

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

Crl. Appeal No.S-2681-SB of 2016(O&M)

Date of Decision: 16.12.2017

Onkar Singh

.. Appellant

Vs.

State of Punjab

.. Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Argued by:- Mr. Kunal Mulwani, Advocate
for the appellant.**

Mr. Karanbir Singh, AAG Punjab.

ANITA CHAUDHRY, J.

The appellant has been convicted and sentenced to 7 years rigorous imprisonment alongwith fine under Section 376 IPC by the Addl. Sessions Judge, Hoshiarpur. In default of payment of fine there was a further order for default sentence.

Briefly stated the prosecution story is that the victim left her house on 27.02.2015. She gave her age as 17 years. She was studying in 10+1 class. In her complaint made on 11.03.2015 she disclosed that the accused used to follow her and had fallen for her and proposed marriage. On 27.02.2015 she left her house in the evening at about 7/8 pm. She went outside the village to meet the accused. He took her on his motor cycle on the pretext that he would marry her. On the way she felt thirsty and the accused gave her chilled water after which she became unconscious. She disclosed that thereafter she did not know what happened. On 01.03.2015 she gained consciousness at about 8.00 pm. and she found that she was

wearing different set of clothes. The accused dropped her at M.P. Resort on 01.03.2015 and asked her wait but did not return.

The prosecutrix further disclosed that she went inside the resort and asked for help and a call to her father was made. Her father came to the resort. The victim narrated the occurrence. Her father spoke to family of accused but the accused refused to marry her. Allegations were levelled that sexual act was committed without her consent.

The victim was produced before the Illaqa Magistrate on 12.03.2015 where her statement under Section 164 Cr.P.C was recorded which reads as under:-

“It is stated that on 27.03.2015 again said on 27.02.2015 at 7:00 PM, Onkar Singh called me at Garshankar. I went out of the house on some pretext. He said that he had to perform marriage with me and asked me to go with him. I refused him saying that I had not disclosed about anything at home. At this, he replied that I had got late, therefore, the member of my family would rebuke me if I went home and asked me to stay there with him. When I returned for home, then he made me sit on his motorcycle. I told him that I was feeling thirsty. Then, he offered cold water. I lost my consciousness after five minutes. On the second day he left me at Dhigam Palace. I asked him as to where he was going. At this he did not say anything and said that he would return within five minutes, but he did not return. Then, I managed to inform at my house after taking phone from someone. The member of my family took me from there. I narrated the entire incident to my family members.”

The police got the medical examination of the prosecutrix. She disclosed her age as 17 years 11 months. The medical officer did not find any internal and external injury but hymen was found to be torn. The

medical officer also advised ossification test and Dental examination for determination of age.

The accused was arrested and sent up to face trial. Charge was framed under Sections 363, 366-A, 376 and under Section 6 of Prevention of Children from Sexual Offences Act, 2012. The accused pleaded not guilty & claimed trial.

The prosecution in order to establish the case examined thirteen witnesses.

When the accused was questioned with regard to the incriminating evidence appearing against him, he denied the same and gave a completely new defence. He stated that he had refused to give false evidence on the asking of the parents of prosecutrix therefore false case was registered.

The trial Court though noted that the girl had left the house on own and had an affair with the accused but held that she had not given her consent for physical relations and was raped after she was made unconscious.

The Court relied upon the certificate Ex. PW 13/A to hold that the girl was less than 18 years i.e. 17 years and 11 months. Referring to the medical evidence and relying on the FSL report, the Court recorded conviction under Section 376 IPC only and acquitted the accused under the other sections.

The learned counsel has submitted that the conclusions drawn by the trial Court are perverse. The counsel submitted that the prosecution had deliberately suppressed the true story to show that there was abduction or that the accused forced himself upon her and it was a case of consent. It

was urged that both the father & daughter admit that both of them were having an affair and the girl did not speak of her molestation in her statement given under Section 164 Cr.P.C. but made a statement against him at the trial but in the cross examination demolished her own case. It was urged that the girl was away for two nights but the father did not lodge a report and even after her return the incident was reported after 12 days of the occurrence. It was urged that the girl was major and it was case of consent and the prosecutrix to justify her story made improvement and introduced more people but it makes her story improbable. It was also submitted that date of birth certificate has no evidentiary value and the person who made the entry and the document on the basis of which entry was made had not been produced. Reliance was placed on **Alamelu & Anr. Vs. State Rep. by Inspector of Police, 2011 AIR(SC) 715, Satish Kumar Vs. State of Punjab & Anr. 2015(5) Law Herald 3897, Brahm Dutt Vs. State of Punjab, 1999(3) RCR(Crl.) 449, Gulab Singh Vs. The State of Haryana, 1983(2) RCR(Crl.) 432, Anil Kumar Vs. State of Haryana, 1998(4) RCR(Crl.) 599, Dileep Verma Vs. State of U.P. 2016(5) RCR(Crl.) 861 and Umesh Rajabhau Khandekar Vs. The State of Maharashtra 2015 All MR(Crl.) 4006.**

The State Counsel submitted that the girl was minor and the victim had stated that she had not consented to sexual intercourse and the Court has to presume that the prosecutrix was not a consenting party.

The victim was missing from the house since 27.02.2015. The parents did not lodge a missing report. The FIR has been lodged after 13 days. The girl had returned home on 01.03.2015 but still the report was not made. It was expected of the parents to have necessitous concern. It baffles

common sense that the parents did not search for her for some unfathomable reason that defeats basic human prudence.

It is apt to mention that in rape cases the delay in FIR by the victim or by the parents is not of significance. Some allowance has to be given in cases where the family would be in trauma, the agony and anguish it would have created in the mind of victim. It would take a lot of valour to muster courage to expose oneself in a conservative social milieu. It needs all the psychological inner strength to undertake such a legal battle. But it is facts of each case which require examination and there is no strait jacketed formula to be applied in each case of rape. Thus mere delay in lodging in FIR may not by itself be fatal but delay has to be considered in the background of facts & circumstances.

Before dwelling on the factual score, it would be necessary to refer to the case law.

In the case of **Birad Mal Singhvi Vs. Anand Purohit, 1988 (supp) SCC 604**, Hon'ble Apex Court has held that the date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The Court further held that the truth or otherwise of the factum of date of birth as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those person who could vouchsafe for the truth of the facts in issue. It was held that in the circumstances the dates of birth as mentioned in the documents have no probative value in the absence of the admissible evidence and the same could not be accepted.

The same proposition of law was reiterated by the Supreme Court in **Narbada Devi Gupta Vs. Birendra Kumar Jaiswal, 2003(4)**

RCR(Civil) 683, wherein it was held that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents and its execution has to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue.

To appreciate the rival submissions raised at the bar and analyzing the evidence brought on record, it is necessary to first refer to the age of the victim. It is not in dispute that the victim was a 10+1 student, therefore, it was easy for the prosecution to produce the Board certificate that would have given the date of birth and could be accepted as a cogent piece of evidence. The ossification test and dental examination test was carried out for determination of the age and the radiologist had given the age between 17 and 19 years while on dental examination her age was opined between 17 and 21 years. The prosecutrix had given her age at the time of her examination by the Medical officer as 17 years 11 months. The prosecution did not summon any record to prove the birth certificate. The father of the victim had produced the certificate Ex.PW13/A and the date of birth was mentioned as 16.04.1997, but it is interesting to note that this certificate has been issued on 26.06.2015 i.e after the incident.

The Apex Court in **Birad Mal Singhvi's case (supra)** had held that the date of birth certificate would have no evidentiary value unless the person who had made the entry and the document has no probative value in the absence of admissible evidence. In the case of **Narbada Devi Gupta(supra)**, it has been held that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents and its execution has to be proved by admissible evidence.

The burden of proof was on the prosecution to prove the age of the victim and it has failed to discharge the same. The ossification test as well as dental examiner report gave variation of two to four years and the margin of error in age has been judicially recognized by the Courts and therefore in the facts of this case the age of the girl could not be fixed merely on the oral statement. The prosecution had held back the Board certificate, the father could not give the date of birth of his child when questioned in the cross-examination. The expert evidence does not rule out the possibility of the girl being major. In my view the prosecution had failed to prove that the girl was a minor at the relevant date.

The prosecutrix had admitted that she had left the house of her own in the late evening and she went to meet the accused outside the village. The parents did not lodge a missing report. They did not report the matter even after the return of their daughter. The victim and the father have admitted that the girl and the accused were having an affair. It is for this reason that even after the return of the girl the FIR had not been lodged. A perusal of the statement of the victim also reveals that she had made inconsistent statement and it does not led credence to the prosecution case. The prosecutrix had introduced one more person at the trial and she had alleged that an unknown person had put a hanky over her nose and thereafter she felt unconscious. In the cross-examination she admitted that she had been talking to the accused on the mobile. She was brazen to admit that she wanted to get married to him but their parents were against the marriage. She stated that she did not know who had done the sexual act as she was unconscious. She admitted her statement made before the Magistrate and that she did not disclose about the sexual acts then. She

admitted that when the family members of the accused refused to perform the marriage, then her parents had got the case registered. She had stated that she had left the house of her own secretly and did not inform anyone including her father. The prosecutrix had admitted that she had left the house of her own and it is subsequently that the story of abduction and kidnapping had been made. The girl was major and she was a consenting party. At the trial, the prosecutrix tried to make major improvements, may be unable to justify the version she was giving. She remained with the accused for two nights. She did not complain to anyone though had the opportunity.

From the above, it can be safely concluded that the trial Court had not correctly examined the evidence and it is held that the prosecution has failed to prove the charges beyond reasonable doubt. Therefore, the accused is entitled to acquittal.

The appeal is allowed. Judgment and conviction is set aside. The accused is acquitted. He be released forthwith, if not required in any other case.

December 16, 2017
Jiten

(ANITA CHAUDHRY)
JUDGE

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No