

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

CRA-S-1046-SB of 2013 (O&M)

Date of decision: 18.11.2017

Nahna

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR.JUSTICE JITENDRA CHAUHAN

Present: Ms. Sanamjeet Kaur, Advocate/Legal Aid Counsel
for the appellant.

Ms. Mahima Yashpal, AAG, Haryana
for the State.

Jitendra Chauhan, J.

The present appeal is directed against judgment of conviction dated 09.10.2012 and order of sentence dated 11.10.2012, passed by Sessions Judge, Faridabad, whereby the appellant was convicted under Sections 366 and 376 of the Indian Penal Code (for short 'IPC') and sentenced to undergo rigorous imprisonment for five years with fine of Rs.5000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of two months under Section 366 of IPC. He was further sentenced to undergo rigorous imprisonment for seven years with fine of Rs.7500/- under Section 376 of IPC and in default of payment of fine, to further undergo rigorous imprisonment for three months. Both the sentences were ordered to run concurrently.

2. The case of the prosecution as set out in para No.2 of the judgment of the trial Court is as under:-

“On 09.03.2011, complainant Sadhna had moved an application Ex.PH before the police mentioning therein that earlier her marriage was performed with Raju resident of Indra Colony and from his loins a daughter, the prosecutrix, had born to her on 10.01.1997 at her parental house. Her husband Raju had expired due to illness. Thereafter, the complainant had remarried Rameshwar and from his loins she has a son and two daughters. She and her daughter, the prosecutrix used to reside in the house of her father Khubi situated in A.C. Nagar. Nehna (accused) brother-in-law (Sala) of her brother Mukesh also used to reside in her parental house and used to work in a company in Sector 24, Faridabad, who is aged 20-22 years. On 06.02.2011 in their absence, her daughter, the prosecutrix has been enticed away by Nehna from their house in A.C. Nagar on the pretext of marrying her. Due to relationship they did not report the matter to the police. They tried to search them at their own level but could not find them. She is firm that Nehna has enticed away the prosecutrix. She sought action against Nehna who is also missing from that very day and her daughter be traced.

On receipt of application Ex.PH, ASI Rakesh Singh recorded formal FIR Ex.PH/1 and made his endorsement Ex.PH/2. He then went to the spot along with complainant and recorded the statements of witnesses. He took into possession birth certificate Ex.PJ/1. On 10.03.2011, the prosecutrix was

recovered from the company of accused vide memo Ex.PD. He then arrested the accused. Accused as also the prosecutrix were medico-legally examined and he took into possession the articles handed over by the doctors after their medico-legal examination. He prepared the rough site plan Ex.PN of the place of occurrence. On 06.04.2011, he got prepared the scaled site plan of the place of occurrence. During investigation he recorded the statements of various witnesses. After completion of investigation, report under Section 173 Cr.P.C., was prepared by SI Virender Singh and presented in Court.”

3. On presentation of challan, the trial Court finding prima facie evidence against accused-appellant, framed charge for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code to which accused pleaded 'not guilty' to the charge and claimed trial.

4. In support of its case, the prosecution examined the following witnesses:-

PW-1 Dr. Narinder Kaur medico-legally examined the prosecutrix and produced the MLR record and she opined that the possibility of sexual intercourse could not be ruled out.

PW-2-ASI Anoj Kumar, Draughtsman proved on record the scaled site plan Ex.PB of the place of occurrence prepared by him on the demarcation of the prosecutrix.

PW-3 Constable Prem Kumar had deposited the case property with FSL, Madhuban and tendered his affidavit Ex.PC into

evidence

PW-4 Constable Rishi Pal was one of the associate of investigating agency and in the presence of this witness, the prosecutrix was recovered from the possession of accused.

PW-5 Sadhna, the complainant and mother of prosecutrix, narrated the whole occurrence.

PW-6 Khubi Ram, father of the complainant reiterated the statement made by the prosecutrix by stating that accused is brother in law of his son Mukesh and used to reside in AC Nagar in his house. On 06.02.2011, accused had enticed away her daughter from his house. Thereafter, the matter was reported to the police. The prosecutrix (her daughter) was recovered from the possession of accused on 10.03.2011. He identified the accused present in Court.

PW-7 Prosecutrix herself stepped into the witness box and testified the whole prosecution story. She stated that accused present in Court had been living with her mama Mukesh. On 06.02.2011 at noon she was alone, accused came there and removed her clothes and committed rape upon her. After committing rape he went away from the house. She further stated that accused came to house in the evening and said that he will solemnize marriage with her and on that pretext he took her to various places and commit rape upon her.

PW-8 Dr. Ravi Shankar Gaur conducted the ossification test of the prosecutrix and proved on record his report Ex.PL/1 and X-ray films Ex.PL/2 to Ex.PL/4.

PW-9 Dr. A.K. Yadav conducted medico-legal examination upon the accused and proved the copy of MLR Ex.PM/1

PW-10 ASI Rakesh Singh, Investigating Officer testified about the manner of investigation carried out by him

5. The statement of the accused under Section 313 Cr.P.C., was recorded. He pleaded innocence and alleged false implication. However, the accused did not lead any evidence in his defence.

6. After hearing the Public Prosecutor for the State and Legal Aid Counsel for the accused and after going through the evidence on record, the trial Court convicted and sentenced the accused/appellant, as stated hereinbefore.

7. Feeling aggrieved, against the judgment of conviction and sentence rendered by the trial Court, the instant appeal was filed by the accused/appellant which was admitted on 04.04.2013.

8. Learned amicus curiae for the appellant/accused submits that the learned trial Court erred in convicting the appellant and has misread, misconstrued and misinterpreted the oral as well as documentary evidence. As per allegations, the appellant enticed the daughter of the complainant on 06.02.2011, whereas the FIR came into being on 09.03.2011, after a considerable delay of one month which shows that the version put forth by the prosecution is false. The learned counsel refers to statement of prosecutrix recorded under Section 164 Cr.P.C., to contend that the prosecutrix had specifically admitted that she was in love with the appellant and had left her home in the company of the appellant out

of her own sweet will, therefore, the learned amicus curiae for the appellant has submitted that the prosecutrix was a consenting party but the trial Court has not taken into consideration the above aspect of the matter.

9. The next argument raised by learned amicus curiae for the appellant is that the trial Court has failed to take into consideration the contradictions and inconsistencies in the statements of the prosecution witnesses. There were material contradictions in the testimonies of star witnesses of the prosecution i.e. PW-5 Sadhna, mother of the prosecutrix and PW-6, Khubi Ram, maternal grand father of the prosecutrix with regard to reporting the matter to the police. PW-6 Khubi Ram in his examination in chief had stated that they reported the matter to the police, whereas, in his cross examination, he candidly admitted that he did not personally report to the police that accused had enticed away the prosecutrix.

10. The next submission made by learned amicus curiae is that the trial Court appears to have been overwhelmed by Ex.PJ/1, projected to be the birth certificate of the prosecutrix which in fact does not pertain to her. There is no cogent evidence to prove the exact age of the prosecutrix. In this context, the learned amicus curiae has referred to the statement of PW-9-Dr. Ravi Shankar Gaur who had conducted the ossification test upon the prosecutrix and had opined that the age of prosecutrix was to be between 14 to 16 years within a margin of 6 months to 1 year on either side, therefore, the learned counsel has

submitted that the prosecutrix was not only more than 16 years, in fact, she was above 18 years at the relevant time. Even, the star witnesses i.e. PW-5 Sadhna, mother of the prosecutrix and PW-6 Khubi Ram have failed to state the date of birth of the prosecutrix and other children.

11. It is further contended that the trial Court has not taken into account the fact that the prosecutrix had admitted that she and the appellant had entered into a marriage at Shrine of a Muslim Peer in Aligarh. The learned counsel refers to the cross examination of the prosecutrix wherein she has categorically admitted that on 06.02.2011, she along with appellant left for Delhi at about 6 p.m. She had not carried any clothes with her. While staying at Delhi, accused/appellant used to go to market and she also used to go to market. She has further stated that she did not raise any alarm during her stay with the appellant at Delhi or at Aligarh. She has stated that she left the house with her own free will due to be beatings given by her mother. Therefore, the learned counsel has submitted that the prosecutrix was never enticed away and in fact, she was a consenting party. The prosecutrix remained in the company of the appellant without any pressure or fear. Had there been any pressure or threat upon the prosecutrix by the appellant, she would have tried to escape, however, in the instant case, she enjoyed the company of the appellant.

12. The learned counsel states that the FIR is on account of dispute between the mother of the prosecutrix, the complainant and Poonam, sister of the accused. There is no trustworthy evidence against

the appellant, rather the facts on record goes to establish the false implication of the accused in the present case.

13. Lastly, the learned amicus curiae has submitted that the appellant has undergone the entire sentence. He is poor person. He was represented by Legal Aid Counsel throughout. There is none else to support and look after the old parents. The appellant is facing the agony of trial since his arrest on 10.03.2011 and has remained in custody for 05 years and 03 months, therefore, she prays that the present appeal may be accepted.

14. *Per contra*, the learned State counsel has contended that the case of the prosecution has been duly proved by virtue of credible evidence and material on record. The star witness i.e. prosecutrix has supported the prosecution version. Her statement is duly supported and corroborated by way of medical evidence and the investigation of the present case. The learned State counsel refers to Ex.PJ/1, the birth certificate of the prosecutrix issued by Municipal Corporation, Faridabad whereby date of birth of the prosecutrix was reflected as 10.01.1997, to submit that the prosecutrix was minor at the time of occurrence. Therefore, the learned State counsel argued that the offence under Sections 366 and 376 IPC are duly proved as the minor cannot give the consent and, therefore, the consent of prosecutrix, if any, is immaterial.

The act of the accused has been duly proved by way of medical evidence, therefore, learned State counsel prays for the dismissal of the present appeal.

15. I have heard learned counsel for the parties and have gone through the record.

16. Indisputably, the prosecutrix remained in the company of the the appellant for more than one month since the registration of FIR on 09.03.2011, lodged by mother of the prosecutrix. The submission of learned counsel for the appellant is that the prosecutrix was a consenting party as she had specifically admitted in her statement Ex.D2 recorded under Section 164 Cr.P.C., before the Magistrate stating that she left with the appellant out her own free will and travelled with the accused to Delhi and other places. She has also admitted that she solemnized marriage with accused at Aligarh and thus, no illegal act was committed by the accused, is of no consequence. No doubt, the complainant, mother of the prosecutrix and grandfather while appeared in the witness box have failed to give the exact age of the prosecutrix, however, on perusal of the record, it reveal that the prosecutrix was minor at the time of occurrence. The prosecution has brought on record the birth certificate of the prosecutrix Ex.PJ/1, issued by the Registrar (Birth & Death), Municipal Corporation, Faridabad which depicts the age of the prosecutrix to be 10.01.1997. The prosecutrix was also subjected to ossification test by PW-8, Dr. Ravi Shankar Gaur, whereby he tendered his affidavit Ex.PL and proved his report Ex.PL/1 and X-ray films Ex.PL/2 to Ex.PL/4. As per ossification test report, the approximate age of the prosecutrix was found to be 14 to 16 years with margin of error of six months on either side, which means the prosecutrix was minor at the time of occurrence.

The version of prosecutrix being minor has been duly corroborated by way of documentary evidence as well as by medical evidence. The accused/appellant has failed to rebut the factum of prosecutrix being minor.

17. Further, the prosecutrix in her deposition before the Court has duly supported the prosecution version, whereby she has specifically stated that on 06.02.2011, she was alone at her house. Her maternal grandfather and her mother had gone to the village. At noon, accused came to the house and removed her clothes and committed rape upon her. While committing the wrong act, accused gagged her mouth and thereafter, he went away. In the evening accused came to the house and said that he will solemnize marriage with her and took her away to Delhi and kept her for a month in Delhi. During her stay in Delhi, the accused committed rape upon her number of times. It is well settled that if the prosecutrix was minor, therefore any consent by her is of no consequence. The appellant cannot be absolved of the act committed by him. She was taken away from the custody of her natural guardian and was raped.

18. The argument of learned counsel for the appellant that accused has been falsely implicated as there was dispute between the mother of the prosecutrix, the complainant and Poonam, sister of the accused is without any substance as there is no iota of evidence which would prove the enmity of the complainant. The accused has not led any evidence in his defence to prove the above said fact. The discrepancies in the statements of PW-5 and PW-6 pointed out by learned defence counsel

are minor and do not go to the root of the case. Hon'ble the Supreme Court in **State of H.P Vs. Lekh Raj**, 2000(1) SCC 247 has observed as under:-

“Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incidence there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement.”

19. From the oral as well as documentary evidence, this Court comes to conclusion that the prosecution has successfully established its case beyond reasonable doubt against the accused/appellant.

20. There is no illegality or impropriety in the impugned judgment of conviction dated 09.10.2012 and order of sentence dated 11.10.2012 and the same, is, hereby upheld and affirmed. There is no merit in the appeal which is hereby dismissed.

21. It is pertinent to mention here that as per custody certificate dated 07.10.2017, issued by Deputy Superintendent, District Prison, Faridabad, the appellant was released from jail on 09.06.2016 on completion of the sentence by giving benefit of undertrial period and

earned remissions. As such, no further order is required to be passed with regard to committing him to prison again.

18.11.2017
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(JITENDRA CHAUHAN)
JUDGE

<i>Whether speaking/reasoned :</i>	<i>Yes</i>	<i>No</i>
<i>Whether Reportable :</i>	<i>Yes</i>	<i>No</i>