

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

**Crl. Appeal No. S-1110-SB of 2012  
Date of decision : 05.02.2016**

**Bitta & another**

**..... Appellants**

**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

**Argued by: Mr. J.S. Lalli, Advocate  
for appellant Bitta.**

**Mr. Nishant Raj, Advocate  
for appellant Bijender.**

**Mr. Surender Singh, AAG Haryana.**

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**ANITA CHAUDHRY, J.**

Appellants Bitta and Bijender have preferred the instant appeal against the judgment of conviction and sentence dated 08.02.2012 vide which they were convicted and sentenced to undergo rigorous imprisonment for ten years and pay a fine of Rs.5000/- each under Section 376(2)(g) IPC. In default of payment of fine, they were required to further undergo rigorous imprisonment for one year. Appellant Bitta was further sentenced to undergo rigorous imprisonment for three years with a fine of Rs.2000/- under Section 363 IPC. In default of payment of fine, he was required to further undergo rigorous imprisonment for one month. Both the sentences awarded to appellant Bitta were to run concurrently.

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

On 28.05.2010 prosecutrix (PW7) accompanied with her father and aunt Kamlesh met the police and made a statement (Ex.P12) stating that she was a student of 10<sup>th</sup> standard, her father was a labourer. On 23.05.2010 she was alone in the house. Bitta called her out and took her to the house of Bijender, where both of them i.e. Bitta and Bijender raped her. She narrated the incident to her father, but due to shame they did not report the incident.

On 27.05.2010 she had gone to place the cow dung cakes, Rubi did obscene acts with her. She raised alarm. Her aunt Kamlesh came to her rescue.

On the basis of complaint, FIR No. 183 dated 28.05.2010 was registered under Sections 363, 366-A and 376(2)(g) IPC at Police Station Matlauda and was investigated. The prosecutrix was medico-legally examined. The appellants were arrested on 29.05.2010 and were subjected to medical examination. Both of them suffered disclosure statements and admitted the acts and got the place demarcated. Separate challan was filed against accused Rubi.

On completion of investigation, challan was filed. The appellants were charge sheeted under Sections 363 and 376(2)(g). They denied the charges and claimed trial.

During trial, the prosecution produced eleven witnesses, viz. PW1 Hawa Singh proved the birth certificate of prosecutrix as Ex.P1; PW2 HC Rohtash and PW3 Const. Ram Kumar tendered their affidavits Ex.P2

and Ex.P3 respectively in evidence; PW4 EHC Jagbir Singh had prepared the scaled site plan Ex.P4 of the place of occurrence; PW5 Dr. Sham Lal, medicolegally examined the appellants; PW6 EHC Baljeet Singh attested the disclosure statements Ex.P10 and Ex.P11 suffered by the appellants; prosecutrix appeared as PW7; PW8 SI Rajbir Singh was the investigating officer; PW9 Dr. Shashi Garg medicolegally examined the prosecutrix on 28.05.2010; PW10 ASI Ishwar Singh took the appellants for medical examination and the father of the prosecutrix, namely Ram Kumar stepped in the witness box as PW11. He stated that that on 23.05.2010 when he returned from the work, his daughter told that Bitta and Bijender had committed rape with her; he went to the house of accused Bijender to complain and the accused fled away; they kept quite as the honour of the family was at stake. He identified the accused persons in the Court.

In their statements under Section 313 Cr.P.C., the appellants denied the incriminating material which had come against them in evidence and pleaded false implication at the instance of the police. However, no evidence was led by them in defence.

On conclusion of trial, the trial Court convicted and sentenced the appellants in the manner indicated above.

Dis-satisfied with the same, instant appeal has been preferred by them.

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

Learned counsel for the appellants had submitted that the trial Court had wrongly relied upon birth certificate, Ex.P1 and the Chowkidar

who had entered the date of birth was not examined by the prosecution and there was no source from where the date of birth was taken. He had submitted that the prosecutrix was more than 16 years of age, a consenting party and habitual to sex. Elaborating the arguments, they had referred to the statement of PW9 Dr. Shashi Garg who had examined the prosecutrix. It was urged that no mark of external injury was found on her person; her hymen was old torn and she had opined that there was nothing to suggest about forceful sexual intercourse. It was further urged that there was inordinate delay in lodging the FIR and the statements of prosecutrix and her father are discrepant and the conviction of the appellants was not sustainable on the sole testimony of prosecutrix.

Learned State counsel had supported the judgment of the trial Court. He had urged that no ill-will or motive had been proved on record to falsely implicate the appellants. The prosecutrix was rightly held to be a minor. He had referred to **Md. Iqbal & Anr. Vs. State of Jharkhand, 2013 (3) RCR(Crl.) 895**, to contend that nobody can be a consenting party to several persons simultaneously. Further reliance has been placed on **Mohan Lal & Anr. Vs. State of Punjab 2013(2) RCR(Crl.) 793**.

The first issue that arises for consideration in this appeal is whether the findings as regards the age of the prosecutrix was based on the proper appreciation of evidence. The prosecution had examined PW1 Hawa Singh from the office of Chief Medical Officer, Panipat who proved the birth certificate of the prosecutrix as Ex.P1, according to which her date of birth was 28.07.1994. The birth entry was registered on 03.09.1994 at Sr. No.103. The prosecutrix and her father stepped in the witness box deposed

the age to be less than 16 years of age at the time of occurrence. Both were subjected to cross-examination, but nothing fruitful could be elicited. To rebut the same, no evidence had been led by the appellants. The birth certificate Ex.P1 was entered in the Government record and was conclusive proof as regards the age. The prosecution had discharged the onus of proving the fact. The prosecutrix was minor at the time of occurrence.

Much stress has been laid by counsel for the appellants on the medical evidence that the prosecutrix was habitual to sex and a consenting party. But, once it is concluded that the prosecutrix was less than 16 years of age, it is totally immaterial whether she was a consenting party or not. The prosecutrix had categorically deposed that she was raped by both the appellants turn by turn. She was over-powered by two grown up men and absence of any mark of injury is not a ground to disbelieve her. Her medical examination was conducted after five days of the occurrence and no human semen could be detected for that reason.

The Hon'ble Apex Court in **State of Uttar Pradesh v. Munshi AIR 2009 SC 370**, had expressed its anguish and held that even if the victim of rape was previously accustomed to sexual intercourse, it cannot be the determinative question. On the contrary, the question still remains as to whether the accused committed rape on the victim on the occasion complained of. Even if the victim had lost her virginity earlier, it can certainly not give a licence to any person to rape her. It is the accused who was on trial and not the victim. Whether the victim is of a promiscuous character, is totally an irrelevant issue altogether in a case of rape. Even a woman of easy virtue has a right to refuse to submit herself to sexual

intercourse to anyone and everyone, because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. A prosecutrix stands on a higher pedestal than an injured witness for the reason that an injured witness gets the injury on the physical form, while the prosecutrix suffers psychologically and emotionally.

In **Narender Kumar v. State (NCT of Delhi) AIR 2012 SC 2281**, Hon'ble Apex Court had occasion to deal with a case where the allegation was that the victim of rape herself was an unchaste woman, and a woman of easy virtue. The court held that mere statement of prosecutrix herself was enough to record conviction and found it worth reliance.

When the testimony of prosecutrix is examined, there remains no doubt that a vivid description of the occurrence has been given by her. She specifically deposed that accused Bitta called her at the residence of accused Bijender and both of them raped her. She informed her father. Her father took her to the house of accused Bijender in order to complain, but the accused fled away. To keep the honour and prestige of the family, they kept quiet for the reason that it would have brought shame to the family and create more problem for the girl. Her father also deposed on the same lines while appearing as PW.11. The learned trial Court rightly placed implicit reliance on the testimony of prosecutrix and her father and accepted the reasons for delay in the FIR. No motive for false implication had been projected by the appellants. The testimony of the victim inspires confidence. The defence plea that they were falsely implicated by the police, cannot be accepted, in absence of any reason. The contradiction in the statements of PW7 and PW 11 regarding the distance between place of occurrence and

house of the prosecutrix is of no importance as the witnesses were examined after a gap of more than one year and minor variations were most natural. It is settled that conviction can be based on the sole testimony of the prosecutrix, if the same is found to be worthy of credence and reliable, requires no corroboration. Reference can be made to **Vijay @ Chinee Vs. State of Madhya Pradesh, 2010(8) SCC 191**, followed recently in **State of Rajasthan Vs. Babu Meena, 2013(2) SCALE 479**.

There is no reason to differ with the findings recorded by the trial Court so far as offence under Section 376(2)(g) are concerned.

Appellant Bitta was also convicted under Section 363 IPC. Kidnapping from lawful guardianship has been defined in Section 361 IPC, which reads as under:-

*“361. Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”*

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards.

Having regard to the age of the prosecutrix on the date of occurrence being below 16 years of age, as has been proved from Ex.P1, she was minor on the date of occurrence. It has to be examined whether she was taken away from the lawful guardianship. PW7 the prosecutrix categorically

deposed that accused Bitta called her at the house of Bijender. It was appellant Bitta who was instrumental in taking the prosecutrix out of the lawful guardianship and was subjected to rape by both the accused. In the light of evidence coming on record, there is no error in the findings recorded by the Court below convicting the appellant Bitta under Section 363 IPC.

As a last resort, learned counsel had submitted that the appellants are in custody and have undergone more than eight years of sentence, including remissions and a lenient view may be taken. The custody certificate dated 19.01.2016 shows that actual period undergone is 05 years, 07 months and 17 days and after remission, the total custody adds up to 08 years, 01 month and 13 days.

The offence of rape is an assault on the human rights of a victim. It is an attack on her individuality. It is not only an offence but the act creates a permanent scar in the mind of the victim. The prosecutrix was little less than 16 years of age, who fell prey to the lust of the appellants. Considering the gravity of the offence, any reduction in sentence would be an anathema to the very concept of rule of law.

For the reasons aforesaid, there is no merit in the appeal and it is dismissed.

**February 05, 2016**  
**Jiten**

**(ANITA CHAUDHRY)**  
**JUDGE**