

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

**Crl. Appeal No. S-215-SB of 2014
Date of decision : 22.10.2016**

Arshad

..... 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

**Argued by: Mr. Karan Pathak, Advocate
for the appellant.**

Mr. Sandeep Vashisth, DAG Haryana.

ANITA CHAUDHRY, J.

Appellant Arshad has preferred the instant appeal against the judgment of conviction dated 19.09.2013 and order of sentence dated 23.09.2013 vide which he was convicted and sentenced to undergo rigorous imprisonment for ten years and pay a fine of Rs.3000/- and Rs.1000/- under Section 376(g) and 366-A respectively IPC. In default of payment of fine, he was required to further undergo rigorous imprisonment for six months under the default clause. He was further sentenced to undergo rigorous imprisonment for seven years with a fine of Rs.1000/- under Section 363 IPC. In default of payment of fine, he was required to further undergo rigorous imprisonment for six months. All the sentences were to run concurrently.

The facts leading to the registration of the FIR are being noticed first.

Imrat submitted a written complaint on 12.09.2010, Ex.PW9/A to the police disclosing that on 25.05.2010 he and his family were working in the fields, then her daughter (hereinafter referred to as the prosecutrix) was enticed by Arshad and his relative Shabbir. Since the honour of his family was involved, he took the matter to the “Biradari”, but the accused did not accede before the “Biradari” and the girl is still with Shabbi of Kalanjar.

On the basis of aforesaid complaint, FIR No. 327 dated 12.09.2010 was registered under Sections 363 and 366-A at Police Station Punhana and investigated. Rough site plan of the spot from where the prosecutrix was kidnapped was prepared. The prosecutrix was recovered on 27.09.2010. Her statement was recorded under Section 164 Cr.P.C.(Ex.PB) by the Sub Divisional Judicial Magistrate, Ferozepur Jhirka, wherein she alleged that she was kidnapped by the appellant and Shabbir about four months ago and they had raped her. She was got medically examined and Section 376(g) was added. On 09.02.2011 Arshad was arrested and he suffered disclosure statement (Ex.PW5/A) wherein he admitted the kidnapping and rape of the prosecutrix with the aid of his relative Shabbir. Accused Shabbir could not be arrested in this case. On completion of investigation, challan against the accused Arshad was prepared and forwarded to the Court for trial.

The appellant was charge sheeted under Sections 363, 366-A and 376(2)(g). He denied the charges and claimed trial.

During trial, the prosecution produced seventeen witnesses, viz.

PW1 Dr. Asha had medicolegally examined the prosecutrix and she had tendered her affidavit Ex.PA/1 in evidence; PW2 EHC Rakesh Kumar took the ruqa for registration of the FIR; PW3 the prosecutrix; PW4 Basiri, her mother were examined, who supported the case; PW5 SI Virender Singh arrested accused Arshad on 09.02.2011. He proved disclosure statement, Ex.PW5/A suffered by the accused; PW6 HC Charan Singh had tendered affidavit Ex.PW6/A in his evidence; PW7 Dr. Atul Chaudhary had tendered affidavit Ex.PW7/A about medical examination of the accused and proved MLR Ex.PW7/B; PW8 Zakir Hussain; PW9 Imrat, complainant, is the father of the prosecutrix; PW10 Jamshed was the brother of the prosecutrix; PW11 ASI Bharat Singh had tendered affidavit Ex.PW11/A; PW12 Parmod Kumar had delivered the special reports to the Illaqa Magistrate; PW13 ASI Malkhan Singh had recorded the FIR of the case and sent it to the higher authorities; PW14 Inspector Dhanpat Singh had prepared the final report of the case against Arshad; PW15 Dharampal had prepared the scaled site plan Ex.PW15/A; PW16 ASI Kanwar Singh was the investigating officer of the case and PW17 Lady Const. Mamta Rani had accompanied the prosecutrix for her medical examination.

In his statement under Section 313 Cr.P.C., the appellant denied the incriminating material which had come against him in evidence and pleaded false implication. No evidence was led by him in defence.

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

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

I have heard learned counsel for the appellant and learned State

counsel and have gone through the record carefully.

Learned counsel for the appellant had submitted that there was inordinate and unexplained delay of more than three and a half months in reporting the matter to the police. Elaborating his submission, he had urged that the prosecutrix was allegedly kidnapped on 25.05.2010 and the matter was reported to the police on 12.09.2010. According to him, the prosecution had withheld the age of the prosecutrix who was more than 16 years of age on the date of incident and was a consenting party. Referring to the medical evidence, it was urged that the hymen was ruptured and prosecutrix was found habitual to sexual intercourse and there was no injury and the medical evidence belied the ocular version. According to him, the accused was known to the family of the complainant and she had remained with the accused for more than three and a half months and silence on her part speaks volume about her veracity. He had further urged that the appellant was falsely implicated at the instance of her parents. It was further urged that the statements of prosecutrix and her family members are discrepant and the conviction of the appellant could not be sustained 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 appellant and the prosecutrix was a minor.

The first issue that arises for consideration is the age of the prosecutrix. There is no documentary evidence relating to age of the prosecutrix. It has come in evidence that she was illiterate. With regard to her age, the prosecution had examined the prosecutrix, her parents and brother. All of them are illiterate. The case of the prosecution right from the

beginning i.e. submission of complaint by the father of the prosecutrix, was that she was 14 years old at the time of occurrence. The prosecutrix when appeared as PW3 on 03.04.2012 had given her age as 16 years, meaning thereby she was around 14 years on the date of incident i.e. 25.05.2010. Not a single suggestion was given to her that she had given her age wrongly. The only suggestion to her was that the accused had been falsely implicated to avoid repayment of money by her parents which was borrowed from Arshad. PW4 Basiri, the mother deposed that she had 13 children and the prosecutrix was her ninth born and was 14 years old on the date of occurrence and three of her children had died. In the cross-examination it was suggested to her that she had wrongly stated about the death of three children to conceal the age of the prosecutrix. It was not suggested to her that she was more than 16 years of age. Likewise, PW9 Imrat, the father of the prosecutrix deposed that her daughter was 14 years old at the time of incident. The accused did not cross-examine this witness on the point of age nor this witness was suggested that he had wrongly given the age of the prosecutrix. PW10 Jamshed, the brother of the prosecutrix had also mentioned her age as 14 years. He admitted that on the day of his examination he had given his age as 24 years and had said that the prosecutrix was seven years younger to him. He was examined after almost three years of occurrence and from his evidence, it become clear that the age of the prosecutrix was 14 years at the time of occurrence. It was only when PW10 was examined a suggestion was given that the prosecutrix was less than 18 years of age. Against the ocular version produced by the prosecution, the defence failed to adduce any evidence to rebut the same.

Neither the prosecutrix or her parents were cross-examined on the point

of age. The defence did not ask for her ossification test. The prosecutrix was minor at the time of occurrence, therefore, the question of consent would not be available.

Coming to the delay aspect, in the complaint itself, the father of the prosecutrix had mentioned that he had raised the issue before the “Biradari” but when the accused refused before the brotherhood, the matter was reported to the police. It has come in the statements of mother, father and brother of the prosecutrix that they did not report first as honour of the family was involved. It is settled that mere delay itself cannot be a ground to disbelieve the entire case of the prosecution.

In State of *Himachal Pradesh Vs. Prem Singh* AIR 2009 SC 1010, this issue was considered at length and it observed as under :-

“So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR.”

In a rape case the victim, her family are worried about the future. The victim goes into a traumatic state and it is seen that the family initially show reluctance to go to the police station because of society’s attitude. It brings shame upon them. There is hardly any one who would comfort them or sympathise with them. Family remains concerned about the honour and reputation of the prosecutrix. After only having a cool thought it is possible for the family to lodge a complaint in sexual offences.

(See *Karnel Singh Vs. State of M.P. AIR 1995 SC 2472*; and *State of Punjab Vs. Gurmeet Singh & Ors. AIR 1996 SC 1393*). The explanation rendered by the prosecution regarding delay appears to be plausible.

Much stress has been laid by counsel for the appellants on the medical evidence that the prosecutrix was habituated to sex and a consenting party. Once it is concluded that the prosecutrix was less than 16 years of age, it is immaterial whether she was a consenting party or not. While stepping into the witness box, the prosecutrix had deposed that on 25.05.2010 she was washing clothes outside her house, when Arshad and Shabbir came in a red colour car and forcibly pushed her inside the vehicle and took her towards Punhana. She was confined in a room where both of them committed rape upon. She was taken to village Nai and was raped again by both the accused. She was taken to Mathepur and Kalinjar later and again ravished. She further deposed that the police recovered her from village Mathepur on 27.09.2010 and she was brought to Punhana where she was medically examined and her statement under Section 164 Cr.P.C. was recorded by the Magistrate. Her custody was given to her parents. She identified the accused Arshad. The prosecutrix had categorically deposed that she was raped by the appellant and his relative Shabbir turn by turn at different places. The accused was even not sure of his defence. A suggestion had been put to the prosecutrix and her mother that the appellant had been falsely implicated to avoid repayment of loan borrowed from Arshad, but it was not suggested to Imrat, father of the prosecutrix that he had borrowed any money from Arshad. PW9 and PW10 Jamshed were given different suggestions that Arshad was having enmity with Sarun, the other brother of the prosecutrix. Though, documents Ex.D1 was produced

to show that the appellant and brother of the prosecutrix were arraigned as an accused in a case, but that would not be the reason for the prosecutrix to falsely implicate the appellant. A vivid description of the occurrence had been given by the victim. She specifically deposed that accused Arshad and his relative Shabbir had raped her at different places. The testimony of the victim inspires confidence. Some variations appear in the statement of prosecution witnesses, but are bound to occur because they were illiterate and examined after a gap of more than a year. 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**.

Absence of injury is also not a ground to disbelieve the prosecutrix. The victim was over-powered by two young lads. As per FSL report, human semen was detected on her underwear and chunni, which corroborates her version.

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.

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

Appellant was also convicted under Sections 363 and 366-A 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.

As discussed above, the prosecutrix was minor on the date of

occurrence. She has categorically stated that she was kidnapped by the appellant and his relative when she was washing clothes outside her house and she was subjected to rape. Her parents were categorical that the prosecutrix was taken out of their guardianship by the appellant and his relative without their consent. 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 Sections 363 and 366-A IPC.

As a last resort, learned counsel prayed for reduction in the sentence. He had submitted that the appellant was in custody and had undergone about seven years of sentence, including remission period and he was young in age.

For the reasons above, the conviction of the appellant under Sections 363, 366-A and 376(g) IPC is maintained. However, keeping the circumstances, and his age into view, the sentence awarded to the appellant is reduced to the period of eight years under Sections 376(g) and 366-A IPC. Sentence of fine is maintained.

With the above modification, the instant appeal stands disposed of.

October 22, 2016
Jiten

(ANITA CHAUDHRY)
JUDGE

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No