

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-571-SB-2012 (O&M)
Date of decision: 03.02.2018

Pal Singh

... Appellant

Vs.

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Ms. R.P. Kaur, Advocate (Legal aid counsel)
for the appellant.

Mr. Karanbir Singh, AAG, Punjab.

ARVIND SINGH SANGWAN, J. (ORAL)

Challenge in this appeal is to the judgment dated 30.09.2011, vide which the appellant was convicted for the offences punishable under Sections 366A, 376 of the Indian Penal Code ('IPC' for short) and vide order of sentence dated 30.09.2011, he was awarded R.I. for 10 years and to pay a fine of Rs.10,000/- under Section 376 IPC. In default of payment of fine, the appellant was further ordered to undergo imprisonment for six months and R.I. for 05 years along with a fine of Rs.5,000/- under Section 366A IPC and in default of payment of fine, he was to further undergo imprisonment for three months.

Brief facts of the case are that an FIR No.53 dated 19.05.2009 under Sections 363A, 366, 376, 120-B IPC, Police Station Sadar Kotkapura was registered on the statement of Harbans Kaur, mother of the prosecutrix. As per the version given by her, on 18.05.2009 at about 10.00 AM, she along with her husband Sukhdev Singh, two sons and daughter Ramandeep Kaur were present in the house. Her daughter Ramandeep Kaur was aged about 14 years and she

went to a nearby shop and did not return. When they were searching for her, one Hukam Singh son of Mangat Ram and Kirpal Singh son of Mehar Singh met her near Ram Dass Mandir and told that her daughter Ramandeep Kaur and Pal Singh (accused-appellant) were going towards bus stand. After reaching the bus stand, she could not find her daughter and Pal Singh. It was further stated that Pal Singh-appellant had kidnapped her daughter Ramandeep Kaur, a minor. It was further stated that Pal Singh is aged about 18/19 years. On the basis of her statement Ex.PA made to the police and endorsement Ex.PA/2 made by ASI Amrik Singh, the information was sent to the police station and FIR Ex.PA/3 was registered by ASI Ram Singh. He made his endorsement on ruqa Ex.PA/4 and also recorded the statements of Hukam Singh and Kirpa Singh. On 11.07.2009, SI Roop Chand recovered Ramandeep Kaur, while she was standing with the appellant Pal Singh near Jubilee Cinema Chowk, Faridkot and recorded her statement and thereafter, the offence under Section 376 IPC was added and accused Pal Singh was arrested. After medico-legal examination of Ramandeep Kaur as well as of the accused, other formalities were completed and the accused was presented before the Illaqa Magistrate. Thereafter, the challan was presented and a copy thereof was supplied to the accused persons.

The trial Court vide order dated 08.10.2009 committed the case to the Court of Sessions and therefore, vide order dated 09.11.2009, charges were framed against accused persons Pal Singh, Rajnit Singh and Resham Singh under Sections 366, 376 IPC read with Section 120-B IPC.

A report from the Juvenile Justice Board dated 12.08.2010 was also received by the trial Court, in which it was held that accused Pal Singh is not juvenile and therefore, all the three accused persons namely Pal Singh, Ranjit

Singh and Resham Singh faced the trial under Section 366, 376 read with Section 120-B IPC.

The prosecution in its evidence examined PW1 Harbans Kaur-complainant, mother of the prosecutrix and she deposed on the lines of the statement made to the police Ex.PA forming basis of registration of the FIR Ex.PA/3. She also proved an affidavit Ex.PB submitted by her to the police regarding the date of birth of her daughter Ramandeep Kaur. PW2 Dr. Ram Gopal tendered into evidence affidavit Ex.PW5/A and proved copy of MLR of accused Pal Singh vide Ex.PW5/B. This witness stated that he has conducted the medical examination of accused Pal Singh on the basis of an application moved by the police Ex.PW5/C. PW3 Ramandeep Kaur, the prosecutrix stated that she was 16/17 years of age when the occurrence took place. She knew Pal Singh accused and he was having his house in her neighbourhood. It was further stated that Pal Singh used to ask her to marry him and he took her to Faridkot where they remained together for about two months (wrongly recorded as two years) and he used to keep her under constant threat. It was further stated that Pal Singh was doing the labour work during the said period of two months and he used to commit sexual intercourse without her consent. She and Pal Singh were arrested by the police from Muktsar. This witness further stated that accused Pal Singh, Ranjit Singh and Resham Singh took her towards Amritsar where they had taken one room on rent.

PW4 SI Roop Chand partly conducted the investigation, proved on record recovery memo Ex.PW6/A regarding the recovery of the prosecutrix, recorded DDR Ex.P6/B in this regard and another DDR for addition of offence under Section 376 IPC was also recorded. This witness also proved the other

documents relating to medical examination of the accused, his arrest during the course of investigation.

PW5 Balaur Singh proved scaled site plan Ex.PX and Ex.PY. PW6 ASI Amrik Singh deposed that on 19.05.2009, on receiving the statement of PW1 Harbans Kaur vide Ex.PA and endorsement Ex.PA/1, he registered the FIR Ex.PA/3 and also proved other relevant documents regarding the investigation and recovery of some articles. PW8 Kulwinder Singh stated that about two months ago (wrongly recorded as two years), he had gone to the house of Harbans Kaur and Sukhdev Singh. Pal Singh had abducted Ramandeep Kaur. He knew Pal Singh accused, who was present in the Court. PW8 was joined by the police and he went to Faridkot where police arrested Pal Singh and recovered Ramandeep Kaur. He was a witness to the recovery memo Ex.PW6/A to Ex.PW6/G.

PW9 HC Gurmail Singh, a formal witness, tendered his affidavit Ex.PW9/A. PW10 Sukhraj Singh stated that on 18.05.2009, he had seen Resham Singh driving a Tata Sumo vehicle and on the back seat, Pal Singh along with Ramandeep Kaur were seating.

Thereafter, the prosecution evidence was closed and the statements of accused persons under Section 313 Cr.P.C. were recorded. Accused Pal Singh denied all the incriminating evidence put to him during his statement and pleaded his false implication. Similar statements were made by other co-accused Ranjit Singh and Resham Singh. However, no defence evidence was led by the accused persons.

The trial Court vide its judgment dated 30.09.2011 acquitted Ranjit Singh and Resham Singh. Appellant Pal Singh was held guilty of offences

punishable under Sections 366A and 376 IPC and was sentenced to undergo 10 years R.I. along with a fine as per the order of sentence dated 30.09.2011 and the instant appeal is filed.

Counsel for the appellant submits that the findings recorded by the trial Court regarding the age of the prosecutrix Ramandeep Kaur are not correct, as neither any birth certificate has been produced on record nor any ossification test was conducted to prove her date of birth, as admitted by PW4 SI Roop Chand. In the MLR Ex.DX of the prosecutrix, she got recorded her age as 16 years and no ossification test of the prosecution was got conducted. Counsel for the appellant further submits that Dr. Shelly Sharma who conducted the medico legal examination of the prosecutrix, was never examined and therefore, the appellant Pal Singh was denied his valuable right to cross-examine this witness with regard to proving the age of prosecutrix. It is further submitted that trial Court has relied upon the affidavit of PW1 Harbans Kaur, mother of the prosecutrix Ex.PB to hold that prosecutrix is 16 years of age. Counsel for the appellant has further referred to MLR Ex.DX, which is reproduced as under: -

“....16 years unmarried, h/o sexual relationship with consent and stayed with that person for 2 months. She has taken bath & washed her clothes. H/o amenorrhia since 2 months. Cooperative, well oriented to time place & person. 2Ndry sexual characters well developed. Breast well developed. L/E – No external injury mark seen. P/V Vagina easily admits 2 fingers.”

Counsel for the appellant has further submitted that in the MLR itself, the prosecutrix had disclosed history of sexual relationship with consent and stayed with the appellant for two months. It is further submitted that a

perusal of MLR shows that the prosecutrix was more than 18 years of age. Counsel for the appellant also submits that even as per the statement of PW3 Ramandeep Kaur, she stayed with appellant Pal Singh for two months in a rented accommodation and during this period, she had not raised any suspicion or has not complained to any person from the public that she is living either under threat or without her consent. Counsel for the appellant has argued that PW3 Ramandeep Kaur has admitted in the cross-examination that in her statement made to the police, it is stated by her that accused used to commit sexual intercourse without her consent, though she stated that during her stay with accused Pal Singh, he used to go out for doing labour work.

Counsel for the appellant has further submitted that as per Section 376 (1) IPC, the offence of rape is not made out against the appellant, as the prosecutrix was above the age of 16 years. It is also submitted that offence under Section 366A IPC is also not made out.

On the other hand, learned State counsel has submitted that from the statement of PW1 Harbans Kaur, mother of the prosecutrix as well as the affidavit Ex.PB submitted by her, the date of birth of the prosecutrix is 10.10.1995 and she was less than 16 years of age. It is also submitted that PW3 prosecutrix has stated that she was kept by Pal Singh under threat to her life and due to that reason, she could not inform any person and on information given by her to Kirpal Singh that she was being taken forcibly, she was recovered.

After hearing learned counsel for the parties, I find that the offence under Sections 376 and 366A IPC are not made out against the appellant for the following reasons: -

- (i) Admittedly, Dr. Shelly Sharma who conducted the medico-legal

examination of the prosecutrix, has not been examined by the prosecution, though she has been cited as a witness in the report under Section 173 Cr.P.C. Therefore, the appellant was denied his legal right to cross-examine this witness with regard to proving age of the prosecutrix and the allegation that she was subjected to rape without her consent.

(ii) A perusal of the MLR Ex.DX, which was proved by PW4 SI Roop Chand also shows that the prosecutrix herself declared her age as 16 years and on her statement, doctor has recorded the history of sexual intercourse with consent and stayed there for a period of two months. PW4 SI Roop Chand has further admitted that no ossification test was conducted to ascertain the age of the prosecutrix, therefore, in view of the declaration made by the prosecutrix herself before doctor at the time of medico-legal examination, it cannot be said that she was below 16 years of age. Even PW3 prosecutrix in her statement before the Court stated that she was 16/17 years of age when the occurrence took place.

(iii) A perusal of the MLR Ex.DX, which was produced by the Investigating Officer and not by the doctor, who conducted the MLR, further shows that the prosecutrix has voluntarily given the history that she had sexual relationship with consent and stayed with the accused person for two months. The secondary sexual characters were well developed, breast was well developed and vagina easily admitted two fingers. This also shows that the prosecutrix was above the age of 16 years and was habitual of sexual intercourse.

(iv) It is the admitted case of the prosecutrix that she accompanied Pal Singh to Faridkot where he has taken a room on rent and she stayed there with

him for about two months (wrongly recorded as two years). She further stated that Pal Singh was a labourer and during the said period of two months, he used to go out for doing labour work. This witness has further stated in her cross-examination that she never visited neighbourhood when the accused used to go out for labour work. It has also come in the cross-examination of this witness that in her statement Ex.DA, which was made before the police, she has stated that the accused used to commit sexual intercourse without her consent. Therefore, it is apparent from the statement of the prosecutrix that she left her home with her own consent and stayed with Pal Singh for about two months in a rented room at Faridkot.

(v) It has been held by the Hon'ble Supreme Court in **Alamelu and another Vs. State rep. by Inspector of Police, 2011 AIR (SC) 715** that judicial notice can be taken, in case of determination of age by a radiological examination that the margin of error in age is of two years on either side. In the instant case, though no ossification test was got conducted to ascertain the age of the prosecutrix yet in view of the fact that she stated her age as 16/17 years, although no specific finding can be recorded, but it can be safely held that she was above 18 years of age and therefore, conviction of the appellant under Section 366A IPC is also not sustainable.

(vi) The trial Court has convicted the appellant only on the basis of an affidavit Ex.PB, submitted by her mother PW1 deposing the date of birth of the prosecutrix is 10.10.1995, which is without any basis, as neither the birth certificate nor any other documentary evidence to prove the date of birth of the prosecutrix was produced on record. Even no ossification test was done and the doctor, who conducted the MLR, was never examined and the accused was

denied his right to cross-examine her, to disprove the age or commission of offence.

As per the custody certificate dated 02.02.2018 filed in the Court today, the appellant has already undergone 04 years, 09 months and 10 days of actual sentence and 05 years, 03 months and 05 days of total sentence including remission and this case is pursued by legal aid counsel appointed by High Court Legal Services Authority.

In view of the above, this appeal is allowed. As the charges under Sections 376/366A IPC are not proved against the appellant, therefore, the conviction and sentence of 10 years R.I. with a fine of Rs.10,000/- awarded vide impugned judgment and order of sentence dated 30.09.2011 under Sections 376/366A IPC is set aside.

[ARVIND SINGH SANGWAN]
JUDGE

03.02.2018
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Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No