

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA No.S-3380-SB of 2012 (O&M)

Date of Decision: 28.10.2017

Mukesh

.....Appellant

Versus

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Ms. Aditi Girdhar, Legal Aid Counsel,
for the appellant.

Mr. Ravi Partap, AAG Haryana.

AVNEESH JHINGAN, J.

The appellant has filed the present appeal challenging the judgment of conviction dated 11.09.2012 and order of sentence dated 13.09.2012 passed by the Sessions Judge, Faridabad. The appellant was facing trial in FIR No.251 dated 09.09.2011 registered at Police Station Sarai Khawaja, under Sections 323, 344, 363, 366-A and 420 IPC. He was acquitted under Section 420 IPC but convicted and sentenced under Sections 323, 344 and 366 IPC as follows:

<u>Offence</u>	<u>Sentence</u>
323 IPC	Rigorous Imprisonment for a period of six months;
344 IPC	Rigorous Imprisonment for a period of one year. He is also directed to pay fine of Rs.2000/-. In default of payment of fine, the convict shall further undergo R.I. for one month;
366 IPC	Rigorous Imprisonment for a period of 5 years. He is also directed to pay fine of Rs.5000/-. In default

of payment of fine, the convict shall further undergo R.I. for 3 months.

The substantive sentences imposed upon the appellant were ordered to run concurrently.

The case of the prosecution is that one Mamta moved an application on 20.05.2011, on the basis of which DDR No.27 was lodged by the Police of Palla Police Post, District Bhiwani. It was stated that on 16.05.2011, Mamta-complainant left her house and went to her job in DLF. On coming back from job in evening, she found that her elder daughter was missing from the house. On 01.09.2011, Mamta-complainant informed the police that her daughter had safely come back to home. On 09.09.2011, another application was moved by Mamta-complainant stating that on 16.05.2011, her daughter left the house on the pretext of going to a shop, when she did not come back, a DDR was lodged. Her daughter was found on 31.08.2011 and information was given to police on 01.09.2011. She stated that her daughter disclosed that she was enticed by Mukesh on the pretext of marriage and he kept her in his house. Her daughter further stated that due to fear she could not disclose anything earlier.

On receipt of the application from Mamta-complainant, FIR was registered under Sections 363 and 366-A IPC and statement of the prosecutrix was recorded in the presence of Smt.Kiran Bhardwaj, Legal Aid Counsel. Later on, Sections 323 and 342 IPC were added. Police visited the spot and prepared the rough site-plan. Prosecutrix was medico-legally examined on 10.09.2011 and her statement under Section 164 Cr.P.C. was recorded on 12.09.2011. On 16.09.2011, Mukesh-accused was arrested. On 23.09.2011, the birth certificate of the prosecutrix was taken into possession

and thereafter, Section 420 IPC was added in the case.

On completion of investigation of the case, report under Section 173 Cr.P.C. was prepared and presented in the Court. The case was then committed for trial to the Court of Sessions vide order dated 05.11.2011.

Accused-appellant-Mukesh was charge-sheeted for the offences punishable under Sections 363, 366, 323 and 420 IPC vide order dated 07.12.2011 to which he pleaded not guilty and claimed trial.

During trial, the prosecution examined as many as 13 witnesses to prove its case. Statement of accused-appellant under Section 313 Cr.P.C. was recorded in which he claimed innocence and pleaded that he has been falsely implicated in this case. Accused closed his defence evidence without leading any evidence.

The trial Court, after hearing the counsel for the appellant as well as the Public Prosecutor, and considering the evidence, convicted the accused-appellant under Sections 323, 324 and 366 IPC vide judgment dated 11.09.2012 and sentenced him vide order dated 13.09.2012 to undergo RI, as detailed in para No.1 of this order.

Feeling aggrieved of the aforesaid judgment of conviction and order of sentence, the present appeal has been filed.

Learned for the appellant states that in the DDR, it was alleged that Mukesh enticed the prosecutrix to go alongwith him. She further contended that there was contradiction in the prosecution story. As per the application moved by Mamta-complainant on 09.09.2011, there was no mention of intoxication to the prosecutrix, whereas in the statement of prosecutrix recorded under Section 164 Cr.P.C., she stated that she was given glass of water laced with intoxicant due to which she fell

unconscious. Learned counsel for the appellant further submitted that there is five days' delay in lodging the DDR. The girl got missing on 16.05.2011 whereas the DDR was lodged on 20.05.2011 which shows that the story put-forth by the prosecutrix was not worth-reliance. Learned counsel further submitted that there is contradiction in the story of the prosecution with regard to recovery of the prosecutrix and the place from where she was recovered. She further contended that Mukesh-appellant has not stated before the police that he had given a call to mother of the prosecutrix and it was on her assurance they had come back. Learned counsel further submitted that the prosecutrix was a consenting party to the marriage.

On the other hand, learned Stated counsel argued that the prosecutrix was minor and the accused enticed her to enter into an agreement of marriage. He further contended that the case of the prosecution has been duly proved by the witnesses and the evidence produced on record. The age of the prosecutrix was duly proved by the School record. The appellant created a forged marriage agreement and that is why he was proceeded against under Section 420 IPC.

Having heard learned counsel for the parties and perusing the record, I am of the view that the pleas raised by the appellant cannot be accepted. The delay of 5 days in lodging DDR would not prove fatal in the facts and circumstances of the case. The prosecutrix was missing since 16.05.2011 and it was only after inquiring and searching that the DDR was lodged on 20.05.2011. It may be noted here that the real picture emerged only on 01.09.2011 when the prosecutrix came back home and narrated the entire story to her mother. It was thereafter only that on 09.09.2011, the complainant-Mamta moved an application Ex.PG on the basis of which FIR

was registered. In such circumstances, the initial five days' delay in lodging the DDR would not have any substantial effect on the case of the prosecution.

Learned counsel for the appellant vehemently pointed towards the contradiction in the statement of the complainant, application and the FIR. It would be appropriate to mention at this stage that one of the contradiction mentioned by learned counsel for the appellant is that on 01.09.2011, when the complainant-Mamta informed the police that her daughter has safely come back to her home, she has not informed the name of the accused-Mukesh to the police. The complainant came to know about the accused from her daughter only when she came back home and took sometime to come out of the fear of incident. Thereafter only, the entire picture emerged and the criminal proceedings were started against the appellant.

With regard to the contradiction in the application moved by the complainant on 09.09.2011, it is stated that there was no reference to any intoxication given to the prosecutrix whereas in the statement recorded under Section 164 Cr.P.C., the prosecutrix mentioned that she was given a glass of water and after drinking it, she fell unconscious.

The offence under Section 366 IPC will not be effected by the fact that whether the prosecutrix was enticed by the accused or on being unconscious, she was taken away to enter into the marriage agreement.

The argument raised by learned counsel for the appellant that the prosecutrix was a consenting party to the agreement of marriage, needs to be looked into from two angles. Firstly, the prosecutrix in her statement recorded under Section 164 Cr.P.C., disclosed that she was taken away by

the accused and thereafter, forcibly kept in a house and was pressurized to enter into marriage agreement.

This statement coupled with the fact that PW-6-Jaglia stated that on 31.08.2011, Mukesh had come to him with a lady at about 2.00 a.m. in the night and stayed there till morning. He further stated that he telephonically informed the mother of the prosecutrix and she came and took both of them with her. PW-8 Kamal Singh, Practicing Lawyer of Civil Court, Firozabad (U.P.), deposed that he identified the prosecutrix on marriage agreement Ex.PF. PW-10 Mohar Singh is a witness to the marriage agreement who deposed that the marriage agreement was signed by the accused and the prosecutrix in his presence. These depositions may suggest that she was a consenting party but these statements when read with statement recorded under Section 164 Cr.P.C. and the MLR report belies the plea raised by the appellant that the prosecutrix was a consenting party.

Secondly, the most important is the age of the prosecutrix. The consent will come into picture only when it is established that the prosecutrix was major and could have given a consent.

In the present case, the statement of the prosecutrix, her mother and the school record which was an official record, establish one thing that she had not attained the age of 18. There may be a dispute regarding actual age which varies from 12 to 15 in various documents and statements. But what is to be considered is whether she was of the age of 18 at the time of the alleged marriage agreement or not?

No evidence was produced by the accused to establish that the prosecutrix was major at the time of marriage agreement. The above said issue after being decided against the accused leaves no substance in the

argument that the prosecutrix was a consenting party.

Section 366 IPC reproduced as below:

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.-Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine (and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.)

A reading of the provision itself makes it clear that the requirement of the Section are two fold, firstly that a woman is kidnapped or abducted and secondly with the intent to marry a person against her will.

In the present case, the minor was enticed away without permission of her lawful guardian. This fact has been proved by the prosecution.

The agreement of marriage proves the second requirement of Section that she was taken away with intent to compel her to marry against her will. She being a minor free will, cannot be there.

Arguments of learned counsel for the State that the accused played fraud and therefore was proceeded against for the offence punishable

under Section 420 IPC is not required to be adjudicated as the trial Court has acquitted the accused so far offence punishable under section 420 IPC is concerned.

In view of the above discussion, I find that the appellant has been rightly convicted by the Trial Court for the offence punishable under Sections 323, 344 and 366 IPC.

Therefore, the judgment of conviction dated 11.9.2012 passed by the Trial Court does not require any interference from this Court.

With regard to sentence, this Court in *Mahabir Vs. State of Haryana*, 1997 (3) RCR 649, keeping in view the delay in trial, reduced the sentence to the period already undergone.

Even, the Hon'ble Apex Court in *Mukesh Versus State of M.P.*, 2014 (16) SCC 571 had reduced the sentence to the period already undergone.

The appellant accused is stated to have old parents and six brothers and sisters and a small child. He is the only earning member of the family. The sentence of the accused was suspended by this Court vide order dated 24.1.2013. Learned counsel for the State on instruction from Sanjiv Kumar, Warden of Faridabad Jail, has stated that after the suspension of sentence of accused, he was not involved in any other criminal case. From perusal of the custody certificate dated 27.10.2017 submitted by Ramesh Kumar, Deputy Superintendent, District Prison, Faridabad, it is evident that FIR is of the year 2011 and thereafter, accused was not involved in any other case.

Keeping in view the aforesaid decisions and the facts as stated above, coupled with the fact that the appellant has already undergone one

year, five months and sixteen days' of actual sentence, and one year, five months and twenty six days of total sentence with remissions, out of the total punishment imposed upon him, the sentence is reduced to the period already undergone by him. However, the sentences of fine alongwith in its default clause, are maintained.

However, the fine is converted into compensation under Section 357 of Cr.P.C. and the appellant is directed to pay Rs.10,000/- over and above fine already imposed. The fine will be deposited with trial Court within a period of 6 months failing which this appeal shall stands dismissed.

The trial Court will disburse the amount of compensation to the victim.

28.10.2017
reema

(AVNEESH JHINGAN)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No