

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-91-SB-2011 (O&M)
Date of Decision: 30.03.2016

Anand

...Appellant(s)

Versus

State of Haryana

...Respondent(s)

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
3. Whether the judgment should be reported in the digest? Yes/No

Present: Mr. Veneet Sharma, Advocate
for the appellant.

Mr. Surender Singh, DAG, Haryana.

ANITA CHAUDHRY, J.

This appeal is directed against the judgment of conviction dated 09.10.2010/10.10.2010, passed by Sessions Judge, Gurgaon, vide which the appellant was sentenced to the following punishment:-

Under Sections	Simple Imprisonment for a period of	Fine	In default of payment of fine further imprisonment
363 IPC	7 years	Rs.5000/-	1½ years
366 IPC	7 years	Rs.5000/-	1½ years
376 IPC	10 years	Rs.10,000/-	2½ years

All the sentences were ordered to run concurrently.

Factual matrix first. A complaint was lodged regarding a kidnapping incident which occurred on 22.01.2010. The complaint was lodged by the father. His minor daughter had been kidnapped. The victim was stated to be about 15 years old. The complainant was not aware of the person who was involved. The girl was recovered on 30.01.2010. It appeared later that the accused was a mason and was working in the house of the complainant. He was married with two children.

The matter was investigated and challan was presented against the accused. Charge was framed to which the accused pleaded not guilty.

The prosecution examined eleven witnesses.

The accused pleaded innocence and examined himself as a defence witness. He took the plea that he had worked in the house of the complainant and was to be paid some amount which was not paid despite demand and he wanted to approach the Labour Court and had postponed the filing of the petition by two days and during this period he was apprehended and the case was false. He stated that the construction was completed in September, 2009 and no complaint was made by him till January, 2010.

Though the accused had presented a list of witnesses but later withdrew the same.

The record reveals that the Bar Association went on a long strike and written arguments were submitted by the accused, which were also signed by the counsel representing him. The trial Court convicted the appellant to the sentence mentioned here-in-before.

I have heard the counsels of both the sides.

Initiating the submissions counsel for the appellant had urged that the appellant was in custody for over 6 years and if the remission is added, the period would be over 8½ years and it was a case where the accused was not represented by any counsel and it would not be proper to uphold the conviction and the case cannot be decided in the absence of his counsel and the Court should have appointed an Amicus Curiae and the accused had a right of being defended. Reliance was placed upon ***Mohd. Sukur Ali Vs. State of Assam (2011)4 SCC 729, Man Singh and another Vs. State of Madhya Pradesh (2008) 9 SCC 542, Bapu Limbaji Kamble Vs. State of Maharashtra (2005) 11 SCC 413 and A.S. Mohammed Rafi Vs. State of Tamil Nadu (2011) 1 SCC 688.***

It was urged that no semen was found in the FSL report and vaginal swabs were not taken and there are discrepancies with respect to the date of incident and different dates had appeared in the version given by the complainant and the victim. It was urged that there is also a

discrepancy with respect to number of days the victim had stayed outside and there is no evidence regarding her age and it was a case of consent and there are no injuries.

The submission on the other hand was that the accused had been represented by a counsel throughout trial and the witnesses had been cross-examined by his counsel and when the case reached the stage of arguments, there was a strike by the lawyers and the trial Court had observed in its order of 01.11.2010 about the proceedings which had taken place and the accused had submitted written submission signed by the counsel and the accused and the authorities referred to by the appellant were not applicable. Reliance was placed upon ***Satish Kumar Jayanti Lal Dabgar Vs. State of Gujrat 2015(7) SCC 359*** and ***Vijay alias Chinees Vs. State of Madhya Pradesh (2010)8 SCC 191***.

It was urged that the victim was 15 years old and the accused was married with two children and there can be no consent when a minor girl is involved nor consent of the convict can be treated as mitigating circumstance nor any note can be taken of the fact that the appellant was married and the appellant was not entitled to any mercy.

Responding to the arguments, the counsel for the appellant had prayed for leniency in the sentence. It was urged that if the remission period is counted, it is over 8½ years and the sentence be reduced by a year.

The incident took place on 22.01.02010 when the victim was just a little over 15 years. The victim was recovered on 30.01.2010. The girl was medically examined and the Medical Officer noted the following:-

- i. A contusion present on right side of upper lip,*
- ii. Scratch mark of size 3 cms long on inner aspect of right leg above the ankle,*
- iii. Breasts and nipples normal,*
- iv. Pubic and axillary hairs present,*
- v. No external mark of injury on external genitalia,*
- vi. Hymen margin irregular and healed,*
- vii. On per vaginal examination, vagina admits two fingers, Uterus normal in size.*

With respect to the age, the prosecutrix had given her age as 15 years, which is recorded in the MLR. The girl was a student of 10th Class. SI Rani Devi – PW5 in her statement in the Court had stated that the complainant had handed over a school certificate during investigation and the date of birth recorded therein was 27.09.1995. The trial Court had rightly concluded that the girl was 15 years old.

The argument raised by the appellant was that it was a case of consent which has to be rejected. A minor is incapable of thinking rationally and giving any consent whether it is civil law or criminal law, the consent of a minor is not

treated as valid. In this case, the girl was not only a minor but less than 16 years. A minor girl can be lured into giving consent for such act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast upon other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. If the girl is below 16 years, the other partner in the sexual act is treated as a criminal. The law leaves no choice to him and he cannot plead that the act was consensual.

So far as the contradictions which have been pointed with respect to date of the incident and the number of days, the girl had stayed out, these are not such discrepancies that the entire case should be thrown out.

So far as the sentence is concerned, the appellant was a married man with two children and he had kidnapped a girl who was under fifteen. There are no mitigating circumstances. Likewise the appellant cannot plead that the prosecutrix is married now. The appellant is not entitled to any mercy.

The appellant was represented by a counsel throughout. The Court was pained to note the manner in which the lawyers were preventing them from entering the Court on account of the long strike. It is also noted in the judgment. The

counsel representing the accused had submitted written arguments which were duly noted. It cannot, therefore, be said that it was a case where the accused was not given a fair trial nor it is a case for remand.

I find no merit in the appeal. The appeal is dismissed.

(ANITA CHAUDHRY)
JUDGE

30.03.2016
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