an ill-intention to damage the entire case of the prosecution by recording supplementary

statement after supplementary statement from the poor prosecutrix. Through supplementary statement, PW12 had introduced a different location of the place of occurrence. But the prosecutrix had stoutly denied having suffered such a statement changing the very location of the place of occurrence before PW12.

26. PW12 Jagpal Singh had spoken before the Court without any basis to support his version. It appears that DSP and Superintendent of Police, Rohtak had unnecessarily made an attempt to poke their nose in the investigation when the investigation was in the grip of PW12. No statement recorded by the DSP was on record to show that there was some material to establish that the version of the prosecutrix was false. No statement under Section 161 Cr.P.C. was recorded from the villagers to falsify the statement of the prosecutrix and her father. DW1 Satyawar who is the owner of kotha of tubewell was also not examined under Section 161 Cr.P.C. by PW12 or the DSP who made an attempt to give a clean chit to the accused. The observations made by DSP or Superintendent of Police, Rohtak are not at all found on record.

27. Instead of deposing before the Court based on the records available, PW12 had gone beyond the brief with a view to break the backbone of the case of the prosecution. The Court should consider only the materials collected by PW12 and not the surmises he had reeled out before the Court during the course of trial. Unfortunately, the trial Court had relied upon the uncharitable and unjustifiable remarks made by PW12 beyond the records during the course of trial.

28. The complainant, of course, would depose that his daughter went away from the house after 6 months of the occurrence and therefore, he had to lodge a complaint with the police that his daughter went missing for 3-4 days during that occasion. The Court cannot jump to a conclusion based on the above conduct of the prosecutrix that she was of a loose character. Even assuming that she was of a loose character, the accused have no right to offend violently her privacy.

29. Accused have stated in their statement under Section 313 Cr.P.C. that the prosecutrix had infact eloped with somebody else. Firstly, the statement under Section 313 Cr.P.C. cannot be taken as a proved fact. The allegations made under Section 313 Cr.P.C. will have to be necessarily substantiated by the accused, at least to the extent of creating a doubt in the mind of the Court as regards the case set forth by the prosecution. There is nothing on record to show that the prosecutrix eloped with somebody else on the day of occurrence.

30. The evidence of DW1 cannot be seriously taken note of as he had not been subjected to examination under Section 161 Cr.P.C. by the investigating official. Therefore, the theory put forth by the defence that kotha of tubewell which belonged to DW1 was occupied by him during night is found not acceptable.

31. The trial Court had found that the prosecutrix could not have been kidnapped during day time in a village. On a careful perusal of the evidence of PW7, we find that when she was proceeding to her house at about 6.00 a.m., accused Vijay who was standing near a white car pushed

her inside the car by gagging her mouth with a chunni and took her to a room in the field. In the early morning, the occurrence which took place in a fraction of second could not have been noticed by the villagers. Even otherwise, accused Vijay and Ajay belonged to the same village. Nobody would have suspected them when they were found in the village with a car. The prosecutrix was completely gagged with a chunni by the accused. The accused would not have kept the window panes of the car open. No wonder, the prosecutrix could not attract the attention of the passers-by on the road.

32. The escape of the prosecutrix was also doubted by the trial Court. In our view, the prosecutrix has deposed in a realistic way that when accused Ajay and Vijay had slept after consuming liquor, she slipped away and reached her house. We do not entertain any doubt as regards the above version of the prosecutrix.

33. Of course, PW9 Dr. Neeta Mehta had not noted any mark of injury on the person of the prosecutrix. The hymen was also found ruptured and healed. The occurrence had taken place on 8.7.2000 and 9.7.2000. The prosecutrix had been subjected to medical examination only on 11.7.2000. The rupture in the hymen would have been in the process of healing. Further, the prosecutrix could not have resisted forcibly as she was having an imminent threat in the hands of able bodied accused who had intended to accomplish their pervert object.

34. In our considered view, the trial Court had fallen in error in accepting the defence version completely disbelieving the version of the

prosecution. We are of the considered view that the prosecution has established beyond reasonable doubt that accused Ajay and Vijay having wrongfully restrained the prosecutrix, criminally intimidated her for the purpose of committing rape, confined in the kotha of the tubewell and committed rape upon her and thereby committed the offence punishable under Sections 341, 342, 363, 366, 376(2)(g) and 506 IPC.

35. Coming to the role of accused Nitu @ Anuj, we find that the prosecutrix had not named him in her statement suffered under Section 161 Cr.P.C., nor the complainant based on the information furnished by the prosecutrix referred his name in the complaint. Further, no active role had been attributed to Nitu @ Anuj. Had he intended to commit rape upon the prosecutrix, he would have definitely accomplished his object when the prosecutrix was in confinement right from 8.7.2000 to 10.7.2000. Therefore, we doubt the case of the prosecution against accused Nitu @ Anuj. In our view, the trial Court has rightly acquitted accused Nitu @ Anuj.

36. On the quantum of sentence, it was submitted by learned counsel for the accused-respondents that accused Ajay and Vijay were 21 years old at the time when the occurrence took place. Further, the occurrence had taken place about 14 years ago. Therefore, a lenient view may be taken in the matter of awarding sentence. We considered the plea for leniency in awarding sentence.

37. In the result, the judgment of acquittal recorded by the trial Court against respondent No.3 Nitu @ Anuj is confirmed. But setting aside

the judgment of acquittal recorded by the trial Court qua accused-respondents Ajay and Vijay, they are sentenced as follows:-

Offence	Sentence
Under Section 341 IPC	R.I. for 1 month each
Under Section 342 IPC	R.I. for 6 months each.
Under Section 363 IPC	R.I. for 5 years and to pay a fine of ₹1000/- each and in default, to undergo a further period of 1 month each.
Under Section 366 IPC	R.I. for 7 years and to pay a fine of ₹3000/- each and in default, to undergo a further period of 3 months each.
Under Section 376(2)(g) IPC	R.I. for 10 years and to pay a fine of ₹5000/- each and in default, to undergo a further period of 5 months each.
Under Section 506 IPC	R.I. for 6 months each.

All the sentences shall run concurrently.

38. The accused-respondents No.1 & 2 shall surrender within 15 days from the date of this judgement before the Chief Judicial Magistrate, Rohtak, who shall send them to jail to undergo their remaining sentence. If they fail to surrender, the learned Chief Judicial Magistrate, Rohtak shall take coercive steps to secure their presence and send them to jail to undergo remaining period of sentence.

39. The appeal against accused-respondents No.1 and 2 stands allowed and the appeal against accused-respondent No.3 stands dismissed.

(M. JEYAPPAUL)
JUDGE

January 7, 2015
Gulati

(DARSHAN SINGH)
JUDGE