

CRA-S-2213-SB-2003

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

CRA-S-2213-SB-2003 (O&M)

Date of decision : 13.09.2017

Sunil Kumar

... Appellant(s)

Versus

State of Haryana

... Respondent

CORAM : Hon'ble Mr. Justice Jitendra Chauhan

Present : Mr. Ankit Chowdhary, Advocate/amicus curiae,
for the appellant.

Mr. Arun Kumar, AAG, Haryana.

JITENDRA CHAUHAN.J.

This appeal is directed against the judgment of conviction dated 01.10.2003 and order of sentence dated 06.10.2003 passed by learned Additional Sessions Judge, Panchkula vide which the appellant was convicted under Sections 363 and 366 of the Indian Penal Code (for short "IPC") and sentenced to undergo RI for 01 year and fine of Rs.1000/-(under Section 363 IPC) and RI for 03 years and fine of Rs.2000/- (under Section 366 IPC). Both the sentences were ordered to run concurrently.

Briefly stated the case of the prosecution as noticed in the judgment passed by the trial Court is as under:-

"Case of the prosecution in brief is that FIR was registered on 11.05.2002 on the statement of Kesho Prasad father of the prosecutrix. As per the FIR, Kesho Prasad is the original resident of village Goomai in U.P. He is residing in Rajiv

Colony since the year 1985 and is a tea vendor. On 8.5.2002, he had left his house as usual at 8.30 a.m. He returned at about 9.30 p.m. and learned that his daughter was kidnapped. He disclosed that their daughter was missing from the house since 7.30 p.m. So they had started searching for their daughter. During the said search, it was learned that their neighbourer Sunil Kumar accused enticed away their daughter and had taken her to some unknown place with the object of performing marriage with her. They kept on searching for their daughter till 11.5.2002 on which date Kesho Prasad met the police party and reported the matter. Then on 21.7.2002, accused Tribhuvan had produced the prosecutrix and all the accused before the police. The accused were apprehended. Police officer recorded the statement of the prosecutrix under Section 161 Cr.P.C. She disclosed that on 8.5.2002 accused Sunil who is a neighbour had enticed her with the promise of performing marriage and had taken her along from her house at 7.30 p.m. She was taken to Mauli Jagran. After two days, she was shifted to Vikas Nagar where she was kept for 12-13 days. Thereafter she was taken to village Jagatpur in Punjab. She was also taken to an Advocate at Chandigarh where Sunil had consulted the lawyer for performing marriage with the prosecutrix. However, the Advocate did not help the accused. The prosecutrix further alleged that she had been repeatedly raped by accused Sunil Kumar during this entire period. Then Sunil had sent a message to his father who had arrived and had taken her along

and produced them before the police. After recording the said statement, the prosecutrix was handed over to his parents. On the next day, she was got medico-legally examined and on 3.8.2002 her statement was got recorded under Section 164 Cr.P.C. Investigating Officer had also recorded the statements of other witnesses and had prepared rough site plan and collected medical record and final report was prepared by the police and filed in the Court.”

On the presentation of challan, copies of documents as required under Section 207 Cr.P.C were supplied to the accused free of cost.

Charge under Sections 120-B, 363, 366, 506 and 376 of the IPC was framed against the appellant and four other accused to which they pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined PW1- Dr. Mohinder Singh, PW2-Dr. Ashu Narula, PW3-C.Ram Saran, PW4- Pushpinder Kumar Yadav, PW5-Ranjit Singh, PW6-Tejpal Singh, PW7- Jatinder Singh, PW8-Raj Kumar, PW9-Keshav Parsad, PW10-SI Bant Ram, PW 11-Phool Chand, PW 12-Kiran, PW 13-Tarsem Singh ASI and PW 14-Murari Lal and thereafter closed its evidence.

The statements of accused were recorded under Section 313 Cr.P.C in which all the incriminating circumstances appearing in the prosecution evidence were put to the accused which the accused denied and pleaded false implication.

No evidence in defence was led by the accused.

After hearing the rival contentions and appraisal of the evidence, the trial Court vide impugned judgment of conviction dated 01.10.2003 and order of sentence dated 06.10.2003, convicted and sentenced the appellant as narrated above and acquitted the remaining four accused.

Feeling aggrieved against the judgment and order dated 01.10.2003/06.10.2003, passed by the trial Court, convict Sunil Kumar has filed the instant appeal.

It is contended that as per the prosecution story, when the prosecutrix was on her way to a shop in Rajiv Colony, Panchkula at around 7.00 p.m., the accused gagged her mouth with a piece of cloth and kidnapped her. Thereafter, she was taken to different locations over a period of more than 2 ½ months. During the period, they also stayed at a hotel, visited the office of an advocate for getting their marriage registered and also Mata Mansa Devi Temple, Panchkula for solemnizing marriage. At no point of time did the prosecutrix raise any hue and cry.

It is further contended that learned trial Court has rightly held the age of the prosecutrix as more than 16 years. Even at the time of lodging of the FIR, the age of the prosecutrix was stated at 17 years by the father of the prosecutrix. Therefore, no case under Sections 363 and 366 IPC is made out against the present appellant as the prosecutrix was mature enough to understand the import of her action.

Learned counsel further states that on the same set of evidence, the trial Court has disbelieved the prosecution story against

four co-accused, therefore, the version put forth qua the appellant also becomes doubtful. Moreover, the prosecution has miserably failed to plead and prove an active act of inducement on the part of the appellant to bring home guilt under Sections 363 and 366 IPC.

On the other hand, learned State counsel has vehemently argued that the prosecutrix has supported the case of the prosecution. She was minor at the time of the incident, therefore, the appellant has been rightly convicted by the trial Court.

I have heard learned counsel for the parties and perused to record.

On behalf of the appellant, it is asserted that the prosecutrix was a consenting party. In order to prove the assertion, learned counsel has referred to the conduct of the prosecutrix. It has been alleged that on the fateful day at about 7.30 in the evening, the prosecutrix while on her way to the market of Rajiv Colony, Panchkula, the appellant tied a cloth on her eyes and mouth. It is further alleged that from there, she was taken to Mauli Jagran on foot. On the way, they also visited a hotel and stayed there for half-an-hour. It is of common knowledge that the market places witness maximum rush during evening time. Furthermore, it is admitted case that the prosecutrix went missing on 08.05.2002 and was recovered when the appellant surrendered before the police on 21.07.2002. During the intervening period of 2 ½ months, she remained with the appellant throughout. It has been alleged that the prosecutrix was shifted to different places during this period. They also visited an advocate at

Chandigarh for solemnizing marriage. When the said advocate did not help them, they also visited Mata Mansa Devi Temple at Panchkula, where they solemnized marriage. It has nowhere come on record that either at the time of her alleged kidnapping on 08.05.2002 or during the period of her stay with the appellant, the prosecutrix made any effort to attract the attention of any member of the public or to get herself freed from the clutches of the appellant. There are no signs of resistance offered by her in the medical evidence either. Therefore, learned trial Court has rightly reached to the conclusion that in this case, the prosecutrix was a consenting party.

Once it is established that the prosecutrix was a consenting party, the next question which arises for determination is whether she had reached the age of discretion. In the FIR, the age of the prosecutrix as on the date of incident was given as 17 years by the father of the prosecutrix. A school certificate, Mark 'B', was also produced depicting the date of birth of the prosecutrix as 23.12.1985. While appearing in the witness box, the prosecutrix has admitted that she studied at Government Girls College, Charkhari (UP) and further admitted that Mark 'B' was a copy of her marksheet of IX standard. Therefore, in any case, the age of the prosecutrix cannot be said to be less than 16 years as on the date of occurrence.

In *Shyam and another Vs. State of Maharashtra, 1995 Supreme Court Cases (Cri) 851*, Hon'ble the apex Court has held as under:-

“3. In her statement in the court, the

prosecutrix has put blame on the appellants. She has deposed that she was threatened right from the beginning when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be difficult to dislodge, but having regard to her conduct, as also the manner of the so-called 'taking', it does not seem that the prosecutrix was truthful in that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or that her whereabouts would be under check by both the appellants/accused and they would emerge at the scene abruptly to commit the offence of kidnapping by 'taking' her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown-up girl – may be one who had yet not touched 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused – Shyam, that he was taking her away for a purpose. It was expected of her to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam – the appellant on her own and in that sense there was no 'taking' out of the guardianship of her mother”

In *S. Varadarajan Vs. State of Madras, (1965) 1 SCR*

243, Hon'ble the Supreme Court has laid down as under:-

“9. It must, however, be borne in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourself to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused persons or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

In this case, it has already been held that the prosecutrix was a consenting party. Even if she was less than 18 years of age, there is nothing on record to show that she was not knowing or was not having capacity to know the full import of what she was doing voluntarily with the appellant. The prosecutrix, a grown up girl, at the

threshold of attaining the age of majority, remained and roamed with the appellant at different places for a period of more than 2 ½ months, cannot be said to have been enticed by the appellant.

In her statement recorded under Section 161 Cr.P.C., the prosecutrix only named the appellant, whereas, in her statement recorded under Section 164 Cr.P.C., after 12 days of the first statement, she named four more accused. All those accused persons who were subsequently named by the prosecutrix stand already acquitted by the trial Court.

The facts and circumstances of the case, when considered in totality, would go to prove that the prosecution case suffers from serious infirmities and the benefit thereof must go to the appellant. The quality of evidence led by the prosecution is insufficient to bring home guilt against him. Consequently, the instant appeal succeeds; the impugned judgment of conviction and order of sentence are hereby set aside; and the appellant is acquitted of the charges framed against him. The appellant is stated to be on bail. His bail bonds shall stand discharged.

September 13, 2017

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(JITENDRA CHAUHAN)

JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No