

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

CRA-S-3477-SB-2013 (O&M)

Date of Decision: May 29, 2018

Shamshuddin

...Appellant

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Ms. Aditi Girdhar, Advocate
for the appellant.

Ms. Rajni Gupta, Senior DAG Punjab.

JAISHREE THAKUR, J. (Oral)

1. The instant criminal appeal has been filed against the judgment and order dated 11.03.2013 and 12.03.2018 respectively passed by the Additional Sessions Judge, Ludhiana whereby, the appellant/accused herein has been convicted and sentenced to undergo rigorous imprisonment for a period of 03 years and to pay fine of ₹ 2000/- under Section 363 of Indian Penal Code, to undergo rigorous imprisonment for a period of 05 years and to pay fine of ₹ 3000/- under Section 366 of Indian Penal Code and to undergo rigorous imprisonment for a period of 07 years and to pay fine of ₹ 5000/- under Section 376 of Indian Penal Code, besides to undergo simple imprisonment for different periods in default of payment of fine under the said sections in FIR No.130 dated 23.12.2011, under Sections 363, 366-A, 376 of Indian Penal Code, registered at Police Station Division No.2, Ludhiana.

2. In short, the case of the prosecution finds its origin in the statement given by Smt. Asha Devi wife of Siri Ram to the police on 23.12.2011 wherein, she alleged that on 21.12.2011, her daughter (prosecutrix) aged 15 years went to Bazar for purchasing vegetables but did not return home. They tried to search for her, but could not succeed. However, they came to know that Shamshudin son of Sakur, who is already married, had enticed her daughter on the pretext of marrying her. On the basis of the aforesaid statement, the instant case FIR has been registered. During investigation, the accused was arrested and the prosecutrix recovered from the possession of accused and her custody was handed over to her parents. Medical examination of both the prosecutrix as well as accused was got conducted. During the course of investigation, statement of the witnesses was recorded under Section 161 Cr.P.C. and after completing the investigation, challan against the accused was presented in court.

3. Copies of the documents and challan were supplied to the accused under Section 207 Cr.P.C. and the case was committed to the Sessions Judge, Ludhiana, and charges under Sections 363, 366-A, 376 of Indian Penal Code were framed against the accused, to which he pleaded not guilty and claimed trial.

4. In order to substantiate its case, the prosecution has examined HC Balbir Singh as PW1, Asha Devi, complainant as PW2, prosecutrix as PW3, ASI Avtar Singh as PW4, HC Surjit Singh as PW5, Dr. Kalwaljit Singh, Medical Officer, Civil Hospital as PW6 and Avtar Singh as PW7. Thereafter, evidence of the prosecution was closed and statement of accused was recorded under Section 313 C.P.C. whereby all the incriminating evidence was put to the accused, but he denied the same and pleaded false implication, however, no

evidence was led in defence by the accused. After hearing learned counsel for both the sides, the trial court convicted the accused and sentenced him to undergo rigorous imprisonment substantially for a period of seven years, as reflected above.

5. Ms. Aditi Girdhar, learned counsel appearing on behalf of the appellant-accused assailed the judgment/order of the trial court on the grounds; that age of the prosecutrix has not been proved being 15 years; that prosecution evidence is not corroborated by medical evidence; that the prosecutrix herself admitted in her cross-examination that the wife of the accused is not working and used to remain at house, therefore, prosecution story that the accused took her in room and committed rape there is highly improbable; that the mother of the prosecution failed to identify the accused during her cross-examination; that the prosecutrix during her cross-examination admitted that no illicit relation was made by the accused with her; that as per the prosecution story the accused was apprehended by the police at Manju Cut Millerganj, while getting down from three wheeler and the prosecutrix was recovered from the custody of the accused, however, during her cross-examination, the prosecutrix has stated that the accused was apprehended on 23rd at about 10.30 am; and that there is delay in lodging of the FIR, which is fatal to the prosecution case. In support of his arguments, learned counsel for the appellant/accused relies upon judgments rendered in **Osmanabad vs. The State of Maharashtra, 2015(25) RCR (Criminal) 166, Alamelu and another vs. State Rep. By Inspector of Police, 2011(1) RCR (Criminal) 498, Madan Lal vs. State of Chhattisgarh, 2007(54) AIC 849, Deepak vs. The State of Maharashtra, 2017 ALL MR (Cri) 2058.**

6. Per contra, learned counsel appearing on behalf of the respondent-

State argues that the judgment/order passed by the trial court is well reasoned and all the arguments raised before this court, were also raised before the trial court, but the same were found to be not sustainable. It is contended that in the present case, a minor girl aged 15 years was subjected to rape by the appellant-accused and the prosecution has been able to prove its case beyond shadow of reasonable doubt against the appellant/accused.

7. I have heard learned counsel for the parties, apart from perusing the pleadings as well as record of the trial court, with the assistance of both the counsel.

8. After going through the record of the case and the judgment passed by the trial court, these court notices that all the arguments so raised before this court, were also raised before the trial court and the trial court has dealt with the same in detail.

9. While dealing with the question of age of the prosecutrix, the trial court has observed that in the FIR, age of the prosecutrix is stated to be 15 years and her mother PW2 Asha Devi (author of the FIR) has deposed on oath before the court that at the time of occurrence, her daughter was about 15 years old. During cross-examination of the witnesses, the defence counsel did not put even a single question or suggestion to the said witness regarding her age or that she was a major. The trial court further observed that PW6 Dr. Kanwaljit Kaur has deposed that she medico-legally examined the prosecutrix aged about 15 years and in the MLR, age of the prosecutrix is written as 15 years. Moreover, the accused has not taken the plea that the prosecutrix in the present case is a consenting party. Therefore, the trial court taking into consideration the testimonies of complainant (mother of the prosecutrix), PW6 doctor and age of the prosecutrix as mentioned in the MLR came to the conclusion that

age of the prosecutrix was 15 years, on the date of occurrence.

10. So far as the question of kidnapping of the prosecutrix is concerned, the trial court after going through the testimony of prosecutrix, her mother and Investigating Officer, observed that the defence counsel has not put even a single question or suggestion during the cross-examination of the complainant that the prosecutrix was not recovered from the custody of the accused and the testimony to this effect remain unrebutted, which clearly shows that the accused had taken away the minor prosecutrix out of the keeping of lawful guardianship of her parents and thereby, committed the offence of kidnapping.

11. While discussing the question whether the accused kidnapped the victim with intent that she will be forced or seduced to illicit intercourse, the trial court observed that *PW3 prosecutrix deposed that she met the accused for the first time about 8/9 months ago and thereafter, they started meeting each other. On 21.12.2011, in the evening, she had gone to purchase vegetables, when accused met her and took her to his house and there accused committed rape with her by twice, against her consent and kept her there for two days. Thereafter, on 23.12.2011, the prosecutrix was recovered and she recorded the above stated whole occurrence before the Magistrate in her statement recorded under Section 164 C.P.C.* The version of the prosecutrix was duly supported by her mother PW2 Asha Devi, who duly identified her signature on her statement recorded by the police as Ex.PW2/A and also identified the accused present in the court, apart from deposing that the prosecutrix was recovered from the custody of the accused and to this effect, identified her signatures on the recovery memo of the prosecutrix as Ex.PW2/B and memo Ex.PW2/C whereby, custody of the prosecutrix was handed over to her.

Investigation part was duly proved by ASI Avtar Singh, while stepping into the witness box as PW4. PW6 Dr. Kanwaljit Kaur deposed that on medico legally examination of the prosecutrix, she found hymen absent and vagina admitted two fingers loosely and she has taken vaginal swabs of prosecutrix for chemical examination for spermatozoa. The trial court taking notice of the report of Chemical Examiner where spermatozoa was detected, coupled with the deposition of the prosecutrix and the medical evidence, came to the conclusion that the prosecutrix was subjected to rape.

12. The argument regarding non-identification of the accused by the complainant during her cross-examination too has been dealt with by the trial court. It was observed that during her examination-in-chief, the complainant had duly identified the accused and deposed that the prosecutrix was recovered from the custody of the accused and identified the memos Ex.PW2/B and Ex.PW2/C on the record, in this regard. Apart from this, the statement of the Investigating officer is also available, who has duly proved the recovery memo. Therefore, there is no substance in the argument so raised.

13. Finally, regarding the question of delay in lodging the FIR is concerned, the trial court noticed that the occurrence took place on 21.12.2011 at about 6.00 p.m. and the FIR was lodged on 23.12.2011 at 1.55 p.m. however, came to the conclusion that delay in lodging the FIR has been explained satisfactorily by the mother of the prosecutrix that on 23.12.2011 only, she came to know that the accused allured and taken her daughter on the pretext of performing marriage.

14. Learned counsel appearing on behalf of the appellant/accused vehemently argued that the prosecutrix was a minor at the time of the occurrence and was a consenting party and she left voluntarily in the company

of the appellant. However this court finds that the prosecutrix being a minor on the date of the occurrence cannot be held to be a consenting party. The observations so made by the trial court are neither illegal nor perverse, and are in consonance with the material and evidence produced on the record. The prosecution has successfully established the guilt of the appellant /accused beyond shadow of reasonable doubt.

15. The case law as relied upon by learned counsel for the appellant are distinguishable and are not applicable to the peculiar facts and circumstances of the present case. The prosecutrix is a minor, and any consent given is irrelevant (even though no such suggestion was given before trial court).

16. In view of the foregoing discussion, no ground is made out to interfere with the judgment and order of sentence passed by the trial court, as such, the appeal is hereby dismissed.

17. Intimation be sent to the concerned court in this regard, with the direction to proceed against the appellant/accused to serve him the remainder of the sentence imposed upon him.

May 29, 2018
vijay saini

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No