

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

CRA-S-515-SB-2010 (O&M)
Date of Decision: July 11, 2018

Gurtej Singh

...Appellant

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Ms. Manpreet Kaur, Advocate
for the appellant.

Ms. Seena Mand, DAG Punjab.

JAISHREE THAKUR, J. (Oral)

1. The instant criminal appeal has been filed against the judgment/order dated 18.02.2010 passed by the Additional Sessions Judge, Sangrur whereby, the appellant-accused herein has been convicted and sentenced to undergo rigorous imprisonment for a period of five years as well as to pay fine of ₹ 3000/- under Section 363 of Indian Penal Code in case FIR No.7 dated 26.01.2009, registered under Sections 366-A, 376, 363 of Indian Penal Code at Police Station Dhuri.

2. In brief, the facts of the case are that complainant-Magher Singh made a complaint to the effect that he is an agriculturist and has two daughters and one son. His eldest daughter Amandeep Kaur was studying in 10+1 class in Arya School, Dhuri. Accused Gurtej Singh used to take

tuition classes for the complainant's daughter and due to this reason, he used to visit their house. On 25.01.2009, Gurtej Singh came to their house on motorcycle and seduced his daughter and took her along with him on his motorcycle. They searched for their daughter, but could not find her. On the basis of aforesaid complaint, the instant case FIR came to be registered. During the course of investigation, site plan was prepared, statements of the witnesses were recorded, daughter of the complainant was got recovered and her statement under Section 164 Cr.P.C. was recorded. Her custody was handed over to her relatives, accused was also arrested and his medical examination was got conducted and after completing the investigation, challan was presented against the accused.

3. Copies of the final report were supplied to the accused free of costs and on finding a prima case under sections 366-A, 376, 363 of Indian Penal Code, he was charge-sheeted accordingly, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution has examined Amandeep Kaur as PW1, Dr. Sukhwinder Kaur as PW2, Magher Singh as PW3, HC Gurmail Singh as PW4, HC Ram Kumar as PW5, Mangal Singh as PW6, ASI Nirmal Singh as PW7, Dr. Sukhbir Singh as PW8, HC Pinderpal Singh as PW9, Kashmir Singh, Draftsman as PW10 and Amritpal Singh as PW11.

5. Thereafter, prosecution evidence was closed and statement of the accused was recorded under Section 313 Cr.P.C. in which, accused denied all the allegations levelled against him and pleaded his false implication in the case. In his defence, accused examined Sunil Gautam as

DW1, Dr. Inderjit Singh as DW2 and thereafter, accused closed the evidence.

6. After hearing both the sides, the learned trial court acquitted the appellant/accused for the charges under Section 366-A, 376 of Indian Penal Code, however, convicted and sentenced the appellant/accused under Section 363 of Indian Penal Code. Being aggrieved against the said conviction and sentence, the instant criminal appeal has been filed.

7. Learned counsel appearing on behalf of the appellant does not dispute the date of birth of the prosecutrix, however, points out that there are material contradictions in the statement of the witnesses. It is argued that allegation of rape has not been proved on record. It is submitted that on 29.01.2009, the prosecutrix was ordered to be sent to the Nari Niketan, Jalandhar, however, she was not sent to Nari Niketan by the Investigating Officer on that day due to late hours and she was kept in the Police Station and on the next day, the statement of the prosecutrix was got recorded before Illaqa Magistrate, which shows that the prosecutrix was tutored by the police and her parents because earlier she was not ready to accompany her parents. It is also contended that before the Illaqa Magistrate, the prosecutrix has suffered a statement that she wanted to marry the appellant/accused and she would be ready to accompany her parents on the condition that they must give in writing that they would not pressurize her and on attaining her majority, they would marry her with the appellant. It is argued that the trial court acquitted the appellant herein for the offences punishable under Sections 376, 366-A of Indian Penal Code, but wrongly held the appellant guilty under Section 366 of Indian Penal Code. Leaned

counsel for the appellant also read the evidence of DW1 Sunil Gautam and DW2 Dr. Inderjit Singh, in order to stress the point that the prosecutrix has deposed falsely in the court that she was taken to Barnala and then to Bathinda, whereas, DW1 clearly proved on record that both the prosecutrix and the appellant/accused had actually stayed in his Dharamshala on 26.01.2009 in Rohtak where the prosecutrix made an entry in her own handwriting that she is staying in the room with her own wishes with the accused and the said handwriting has been duly proved by DW2 Dr. Inderjit Singh. Learned counsel for the appellant concluded her arguments with the prayer that the appellant/accused is also liable to be acquitted under Section 363 of Indian Penal Code. In support of her arguments, learned counsel relies upon judgments of the Apex Court in **S. Varadarajan vs. State of Madras, 1965 AIR (SC) 942** and of this High Court in **Narinder vs. State of Haryana, 2003(3) RCR (Criminal) 721**.

8. Per contra, learned counsel appearing on behalf of the respondent-State argues that the judgment passed by the trial court is well reasoned and no ground is made out to interfere with the same.

9. I have heard learned counsel for the parties and with their assistance also gone through the record of the trial court.

10. In the instant case, the appellant/accused was booked under Sections 363, 366-A, 376 of Indian Penal Code by the police. He was acquitted of the charges framed under Sections 376, 366-A of Indian Penal Code by the trial court, while observing as under;-

“27. Whereas, the question arise, when she had gone on motor cycle to the market and accused instead of taking her to the market, took her to Barnala and from Barnala

took her to Bathinda in a train, she could have easily raise alarm or ask the persons moving on the road or present at the Railway Station for help, but she did not. Rather, she alleged that she was under constant threat of accused, who was holding a knife in his hand. Whereas, it is admitted fact that on 29.1.2009, she came in train to Dhuri. Thereafter, she was produced before Duty Magistrate, Malerkotla where she did not suffer any statement, so she was ordered to be taken to Nari Niketan, Jalandhar and as per prosecutrix, she was taken to Nari Niketan, Jalandhar. However, PW7 ASI Nirmal Singh, Investigating Officer of the case deposed that since, it was late hours, so prosecutrix was not taken to Nari Niketan, Jalandhar, rather she was kept in the Police Station under the supervision of lady constable. So, thereafter, brain of prosecutrix was washed and tutored and then she started alleging that whatever has been alleged by her was under constant threat. In her cross-examination, she admitted that she was produced before Duty Magistrate, Malerkotla where she refused to suffer statement or to accompany her parents, but admitted that she had suffered statement before SDJM, Dhuri that she want to marry with accused Gurtej Singh and further admitted it correct that her parents made a statement to the effect that they will not pressurize her to marry with any one and will not give beatings to her and further admitted it correct that on suffering the said statement by her parents, she became ready to accompany her parents. It means, she intended to marry Gurtej Singh, but due to fear of her parents that they may not refuse to marry her with Gurtej Singh or she was not given beatings, so she refused to accompany her parents. It means, she was consenting party. Therefore, statement of prosecutrix cannot be believed at all as she has backed out from her earlier statement, rather deposed falsely that she was taken to Nari Niketan, Jalandhar where she did not discuss or shared her grievances with her colleagues or ladies. Whereas, as per statement of Investigating Officer, she was not taken to Nari Niketan, Jalandhar due to late hours, rather she was kept in the Police Station under the supervision of Lady Constable.

28. *Further more, even version of the police is not believable as PW5 HC Ram Kumar has deposed that on 13.2.2009, he along with ASI Nirmal Singh and other police officials went to village in connection with investigation of present case and in his presence, ASI Nirmal Singh arrested accused Gurtej Singh. Whereas, ASI Nirmal Singh deposed that accused Gurtej Singh already surrendered before the court, so he obtained production warrant from the court, then formally arrested*

him. It means, HC Ram Kumar is not believable and no reliance can be placed upon him.

29. Moreover, accused in defence examined DW1 Sunil Gautam, who alleged that Gurtej Singh along with Amandeep Kaur stayed in his Dharamshala on 26.1.2009 at Rohtak, where Amandeep Kaur made an entry in her own hand in the register that she is staying in the room with her own wishes with Gurtej Singh. Although, prosecutrix refused to admit her writing and signatures made there in the register against the entry, but said writing and signatures have been got compared by defence counsel with her standard handwriting taken in the court and signatures from Dr. Inderjit Singh, Handwriting and Finger Print Expert, who after comparison given his opinion that the disputed and standard signatures/handwriting are of the one and the same person and Dr. Inderjit Singh, when appeared in the witness box as DW2 proved his report Ex.D.2, besides proving photographs D.2 to Ex.D.14, negatives thereof Ex.D.15 to Ex.D.27. Although, DW2 Dr. Inderjit Singh was subjected to lengthy cross-examination, but noting could be elicited from his mouth falsifying his report in any manner. Moreover, record produced by DW1 Sunil Gautam was maintained in ordinary course of business, so the same cannot be doubted. So, as such, it is proved that they had not gone to Barnala, Bathinda but had gone to Rohtak along with accused Gurtej Singh and the entire story of going to Barnala and Bathinda has been concocted by the prosecution. Moreover, it was incumbent upon the Investigating Officer to get those rooms at Bathinda and Barnala, who prosecutrix alleged to have stayed to be inspected and collect the evidence to the effect whether from those rooms, one could escape or raise alarm, but he did not, meaning thereby, she was not taken to Barnala or Bathinda, so it further falsify the story of the prosecution.

30. No doubt, in medical report and chemical examiner report, it has been proved that rape has been committed on prosecutrix, but by any stretch of imagination, it could be said to be committed with force or constant threat, as discussed above. Rather, from the entire evidence led by the prosecution, it is proved that intercourse has been committed with prosecutrix with her consent. Prosecutrix herself has alleged that her age is less than 18 years. That her date of birth is 3.2.1991, which is also proved by PW6 Mangal Singh, Sr. Asstt. Punjab School Education Board, Mohali, which has not been rebutted by accused. It means, on 29.1.2009, at the time of commission of offence, the prosecutrix was of 17 years, 11 months and 26 days. However, rape has been defined

under Section 375 IPC, as under;-

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So, even if any sexual intercourse is proved to have been committed by accused Gurtej Singh with prosecutrix, even then, it is proved to have been committed with her consent, as discussed above. So, it is not covered under the definition of rape given in Section 375 of IPC. Therefore, no offense punishable under Section 376 IPC is made out as at the time of alleged incident, prosecutrix was more than 16 years of age i.e. 17 years, 11 months, 26 days as is proved from her date of birth given in school certificate issued by Punjab School Education Board, Ex.PW6A. While saying so, I am fortified by the case laws referred above by defence counsel on this aspect.

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32. Now, there is left the charge framed under Section 366-A IPC, although, no arguments have been advanced either by learned Addl. PP for State or by learned defence counsel, on the same which is defined as under;

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But, the present case does not fall within the ambit of Section 366-A IPC as there is no evidence, if accused has seduced or forced minor Amandeep Kaur to have illicit intercourse with another person.”

11. While making the abovesaid observations, the trial court acquitted the appellant/accused under Sections 376, 366-A of Indian Penal Code. However, the trial court convicted the appellant/accused under Section 363 of Indian Penal Code, while observing as under;

“30. So far as offence under Section 363 IPC for kidnapping a minor is concerned, kidnapping has been defined under Section 361 Cr.P.C.;

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31. As discussed above, at the time of commission of offence, Amandeep Kaur was less than 18 years of age and under Section 361 IPC, it is defined that who ever takes or entices an minor under 16 years of age, if a male, or under 18 years of age, if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. So, it means, to complete the offence of kidnapping, the consent of minor is immaterial as consent should be from lawful guardian, in case girl is less

than 18 years of age and it has been said by PW3 Magher Singh that accused used to come to their house to give tuition to her minor daughter Amandeep Kaur and he had taken her with bad intention. Since prosecutrix was more than 16 of age on the date of commission of offence, and has been proved to be consenting party, as discussed above, but that consent is immaterial, as she has been taken away from the custody of lawful guardian of such minor, without the consent of such guardian. Therefore, accused Gurtej Singh is proved to have committed an offence punishable under Section 363 IPC.”

12. From the above findings recorded by the trial court and from the perusal of the record of the trial court, it is an admitted fact that date of birth of the prosecutrix in the instant case is 03.02.1991 and at the time of alleged occurrence, she was 17 years, 11 months and 26 days old. It means, she was almost 04 days short to be of 18 years of age. The trial court, after discussing the entire evidence and the evidence led by the appellant/accused in his defence, has held that the prosecutrix was a consenting party in the entire episode, however, held the appellant/accused guilty for the commission of offence under Section 361 of IPC, while taking note of the fact that she was less than 18 years of age, and as such, her consent is immaterial. During her cross-examination, the prosecutrix has admitted that when she was produced before the Duty Magistrate, Malerkotla, she refused to suffer statement or to accompany her parents, but admitted that she had suffered statement before SDJM, Dhuri that she wanted to marry with accused Gurtej Singh and further admitted it correct that her parents made a statement to the effect that they will not pressurize her to marry with any one and will not physically abuse her and further admitted it correct that on suffering the said statement by her parents, she became ready to accompany her parents. From the statement of ASI Nirmal Singh, Investigating Officer

of the case, it is clear that when the prosecutrix was produced Duty Magistrate, Malerkotla, she was ordered to be taken to Nari Niketan, Jalandhar, but she was not taken to Nari Niketan, Jalandhar, rather she was kept in the Police Station under the supervision of lady constable, however, to this effect also the prosecutrix has deposed falsely that she was taken to Nari Niketan, Jalandhar. It is here when the prosecutrix was kept at Police Station instead of Nari Niketan, Jalandhar, that she made a U-turn and started making allegations of threat upon the appellant/accused. Another factor which also goes to the very root of the case is that as per the version of the prosecution, the prosecutrix was first taken to Barnala and from Barnala she was taken to Bathinda in a train, however, from the statement of DW1 Sunil Gautam and DW2 Dr. Inderjit Singh, it is clear that the prosecutrix and the appellant/accused stayed at a Dharamshala at Rohtak and entry to this effect was made by the prosecutrix in her own handwriting. In case, the prosecutrix had been enticed, she had all the opportunity to raise a hue and cry, which she did not. All these facts lead to only one conclusion that there was no inducement or force used by the appellant/accused. Therefore, it cannot be said that the prosecutrix was enticed or taken away from the lawful guardianship by the appellant/accused. Rather, the prosecutrix, wanted to marry with the appellant/accused and was not even ready to accompany her parents, when she was produced before the Duty Magistrate, Malerkotla. In totality, in the case in hand, both the prosecutrix and the appellant/accused wanted to marry each other and left the house to fulfill their intention and also stayed at a Dharamshala in Rohtak, so it cannot tantamount to “taking” as defined under Section 361 of IPC.

Moreover, the prosecutrix in the case in hand had almost reached the age of 18 years and to attaining majority. The case laws relied upon by learned counsel for the appellant/accused are applicable in the facts and circumstances of the present case.

13. In view of the foregoing discussion, under the peculiar facts and circumstances of the present case and from the material available on record, no offence under Section 363 of Indian Penal Code is made out against the appellant/accused and he stands acquitted. Accordingly, the appeal is allowed and conviction/sentence of the appellant/accused is hereby set aside.

July 11, 2018
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(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No