

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

**CRA-S No.487-SB of 2011
Date of Decision: 11.11.2017**

Moharram Ali

.....Appellant

Vs

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. S.S. Rana, Advocate
for the appellant.

Mr. Sandeep Vermani, Addl. A.G., Punjab.

RAJ MOHAN SINGH, J.

[1]. Appellant has preferred this appeal against the judgment of conviction and order of sentence dated 21.12.2010 passed by the Addl. Sessions Judge, Ludhiana vide which he was convicted under Section 376 IPC and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,000/-. In default of payment of fine, he was to further undergo rigorous imprisonment for a period of 3 months.

[2]. Prosecution story started with the allegations that a case was registered on the statement of Nisha complainant wherein she alleged that she has four daughters and two sons.

Elder daughter Meena was married and younger daughter Sahina was 16 years of age and was working as maid servant with her in the houses of people. Moharram Ali/appellant of the same village used to work as a barber and was on visiting terms with the complainant party. Moharram Ali was having evil eye on Sahina and the same was objected to by the complainant. On 03.06.2007, Sahina did not return to the house after doing her work in the houses of people. At about 3.00 p.m., she told the complainant that she would come back soon, but did not return. Despite the search, the whereabouts of Sahina could not be ascertained. The complainant raised suspicion that her daughter Sahina was kidnapped by Moharram Ali with an intent to marry her.

[3]. During investigation of the case, the police recovered Sahina and also got recorded her statement in which she alleged that on 03.06.2007, Moharram Ali took her to his house in Mohalla Nirankari, where he committed rape upon her against her wishes. Moharram Ali kept her with him by giving threats. The FIR No.176 came to be registered on 17.10.2007 under Sections 363 and 366-A IPC. On 18.10.2007, the accused was arrested. On 19.10.2007, medical examination of Sahina was got conducted from the civil hospital. Thereafter, offence under Section 376 IPC was added.

[4]. Challan was presented against the accused/appellant in the Court on 18.12.2007. After necessary compliance in terms of Section 207 Cr.P.C., charges were framed for the offences under Section 363, 366-A and 376 IPC. The accused/ appellant did not plead guilty and claimed trial.

[5]. Thereafter prosecution examined Dr. Hitinder Kaur, Radiologist as PW-1, Nisha (complainant) as PW-2 and prosecutrix herself as PW-3. Dr. Anantjit Kaur as PW-4. MHC Jagtar Singh as PW-5, ASI Vinod Kumar as PW-6, Dr. Harjap Singh as PW-7 and constable Rakesh Kumar as PW-8. HC Devinder Singh, lady constable Mamta Rani, Joginder Singh, SI Sanjiv Kumar and ASI Gurpreet Singh were given up being unnecessary. The evidence of the prosecution was closed after tendering the report of chemical analyst Ex.PX.

[6]. Thereafter statement of accused was recorded under Section 313 Cr.P.C, who pleaded false implication and claimed himself to be innocent. No evidence in defence was led by the accused.

[7]. Trial Court after appraisal of evidence and hearing the parties, acquitted the accused for the offence under Sections 363 and 366-A IPC, but convicted and sentenced the accused for the offence under Section 376 IPC.

[8]. I have heard learned counsel for the parties and have also perused the record.

[9]. Statement of PW-1 Dr. Hitinder Kaur, Radiologist would show that the age of the prosecutrix was between 17 and 19 years. The said opinion was given by the Doctor on the basis of X-Ray report Ex.PA and ski grams Ex.P-1 to Ex.P-5. The doctor conducted the ultrasound of the prosecutrix and prepared report Ex.P-8 on the basis of films Ex.P-6 and Ex.P-7.

[10]. The statement of prosecutrix PW-3 would show that the accused Moharram Ali belonged to the village of her mother and was on visiting terms with the complainant party. He was having an evil eye upon her and used to do indecent actions with her. Her mother used to restrain him from doing so, but he used to seduce her under the pretext of marrying her. By giving some money on 03.06.2007, he took her to the market on the pretext of buying some clothes for her and thereafter he took her to his house situated in Nirankari Mohalla where the accused forcibly committed rape upon her without her consent. The accused used to threat her of dire consequences in the event of disclosure of the act to someone. Due to the threats given by the accused, the prosecutrix did not disclose this fact to anyone. On 18.10.2007, the prosecutrix was recovered by the police from the custody of Moharram Ali and till then, the accused kept

on committing rape upon her without her consent. The statement of the prosecutrix was recorded and on the next day, she was medically examined in the civil hospital.

[11]. Dr. Ananjit Kaur, Medical Officer, Civil Hospital, Ludhiana while appearing as PW-4 deposed that on 19.10.2007, the prosecutrix was examined. On examination, no external injury was found on the body of the prosecutrix. The secondary sexual characters were well developed. On local examination, no external mark of injury locally, external genitalia were found normal, vagina admitted two fingers, hymen was found torn and healed. Uterus was found normal and fornices were clear. Three vaginal swabs were taken. The doctor proved the original MLR.

[12]. Statement of PW-6 ASI Vinod Kumar would show that on 17.10.2007, he recorded the statement of the complainant and thereafter the same was sent for registration of the case. FIR Ex.PW-6/B was registered by SI Sanjeev Kapoor. Rough site plan was prepared and raid was conducted to arrest the accused. The accused was arrested on 18.10.2007 along with the prosecutrix. The prosecutrix was handed over to her mother.

[13]. Dr. Harjap Singh, while appearing as PW-7 stated that on 19.10.2007, he medically examined the accused and found

that there was nothing to suggest that the accused was incapable of performing the act of sexual intercourse.

[14]. The prosecution story would show that the prosecutrix was allegedly kidnapped by the appellant on 03.06.2007, when she was taken to market by the accused/appellant under the pretext of buying clothes for her. No complaint was lodged by the complainant from 03.06.2007 to 16.10.2007. The FIR came to be registered only on 17.10.2017. The prosecutrix was recovered on 18.10.2007 from the custody of the accused/appellant and the allegations of committing rape came to fore after the recovery of the prosecutrix. The age of the prosecutrix as per radiological test was found to be between 17 to 19 years. The trial Court has found as a matter of fact that the prosecutrix was above 18 years of age and, therefore, question of her being kidnapped by the accused from lawful guardianship /custody of her parents was not proved. Prosecutrix was found to be major and, therefore, the accused/appellant was acquitted for the offence under Section 363 and 366-A IPC.

[15]. As per ossification test, the age of the prosecutrix was found to be between 17 to 19 years. Variance of two years on either side has to be given in order to determine the age on the basis of ossification test. On counting the said variance, the trial Court held the prosecutrix to be more than 18 years of age. The

findings recorded by the trial Court were also based on the statement of the complainant, when she deposed as PW-2 that date of birth of her daughter was 03.06.1990 and her cross-examination further revealed that her elder daughter Meena was aged 21 years. Though she did not know the exact date of birth, but she further stated that there was no documentary evidence with her to prove the date of birth of the prosecutrix to be 03.06.1990, but the prosecutrix stated that her elder sister was 21 years of age and she was 18 years of age and, therefore, the appellant was acquitted for the offence under Sections 363 and 366-A IPC.

[16]. The medical evidence of the prosecutrix would show that she was found to be subjected to intercourse as hymen was found torn and healed. No external mark of injury and signs of any struggle were found on the person of the prosecutrix. The statement of prosecutrix would also show that she did not raise any *rola*/noise on the way when she was kidnaped by the accused and was taken to his house. There were 4-5 rooms where the prosecutrix was kept by the accused. She remained with the accused for more than four months. The accused did not go for work regularly and the prosecutrix used to cook meal for herself as well as for the accused. The complainant-party did

not lodge any complaint against the accused prior to the present occurrence. The police did not record any statement of the residents of that *mohalla* from where the prosecutrix was recovered from the custody of the accused.

[17]. Evidently, the prosecutrix remained in the company of the accused for more than 4 months. No hue and cry was ever raised by the prosecutrix, even she used to prepare meal for the accused during the intervening period. The occurrence took place on 03.06.2007 and the accused was known to the complainant-party. No complaint was lodged by the complainant party till 17.10.2017. Since the prosecutrix was found to be more than 18 years of age on the basis of material on record, it can be inferred that the prosecutrix remained as a consenting party throughout the period. It is true that solitary statement of the prosecutrix can be appreciated in the context of allegation of rape, but the facts and circumstances of the case would show that the complainant-party kept mum from 03.06.2007 to 17.10.2007. Throughout this period, the prosecutrix remained in the company of the accused and even prepared food for the accused and herself. She never objected to the accused, nor there was any mark of injury on her person.

[18]. Prosecutrix was found to be subjected to intercourse as per her medical configuration on record. Apparently, the police

has not recorded any statement of the person from the locality from where the prosecutrix was recovered from the custody of the accused. It is not a case where the prosecutrix has alleged that she was kept in captivity and was opposing the acts of the accused throughout. Since no complaint was filed by the complainant party for more than 4 months, the statement of the prosecutrix would also reveal that she was consenting party as she never made any attempt to flee from the house, nor any force was used upon her in order to commit rape. Even she used to cook food for the accused and herself during the intervening period. Secondary sex characteristics of the prosecutrix were found to be normal. The accused was acquitted of the offences under Sections 363 and 366-A IPC. The very allegation of the complainant that the prosecutrix was allured and kidnapped by the accused with an intention to marry her, could not be proved as she was found to be more than 18 years of age.

[19]. The totality of the facts and circumstances of the case would make it a case of doubtful background.

[20]. In view of facts and circumstances, the prosecution has not brought the guilt of the accused beyond all reasonable doubts. Therefore, benefit has to be given to the accused/appellant. The judgment of conviction and order of

sentence dated 21.12.2010 passed by the Addl. Sessions Judge, Ludhiana is hereby set aside. The appeal is allowed and the accused/appellant is acquitted of the charges. Normal consequences to follow.

November 11, 2017

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**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No