

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

CRA-S-996-SB of 2004

DATE OF DECISION :- July 30, 2018

Devender @ Tunnu

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE H.S. MADAN

Present:- Mr. Pavan Malik, Advocate for the appellant.

Mr. Sulinder Kumar, AAG, Haryana.

This appeal has been filed against the judgment dated 13.3.2004 passed by Additional Sessions Judge, Fast Track Court, Gurgaon vide which he had convicted accused Devender @ Tunnu for offences under Sections 366 A and 363 IPC read with Section 511 IPC and vide order dated 16.3.2004 in terms of which he had sentenced the accused as follows :-

1. Under Section 366A/511 IPC : To undergo rigorous imprisonment for three years with fine of Rs.500/- and in default of payment of fine, to further undergo rigorous imprisonment for three months.
2. Under Section 363/511 IPC : To undergo rigorous imprisonment for two years with fine of Rs.500/- and in default of payment of fine, to further undergo rigorous imprisonment for three months.

All the sentences were ordered to run concurrently.

Feeling aggrieved, the accused convict has filed the present appeal praying that the same be accepted, the impugned judgment of his conviction and order of sentence be set aside and he be acquitted of the charge framed against him.

Briefly stated the facts of the case as per prosecution story are that on intervening night of 9/10.6.2003, while complainant Raj Kumar was sleeping in his house at village Chhavan, Police Station Pataudi, District Gurgaon along with his wife, then he heard shouting by his sister Puja and mother Santosh. The complainant came out and saw Devender @ Tunnu running away in the moon light. On being enquired by the complainant, his sister Puja told that accused had picked her up from bed where she was sleeping. It was so done with bad intention and accused had left her when she raised an alarm.

On the basis of written complaint submitted by Raj Kumar, formal F.I.R. was recorded. The matter was investigated. The accused was arrested in his case on 14.6.2003. He was got medico legally examined. The prosecutrix Puja was also got medico legally examined. After completion of investigation and other formalities challan against the accused was prepared and filed in the Court of JMIC Gurgaon.

The Judicial Magistrate Ist Class, Gurgaon complied with provisions of Section 207 Cr.P.C. by supplying the documents relied upon in the challan to the accused free of cost and finding that offences under Sections 363 and 366 IPC were exclusively triable by the Court of Sessions committed the case accordingly from where it was assigned to Additional Sessions Judge, Fast Track Court, Gurgaon.

Learned Additional Sessions Judge observing that prima facie charge for offence under Sections 366A, 363/511 and 376/511 IPC was disclosed charge sheeted the accused accordingly to which accused pleaded not guilty and claimed trial.

During the course of its evidence prosecution examined as many as eight PWs as per detailed below:

PW 1 Manoj Kumar, who had prepared scaled site plan of place of incident Ex.PA proved the same.

PW2 complainant Raj Kumar supported the prosecution story on material aspects.

PW3 SI Mohd. Hussain who had prepared the challan on completion of investigation deposed in that regard.

PW4 Santosh, mother of complainant and prosecutrix lent support to the prosecution story on material aspects.

PW5 Satpal, Chowkidar of village Chhavan stated that on 10.6.2003 he was called by Sarpanch of village and on his instructions, he effected Munadi and Panchayat was convened at 8.30 P.M. regarding the matter concerning Puja, who had been forcibly lifted by Devender @ Tunnu; that he had gone to the house of Devender @ Tunnu at 8.00 A.M. and asked him to appear before the Panchayat but he did not turn up. The Panchayat members kept waiting for him for about two hours but accused did not appear before the Panchayat. That on 11.6.2003, no Panchayat was convened, however, the Sarpanch and others were waiting for him stating that when he would come back the matter would be sorted out. Sarpanch advised the family members of Puja to report the matter to the police. He

stated that his statement was also recorded by the police.

PW6 Smt. Anshu, Head Teacher, GGPS, Chhavan had brought the summoned record concerning Puja, daughter of Mam Chand having date of birth 1.8.1991. She proved certificate Ex.PC issued by School in that regard.

PW7 Puja deposed as under :-

“On 9.6.2003, I along with my mother was sleeping in the main gate Chowk. Raj Kumar, my elder brother along with his wife was sleeping inside the room. At about 12 or 12.30 night time, I was sleeping, when accused took me in his lap and gagged my mouth. I then gave a bite on the right hand of the accused. He then threw me and ran away towards phirni. I raised noise. My mother also raised noise and when my brother Raj Kumar and his wife came out my brother enquired from me as to what had happened. I told my brother that Devender accused present in the Court had lifted me forcibly from the bed. 2-3

Panchayats were held for settlement. The matter was not settled and it was ultimately reported to the police. Police recorded my statement. I was medico legally examined. Police came to the house but did not meet me. Police did not record my statement. I have stated the facts before my brother alone. I was not examined by the police at all. My brother has not seen Devender accused running from the spot. I only told him about the occurrence. My mother did not see Devender-accused running and lifting me from the bed. My mother was sleeping

at the time. I raised noise. My mother awoke when I raised noise. When I gave a bite on the hand of accused, he pushed his hand from my mouth and then I raised noise. I raised noise when I was at a distance of 25 feet. 60-70 persons came to the spot, after hearing noise Dharampal, Satpal, Jaipal etc. came on the spot. These three persons had not seen the accused running. Panchayat was convened in the morning. My brother alone had gone to attend the Panchayat. I and my mother remained at the house. All the persons assembled after the occurrence had gone to their houses. I my self, my brother, my bhabhi and my mother also came to the house during night time. Devender used to visit our house oftenly before occurrence. It is incorrect to suggest that no occurrence as alleged had taken place and I made an incorrect statement at the instance of my brother and mother. It is incorrect to suggest that I have deposed falsely”

PW 8 Sabha Ram, S.I. Police Station Udyog Vihar, Gurgaon, who on receipt of written complaint by Raj Kumar on 11.6.2003 had recorded formal F.I.R. Ex. PD deposed in that regard. He further testified regarding investigation being conducted by him proving various documents besides deposing about arrest of the accused on 14.6.2003. With that the prosecution evidence the accused got concluded.

Statement of the accused was recorded under Section 313 Cr.PC. in which all the incriminating circumstances appearing against the accused were put to him but he denied the same and said that he is innocent and he is falsely involved in this case. He did not lead any evidence in

defence despite availing of opportunities. After hearing arguments accused was convicted and sentenced as mentioned above which left him aggrieved.

I have heard learned counsel for appellant-accused and learned State counsel besides going through the record.

I do not find any merit in the appeal. In this case, the prosecution had successfully proved its charge against the accused on the record for offence under Sections 366A/511 IPC and 363/511 IPC by examining prosecutrix Puja as PW7, complainant Raj Kumar as PW2 and their mother Smt. Santosh as PW4. All of them supported the prosecution story on material aspects. Though they were cross examined at length on behalf of the accused but they stuck to their guns and could not be shattered on any major point. All three of them deposed in a natural and convincing manner and the account given by them inspire confidence. Investigation in this case has been conducted in a fair and impartial manner. The investigating officer had no motive to involve the accused in this case wrongly or to depose against him falsely. It stands established on the record that prosecutrix Puja was a minor at the time of incident. The trial Court has correctly reached to a conclusion that the accused made an attempt on the intervening night of 9/10.6.2003 to kidnap Puja forcibly from the lawful guardianship with intent to force her to intercourse. Since taking away a minor girl at night time reflects the criminal intentions of accused to force her to illicit intercourse. The trial court has been far enough in holding that offence of attempt to commit rape was not proved by the prosecution beyond reasonable doubt and on basis of suspicion of attempt to commit rape cannot be presumed. The aspect of delay in recording the F.I.R. has

also been discussed observing that an attempt had been made to resolve the dispute through Panchayat, since no settlement took place complainant was compelled to report the matter to the police.

In the instant case PW 5 Satpal, village Chowkidar has deposed in that regard. The delay in such type of cases regarding sexual offences generally takes place since initially the family of the girl victim some how hesitate to report the matter to the police fearing that if the incident becomes public that may invite stigma on the honour of the victim girl and some time is taken in thinking over the matter and deciding as to whether the incident is to be reported to the police or not is significance. In the present case as it comes out from the record that the complainant had tried to resolve the dispute through Gram Panchayat since the accused also belong to the same village where the complainant side has been residing but when settlement could not be reached, obviously on account of accused not appearing before the Gram Panchayat then the matter was reported to the police. Therefore, delay is of no significance in this case. As far as contention raised by learned counsel for the appellant with regard to certain contradictions between the various statements of complainant, his mother and the prosecutrix those are not of much significance rather the same shows that witnesses are truthful unlike the tutor witness who depose in a parrot like manner. Human mind tends to fail with the passage of time and there is difference in power of observation and perception of various individuals due to various reasons like age, physical and mental health, tension, mental sharpness etc. and some variations are bound to occur due to lapse of memory as a result of passage of time also. Therefore, much

weightage cannot be given to such variations.

The judgment passed is well reasoned one based on proper appraisal and appreciation of evidence and correct interpretation of law. There is no illegality or infirmity therein which might have called for interference of this Court while exercising appellate jurisdiction. As regards the sentence order, keeping in view the gravity of the offence i.e. accused trespassing at night time in the house of prosecutrix and trying to kidnap her with an intention to force her to illicit intercourse, it is a very serious and grave offence which cannot be taken lightly. The trial Court has awarded rigorous imprisonment for three years for offence under Section 366A/511 IPC and for two years under Section 363/511 IPC, the same cannot said to be on higher side and no interference is called for so as to reduce the same. The appeal is without merit and is dismissed. The appellant is on bail. His bail bonds are cancelled. The Chief Judicial Magistrate, Gurgaon is directed to issue non bailable warrants of arrest so as to secure his presence and to make him undergo the sentence.

**(H.S. MADAAN)
JUDGE**

July 30, 2018

p.singh

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No