

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

**Crl. Appeal No. S-977-SB of 1998
Date of decision : 07.01.2016**

Satish Kumar

..... Appellant

versus

State of Haryana

... Respondent

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? Yes/No

**Present: Mr. S.S. Dinarpur, Advocate
for the appellant.**

Ms. Vibha Dhiman, AAG Haryana.

ANITA CHAUDHRY, J.

Appellant Satish has preferred the instant appeal against the judgment of conviction and sentence dated 16.11.1998 and 18.11.1998 respectively vide which he was convicted and sentenced to undergo rigorous imprisonment for five years with a fine of Rs.500/- under Sections 376 and 366 IPC. He was further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.500/- under Section 363 IPC. In default of payment of fine, he was required to further undergo rigorous imprisonment for one month under the defaulting clause. All the sentences were ordered to run concurrently.

The facts leading to the institution of present appeal are being noticed first.

On 05.07.1977, Manohar Lal, father of the prosecutrix made a complaint that his fifteen and a half years old daughter was forcibly

abducted by accused Satish, Vinod, Satya Devi, Jagdish and Smt. Shanti Devi on 22.06.1997. All the accused allured his daughter and accused Satish had developed illicit relations with her. FIR (Ex.PN) was registered under Sections 363 and 368 IPC and investigated upon. On 09.07.1997 the prosecutrix was recovered while she was in the company of Satish. Both of them were subjected to medical examination and Section 376 IPC was added. Statement of prosecutrix was recorded under Section 164 Cr.P.C.

On completion of investigation, Satish accused was put to trial.

Charge under Sections 363, 366 and 376 IPC was framed and during trial the prosecution produced ten witnesses, viz. PW1 Dr. Vijay Mohan Atreja had medicolegally examined the accused; PW2 Dr. Prem Chand radiologically examined the prosecutrix; PW3 Ram Kumar had prepared the scaled site plan, Ex.PD; PW4 HC Davinder Singh and PW5 UGC Ram Singh tendered their affidavits, Ex.PE and Ex.PF respectively; PW6 Dr. Vijay Kirti, Dental Surgeon examined the prosecutrix; PW7 Manohar Lal, was the complainant; the prosecutrix stepped in the witness box as PW8; Dr. Neenu Ohri medicolegally examined the prosecutrix on 09.07.1997 and PW10 SI Mohinder Singh was the investigating officer of the case.

When examined under Section 313 Cr.P.C., the accused denied having abducted and raped the prosecutrix. He took the stand that the prosecutrix wanted to marry him and she of her own joined his company and she was more than 18 years of age and a false case had been foisted against him.

On conclusion of trial, the Court held the appellant guilty

under Sections 363, 366 and 376 IPC and sentenced him in the manner indicated above.

I have heard learned counsel for the appellant and learned State counsel and have gone through the record carefully.

The trial Court had observed that the prosecutrix was a consenting party. The observations read thus:-

“16. The prosecution has withheld the statement of the prosecutrix recorded under section 164 Cr.P.C. It gave up Ms. Paramvir Mand, Ld. Judicial Magistrate Ist Class Jagadhri who recorded the same. That document is put on the file by the prosecution and it can be used by the defence which shows that the prosecutrix was not under any force to go with the accused and to have sex with him. She moreover remained with the accused for more than a fortnight and it cannot be believed that she could not complain to anyone during this period about her being kidnapped. Other circumstances, on the record such as moving of application for marriage a notice of which was received by Manohar Lal also shows that the prosecutrix was not under any force and whatever she was doing, she was doing of her own accord.”

The trial Court however concluded that the prosecutrix was less than eighteen years of age at that time, therefore, the consent given by her was immaterial and held the appellant guilty for having taken her out of lawful guardianship of the minor without their consent.

In the fact and circumstances of the case, the question which arises for determination is, whether the prosecutrix was a minor as defined in Section 361 IPC, thereby attracting punishment under Sections 363 and

366 IPC. The whole foundation of the case of the prosecution now rests on the age of the prosecutrix. If she is found to be more than 18 years of age, in the light of her consent, no offence will be made out against the accused.

The trial Court had relied upon a photo copy of High School Examinations certificate (Ex.PI), wherein the date of prosecutrix was mentioned as 01.01.1982 and Dr. Vijay Kirti (PW6) found her to be in the age group of 14 to 18 years. While arriving to the said conclusion, Dr. Vijay Kirti took into consideration the fact that on x-ray examination last molars were neither formed nor erupted which usually follows between 14 to 18 years and 18 to 25 years respectively.

The original of the certificate was never produced by the prosecution. It had come in evidence that photocopy of certificate was handed by the father of the prosecutrix to the investigating agency. No attempt was made to prove this document by primary or secondary evidence. The prosecution failed to examine the authority who had issued it nor any record was summoned to prove its contents. PW Manohar Lal showed his ignorance about the time of admission of his children. The photocopy was got attested from a notary at Moga on 12.07.1997 after the prosecutrix was recovered. The complainant belonged to a district in Utranchal and surprisingly the document had been attested at a far off place situated in Punjab. The certificate, which otherwise was not proved as per law, could not be taken as a conclusive proof to prove the age of the prosecutrix.

The prosecutrix made number of improvements while appearing in the witness box and thus her own statement cannot be

considered as a material evidence. There was a attempt to implicate the appellant and contradictory statements were made. PW6 Manohar Lal had deposed that the prosecutrix was a student of 11th at the time of occurrence while the prosecutrix had stated that she was studying in 12th Class at that time. Attempt was made by the father to prove that she was younger.

PW2 Dr. Prem Chand, on radiological examination found the prosecutrix between the age of sixteen and a half years and eighteen years. PW6 Dr. Vijay Kirti gave the age between 14 to 18 years on dental examination. But these opinions cannot be said to be conclusive of the age. Radiological age can differ on both sides and the margin of error can be two years. In absence of any cogent and reliable evidence on record regarding the age of the prosecutrix, the margin should be presumed to be on higher side favouring the accused. It would not be safe to place implicit reliance on the school certificate, which was not proved nor on the opinion given by PW6 Dr. Vijay Kirti. Once these are excluded from the zone of consideration, there remains nothing to prove that prosecutrix was less than 18 years of age at the time of incident. The plea taken by the defence that she was more than 18 years of age seems quite probable.

In a criminal case, the prosecution has to prove its case beyond reasonable doubt against the accused. In the instant case, the prosecution has failed to prove the case against the accused beyond shadow of reasonable doubt. The prosecutrix was a consenting party and more than 18 years of age at the time of offence. There was no injury on her body. She remained with the accused for about 17 days. They had been travelling together to different places using public transport. The conviction and

sentence of the appellant under Sections 363, 366 and 376 IPC cannot be sustained and is set aside. The appeal is allowed. Accused is acquitted of the charges.

January 07, 2016
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(ANITA CHAUDHRY)
JUDGE