

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-2810-SB-2014 (O&M)
Date of Decision:- 17.03.2018

Rajwinder Singh @ Raju

.... Appellant

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR.JUSTICE AVNEESH JHINGAN

Present: Mr.Karan Bhardwaj, Legal Aid Counsel
for the appellant.

Mr. Rajesh Bhardwaj, Sr.DAG, Punjab.

AVNEESH JHINGAN, J. (Oral)

The appellant has faced trial in case FIR No. 58 dated 04.05.2012, under Sections 363 and 376 of the Indian Penal Code (for short 'IPC') registered at Police Station Dharamkot.

Vide judgment dated 06.01.2014, learned Additional Sessions Judge, Moga, convicted the appellant for offence punishable under Sections 363-A and 376 of IPC.

Vide even dated order, the appellant was sentenced as under :-

Under Section 363-A IPC	To undergo rigorous imprisonment for a period of seven years and pay a fine of Rs.2,000/- and in default of payment of fine to further undergo rigorous imprisonment for six months.
Under Section 376 IPC	To undergo rigorous imprisonment for a period of ten years and pay a fine of Rs.2,000/- and in default of payment of fine to further undergo rigorous imprisonment for six months.

Both the substantive sentences were ordered to run concurrently.

The brief facts of the case are that a complaint was made on 04.05.2012 by Smt. Manjit Kaur, wife of Gurdeep Singh, resident of Lohgarh Road, Dharmakot that her daughter, aged about 17½ years, on 21.04.2012 had been enticed by Rajwinder Singh and eloped with him to marry. Her daughter (prosecutrix) had a friendship with Sukhjot Kaur, daughter of Deepak Singh and accused Rajwinder Singh, were visited the house of Deepak Singh.

On 05.07.2012, accused along with prosecutrix was arrested. During the inquiry, prosecutrix stated that she had gone with the accused with her own will. On 07.07.2012, her statement under Section 164 Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') was recorded before Illaqa Magistrate. Where she stated that she was kidnapped by Ajay Patwari, some unknown persons and the accused. Originally, the challan was presented only against Rajwinder Singh @ Raju under Section 363 and 376 of IPC. The case was committed to the Court of Sessions Judge, Moga after compliance of provisions of Section 207 Cr.P.C.

During the pendency of trial, prosecution moved an application under Section 319 Cr.P.C. Accused Ajay Singh and others were summoned to face trial. Two accused were declared proclaimed offenders vide order dated 08.04.2013. The charges were amended on 10.09.2013. Again on 02.01.2014, the charges were amended against Rajwinder Singh @ Raju, Ajay Singh under Section 363-A and 376 IPC and Sonu and Balwinder Kaur were charged under Section 363-A IPC.

Accused pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined as many as eight witnesses. The witnesses examined included MHC Raj Singh, Inspector Jaivir Singh, Gursimrat Pal Kaur, Head Mistress of Government Primary School, Dharmakot, prosecutrix, head constable Gurdev Singh, Manjit Kaur-complainant, Dr. Tarsem Lal, Retd. Medical Officer, Dr. Daizy Sood Medical Officer and Retired ASI Jora Singh. The prosecutrix was medically examined and a carbon copy of MLR along with rough site plan was exhibited. The photocopy of register of school leaving, marks sheet of 5th standard of the prosecutrix, statement of the prosecutrix, affidavit of Head constable and the statement of the complainant were exhibited.

The appellant was examined under Section 313 Cr.P.C. and all incriminating circumstances and evidence were put to him. He denied the same and pleaded false implication. He stated that prosecutrix was major and had gone with him with her own free will. He had neither enticed her nor committed rape upon her. The defence only examined ASI Lakhwinder Singh as DW1 and proved on record statement of prosecutrix Ex.D1.

Learned legal aid counsel argued that the prosecution had failed to prove offence under Section 376 IPC as the prosecutrix had gone of her free will with the accused. They stayed for almost two months together which is a proof that the consent of the prosecutrix was there. He contended that FIR was registered levelling a charge under Section 363 IPC but ultimately as per the amended charge, the charge was framed against the accused under Section 363-A, IPC. There are no allegations or evidence even to suggest an offence committed under Section 363-A IPC.

Learned counsel for the State argued that the prosecution has duly proved the case against the appellant. He relied upon MLR to state

that there was intercourse with the prosecutrix. The prosecutrix supported the case of the prosecution that accused committed rape upon her. She stated that sexual relation was made with her against her consent. His contention is that the age of the prosecutrix was less than 18 years. Hence the consent is immaterial.

Learned counsel for the State argued that though by clerical mistake in the amended charge, the charge has been mentioned as under Section 363-A IPC but the language used is in fact of Section 363 IPC. The contention is that mentioning of 'A' along with Section 363 IPC is a clerical error only. He argued that it was proved from the school record that prosecutrix was aged 17½ years at the time of occurrence of offence.

I have heard learned counsel for the parties and perused the record.

The trial Court determined the age of prosecutrix as 17½ years. The said finding has not even been disputed now. On the said basis, the trial Court proceeded that even if there was a consent of the prosecutrix, it will not have any effect as rape was committed upon prosecutrix in terms of Section 375(VI) of IPC. As per Explanation VI to Section 375 IPC as the prosecutrix was below the age of 18, her consent was not material.

It is to be considered that Section 375 IPC was amended by Act 13 of 2013 w.e.f. 03.02.2013. Prior to the amendment Explanation VI to Section 375 reads as under :-

“with or without her consent, when she is under 16 years of age.”

After the amendment Explanation VI to Section 375 reads as under :-

“with or without her consent, when she is under 18 years of age.”

The occurrence of offence was during the period 21.04.2012 to 05.07.2012 i.e. prior to the amendment. In such circumstances, it is unamended explanation which would be applicable.

Reliance is placed on Supreme Court's decision in **Dayal Singh vs. State of Rajasthan, 2004(5) SCC 721**, has held as under :-

“We, therefore, do not find that Rattan Lal made a departure from the well settled principle that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than with which he might have been inflicted under the law in force at the time of the commission of the offence.”

Reliance is also placed on Supreme Court's decision in case of **Securities & Exchange Board of India vs. Ajay Aggarwal, 2010(3) SCC 765** has held as under :-

“The right of a person of not being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence and not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence, is a Fundamental Right guaranteed under our Constitution only in a case

where a person is charged of having committed an "offence" and is subjected to a "penalty".

The prosecutrix was 17½ years old, her consent would be relevant. The trial Court had considered the entire case on the basis of the amended explanation. At this juncture, it would be appropriate to consider the evidence and the circumstances to infer if there was the consent of the prosecutrix for sexual relation. She remained with the appellant for a period of more than two months. She could have raised alarm to attract persons living in the surrounding houses. She, however, kept silent throughout. She did not make any complaint to the police. She was taken to the house of 'Bua' of the appellant as per her statement. This shows that she was freely moving with the accused but never tried to raise alarm or to make any complaint. She never tried to run away. In her statement, she admitted that they were residing at Ludhiana and from there she was taken to village Arayan to the house of 'Bua' of the accused. The mother of the prosecutrix in her complaint admitted that prosecutrix had friendship with the accused. Prosecutrix went away on 21.04.2012 but the complaint was made on 04.05.2012. A young girl was missing but no complaint was made almost for 14 days. This all goes to show that she was a consenting party. She eloped with the accused of her own will and had sexual intercourse with him on her accord. When she was found in the company of the accused and apprehended, under the pressure of the parents, statement was made against the accused to the effect that he forcibly took her away and committed rape. MLR shows no external marks or injury showing resistance by the prosecutrix.

Supreme Court in *State of U.P. vs. Chhoteylal, 2011(2) SCC,*

550, has held as under :-

“In State of H.P. vs. Mango Ram, 2000 (3) R.C.R. (Criminal) 752 : (2000) 7 SCC 224, a 3-Judge Bench of this Court while dealing with the aspect of `consent' for the purposes of Section 375 Indian Penal Code held at page 230 of the Report as under:

"Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

Supreme Court in Uday vs. State of Karnataka, 2003(2) R.C.R.

(Criminal) 99 : 2004(1) Apex Criminal 13 : (2003)4 SCC 46, held:-

this Court put a word of caution that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse

is voluntary, or whether it is given under a misconception of fact. The Court at page 57 of the Report stated :

".....In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact.. . . .".

This Court in **State of Haryana vs. Shashi Kant alias Bam Bam alias lambu, 2010(1) RCR (Criminal) 338**, has held as under :-

"The prosecutrix was known to the accused. He was the tenant of the prosecutrix. He had the guts to ask the prosecutrix to accompany him in the presence of her brother which undoubtedly shows that the respondent had intimate relations. That is why, even after reprimanding by the brother of the prosecutrix, he again came to the prosecutrix's house at 9.30 PM. It is not the case of the prosecutrix that she was forcibly taken away by the respondent from her house nor there is evidence of any threat. Rather, she had gone on her own with the respondent as the sequence of

events suggests. It is also not possible for a person to commit sexual intercourse in a park without consent. The story does not rest here. Prosecutrix went to the house of the respondent in village Siwah and from there, she went to Bihar. On the way, she never made any grievance to any one. Both of them moved about freely, in public, by public transport before being intercepted at Delhi. It also appears unbelievable that a young girl is missing from the house and the parents do not lodge the report with the Police for six days particularly when there was suspicion that prosecutrix was allured by the respondent. No explanation worth the name was given by the prosecution. This factor too creates doubt on the veracity of the story of the prosecution. In this view of the matter, the conduct of the prosecutrix voluminously speaks for itself that she accompanied the respondent on her own and had consensual intercourse with him.”

This Court in **Balwan Singh vs. The State of Haryana, 2010**

(3) RCR (Criminal) 734, has held as under :-

“13. In the present case also, the prosecutrix was being taken by the accused to different places in the bus and stayed at those places. She never made any complaint to anyone nor raised any

alarm in the bus or in the van that she was being kidnapped. In her cross-examination, she has deposed that during her stay in Village, she remained alone also for a long time for about 4-5 hours and from that Village, they proceeded to Haridwar in the same van alongwith all those persons. She pleaded ignorance about the path/road via which they reached the Village in Hissar. "She further deposed that the accused also used to go outside from that house during our stay and she used to remain alone in the house on his back." If she was all alone in the house in the absence of the accused, then she had every opportunity to run away and to raise alarm and could disclose the incident to the passer-by. But why she remained silent for such a long time is unexplained which creates a ring of doubt around her statement."

For the reasons mentioned above, in the circumstances of the present case, it is evident that the prosecutrix eloped with the accused with her free will and consent. If any intercourse took place, it was with her consent. She was of 17½ years, offence punishable under Section 376 of IPC is not proved.

From the perusal of the record and the charges framed, it is evident that accused was charged under Section 363-A. It appears that there was a clerical mistake that 'A' was added by hand in the amended

charge-sheet. But it was specifically mentioned in charge-sheet that on 21.4.2012, at about midnight in the revenue area limit of Basti Lohgarh, Dharamkot, you both accused Rajwinder Singh and Ajay Singh along with your co-accused Sonu and Balwinder Kaur (since P.O.), kidnapped Sarabjit Kaur, a minor girl from the lawful custody of her parents without their consent and thereby you accused committed an offence punishable under Section 363-A IPC and within my cognizance.

From the reading of the charge-sheet, it is evident that accused was, in fact, charged under Section 363 IPC. Even the allegations as per FIR and the evidence adduced were also under Section 363 IPC.

As per Section 361 IPC, if a female is taken out of the keeping of the lawful guardian without the consent of such guardian, it amounts to kidnapping.

In the present case, though for the charge under Section 376 IPC, it has been held that the prosecutrix's elopement was with her consent but that would be of no avail for offence punishable under Section 363 IPC. As she was below 18 years, her consent for eloping will not matter. The age of the prosecutrix was duly proved by the prosecution by producing school leaving register and marks sheet of class 5th. The Head Mistress of Government Primary School, Dharamkot, deposed regarding the school record. No evidence to the contrary has been brought on record. The statement of the complainant substantiates the fact that the prosecutrix was taken out of the keeping of the lawful guardian without the consent of the complainant. The commission of offence punishable under Section 363 IPC is duly proved. The conviction under Section 363 IPC is upheld.

Keeping in view the overall facts and circumstances of the case

and the age of the accused at the time of the occurrence of the offence, it would be appropriate that quantum of punishment is reduced.

As per the custody certificate issued by Balkar Singh Bhullar, Superintendent, Modern Central Jail, Faridkot, dated 24.08.2015, the accused had undergone total custody of 3 years, 2 months and 19 days including a remission of 3 months. The accused was 21 years of age at the time of occurrence of offence. Accused should be given a chance of reformation. He was not a previous convict, an opportunity should be provided to him, to mend his ways. The sentence is modified and is reduced to period already undergone by the accused. The fine imposed by the trial Court is upheld.

His bail bonds be released subject to payment of fine, if already not paid.

The appeal is, accordingly, disposed of.

March 17, 2018
anju

(AVNEESH JHINGAN)
JUDGE

Whether speaking/reasoned : Yes

Whether Reportable : Yes