

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

(1) CRA-D-1261-DB of 2015 (O&M)

Rahul

.... Appellant

Versus

State of Haryana

..... Respondent

(2) CRA-D-1480-DB of 2015 (O&M)

Dharambir

.... Appellant

Versus

State of Haryana

..... Respondent

Reserved on : 16.08.2019

Date of decision : 27.08.2019

CORAM :- HON'BLE MR. JUSTICE RAJIV SHARMA

HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. A.P.S. Deol, Senior Advocate, with
Mr. Vishal R. Lamba, Advocate,
for the appellants.

Mr. Vivek Saini, DAG, Haryana.

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RAJIV SHARMA, J.

1. Since common questions of law and facts are involved in both
these appeals, i.e. CRA-D-1261-DB of 2015 and CRA-D-1480-DB of 2015,

therefore, these are taken up together and being disposed of by a common judgment.

2. These appeals are instituted against judgment dated 29.07.2015 and order dated 30.07.2015, rendered by learned Additional Sessions Judge, Gurgaon, whereby appellants Rahul and Dharambir, who were charged with and tried for the offences punishable under Sections 376D, 365 and 506 IPC, were convicted and sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of ₹ 10,000/- each for the offence punishable under Section 376D IPC, and in default of payment of fine, to undergo rigorous imprisonment for a period of two years. They were also convicted and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of ₹ 500/- each for the offence punishable under Section 365 IPC, and in default of payment of fine, to undergo rigorous imprisonment for a period of one month. They were also convicted and sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of ₹ 500/- each for the offence punishable under Section 506 IPC, and in default of payment of fine, to undergo rigorous imprisonment for a period of one month. All the punishments were ordered to run concurrently.

3. The case of the prosecution, in a nutshell, is that the prosecutrix (name withheld) addressed a complaint to Station House Officer, Police Station Civil Lines, Gurgaon, stating therein that she was resident of Hariahera, Police Station Bhondsi, District Gurgaon. She was married six months back. She was going to her in-laws house at Jhajjar accompanied by her husband on 24.11.2014. Dharambir son of Piyare Lal of her village had seen her in the company of her husband. He used to stalk her prior to her

marriage. He reached Bus Stand, Gurgaon, accompanied by another boy Rahul son of Budhi. Her husband had gone to purchase fruits etc. at the gate of Bus Stand. In the meanwhile, Dharambir and Rahul approached her. Dharambir stated that he had asked her to marry him prior to her marriage. He insisted her to accompany him, otherwise her husband Parveen would come. He would keep her with dignity. In case, she did not obey his dictates, he would kill her. He made her to sit on the motorcycle. Later on, she was kept in some vacant room in a valley in Sohna. Dharambir and Rahul raped her repeatedly. On the next day, she was taken to U.P. She was taken to Haridwar on 29.11.2014. She was kept in a room for two days. They continuously raped her. It is in these circumstances that the FIR was registered. Lady Assistant Sub Inspector Saroj Bala prepared the rough site plan upon the demarcation of the prosecutrix by reaching Bus Stand. She also recorded the statement of the prosecutrix under Section 161 Cr.P.C. The prosecutrix was got medico legally examined on 03.12.2014. Accused were arrested. The investigation was completed and challan was put up after completing all the codal formalities.

4. The prosecution examined as many as fourteen witnesses in support of its case. The accused were also examined under Section 313 Cr.P.C. They denied the case of the prosecution. Appellant Dharambir examined Dr. Mohit Lathar as DW.1.

5. The appellants were convicted and sentenced, as noticed herein-above. Hence, these appeals.

6. Learned counsel appearing on behalf of the appellants has vehemently argued that the prosecution has failed to prove its case. Learned

counsel appearing for the State has supported the judgment and order of the learned Court below.

7. We have heard learned counsel for the parties and gone through the judgment and record very carefully.

8. The prosecutrix appeared as PW.1. She deposed that her date of birth was 12.03.1998. She had performed marriage with Parveen aged about 20 years on 20.06.2014. On 26.11.2014 at about 11.00 AM, she had accompanied her husband to her matrimonial home at village Utani, District Jhajjar. Accused Dharambir and Rahul had seen her in the company of her husband. They followed her. They reached Bus Stand, Gurgaon. Both the accused threatened her to accompany them, otherwise they would kill her. The accused forcibly took her in a vacant room at the back of Sohna hill area in the absence of her husband. Her husband had gone to take fruits. She tried to raise alarm. She was beaten up and raped by the accused. On 29.11.2014, she was taken to U.P in a remote area during night. She did not remember the name of the place. She was raped there. They stayed there for two days. On the next day, she was taken to Haridwar. They confined her in a room. They continued to rape her and threatened her. On 02.12.2014, accused brought her at Bus Stand, Gurgaon. She went to Sohna and reached her house. She narrated the entire incident to her parents. She moved application Ex.PA. She was got medico legally examined on 03.12.2014. Her statement was also recorded by the Illaqa Magistrate on 04.12.2014 vide Ex.PB. In her cross-examination, she deposed that the incident was of 26.11.2014, but by over-writing, it was reduced to 24.11.2014. She did not know who had made cuttings on the date. She also got recorded before the

Judicial Magistrate, the date of incident as 26.11.2014. She had disclosed to the Illaqa Magistrate that her husband had gone to buy fruits. She was confronted with her statement recorded by the Magistrate under Section 164 Cr.P.C., vide Ex.PB, wherein it was recorded that she was having pain in her belly and her husband had gone to take medicines for her cure. She had got recorded before the Magistrate that Dharambir and Rahul had administered some intoxicant to her and she fell unconscious. She admitted in her cross-examination that when she was got medico legally examined on 03.12.2014, she did not mention to the lady doctor regarding intoxication given to her by the accused. She also admitted that the place from where she was taken away was a populated area. She had not told her husband that she was being followed by the accused. She did not raise hue and cry when they approached her.

9. PW.2 Parveen is the husband of the prosecutrix. He deposed that on 24.11.2014, he had gone to his in-laws house. He was bringing his wife back to her matrimonial home from her parental house on 26.11.2014 at about 10.00 AM. They reached Bus Stand, Gurgaon, at about 11.00 AM. He had gone to buy fruits outside Bus Stand. When he came back, he found his wife missing. He could not find her. He also rang up his parents at village Kutani. On 02.12.2014, prosecutrix reached at her parental home. In his cross-examination, he deposed that his wife was aged about 16 years. His marriage with the prosecutrix was performed on 20.06.2014. He knew that it is an offence to marry with a minor girl.

10. PW.4 Constable Naresh Kumar got both the accused medico legally examined.

11. PW.6 Archana Singh submitted certificate Ex.PD. According to it, date of birth of the prosecutrix was 12.03.1998. She also proved attested photo copy of the admission and withdrawal register Ex.PE, attested photo copy of admission form Ex.PF and attested photo copy of school leaving certificate Ex.PG. In her cross-examination, she admitted that the prosecutrix was not admitted in school during her tenure. She was got admitted in 6th class on 04.04.2011. Shri Yad Ram Yadav was the Principal of the school at that time. She had never worked with Shri Yad Ram Yadav, Principal. He retired from the school and she joined the school on 16.01.2014.

12. PW.7 Dr. Najma medico legally examined the prosecutrix. She proved MLR of the prosecutrix vide Ex.PH. She did not observe any external mark of injury on any part of the body of the prosecutrix. She led her evidence by filing affidavit Ex.PW.7/A. As per her affidavit, possibility of sexual assault could not be ruled out.

13. PW.8 Amar Lal is the father of the prosecutrix. He deposed that six months back, he had sent his daughter from village Hariahera to her in-laws house with his son-in-law Parveen at about 11.00/12.00 noon. He received telephonic message of Parveen from Gurgaon that the prosecutrix was missing from Bus Stand, Gurgaon. He went to Bus Stand, Gurgaon. Thereafter, they searched the prosecutrix, but she could not be found. They proceeded to Police Post, Bus Stand, Gurgaon. They lodged missing report vide Ex.PK. His daughter came back to his house after one week. She disclosed that accused Dharambir and Rahul had taken her away from Bus Stand, Gurgaon to Sohna. She was confined in a room. Thereafter, she was

taken to Haridwar. The accused had committed rape with her.

14. PW.9 Girish Kumar prepared scaled site plan Ex.PL.

15. PW.13 Dr. Rakesh Chawla medico legally examined accused Dharambir. He proved the MLR of Dharambir vide Ex.PO.

16. PW.14 Lady Assistant Sub Inspector Saroj Bala deposed that the prosecutrix had moved application Ex.PA. She made endorsement Ex.PQ on the application, on the basis of which FIR was registered. Accused Dharambir made a disclosure statement Ex.PV. He got the place demarcated from where the prosecutrix was kidnapped. He also got recovered the motorcycle. Accused Rahul suffered disclosure statement Ex.PZ. He also got demarcated the place from where the prosecutrix was kidnapped. She also got recorded statement of the prosecutrix under Section 164 Cr.P.C. before the Area Magistrate. She admitted in her cross-examination that the prosecutrix was shown as 19 years of age and a married woman in the missing report. She also admitted that the prosecutrix disclosed the date of incident as 24.11.2014 before learned JMIC, Gurgaon, and also disclosed herself to be 19 years of age.

17. DW.1 Dr. Mohit Lathar proved the OPD slip of accused Dharambir vide Ex.DA. According to him, the patient was diagnosed as case of syncopal attacks.

18. The FSL report is Ex.PDD. According to this report, human semen was detected on exhibit-1 (underwear of accused Dharambir), exhibit-2 (underwear of accused Rahul) and exhibit-3 (underwear of the prosecutrix). However, semen could not be detected on exhibit-4 (vaginal swabs).

19. In the complaint Ex.PA, the prosecutrix had stated that on 24.11.2014, she was going to her matrimonial home with her husband to Jhajjar. Dharamvir and Rahul followed her on motorcycle. They reached Bus Stand, Gurgaon. Her husband Parveen had gone at the gate of bus stand for bringing eatables/fruits. In the meantime, both the accused had taken her forcibly. In her statement recorded under Section 164 Cr.P.C., she deposed that she was suffering from stomach ache. Her husband had gone to bring medicine. In the meantime, accused threw something on her and she became unconscious. In her statement while appearing as PW.1 before the trial court, she deposed that the accused followed her. They threatened her to accompany them. Her husband had gone to buy fruits. She tried to raise hue and cry, but she was stunned and could not speak. According to the prosecutrix, she was forcibly taken away from the Bus Stand, Gurgaon, on 26.11.2014. She was kept in a room in Sohna valley. Thereafter, she was taken to U.P. on 29.11.2014. She was kept there in a remote area. She was raped. There she stayed for two days. Thereafter, she was taken to Haridwar. She was dropped at Gurgaon Bus Stand on 02.12.2014. In her cross-examination, she admitted that the place from where she was taken away was populated area. She had not raised alarm, when the accused followed her. She did not raise hue and cry when the accused came close to her. It is not believable that a young girl could be taken away forcibly by two persons from a thickly populated area. According to her one version, she was given some intoxicants by the accused and she became unconscious. However, in her cross-examination, she categorically admitted that she had not disclosed to the doctor when she was medico legally examined on 03.12.2014 that she

was given some intoxicated material. She could raise alarm when she was forcibly taken away from the populated area at Gurgaon; when she was removed to U.P., and thereafter when she was taken to Haridwar and thereafter brought back to Gurgaon. PW.2 Parveen, her husband, deposed that he had gone to purchase fruits and not medicines.

20. In the missing report Ex.PK, the age of the prosecutrix has been mentioned as 19 years on 20.06.2014. In the statement under Section 164 Cr.P.C. recorded by the Judicial Magistrate Ist Class on 04.12.2014, age of the prosecutrix is mentioned as 19 years. PW.14 Lady Assistant Sub Inspector Saroj Bala also deposed that the prosecutrix gave her age as 19 years, when she appeared before Judicial Magistrate Ist Class. The Principal of the school who had issued the Transfer Certificate of the prosecutrix has not been examined. The primary school certificate disclosing her date of birth has not been proved. The certificate Ex.PD mentioning her date of birth was issued by PW.6 Archana Singh. However, in cross-examination, she admitted that the prosecutrix was not admitted in the school during her tenure. She was admitted in 6th class on 04.04.2011, when Principal of the school was Shri Yad Ram Yadav. The date of birth of the prosecutrix has not been duly proved in accordance with law.

21. Their Lordships of the Supreme Court in **Jabar Singh vs. Dinesh and another, (2010) 3 Supreme Court Cases 757** have held that since the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country, the entry was not relevant under Section 35 of the Evidence Act for

the purpose of determination of age. Their Lordships have held as under:-

“27. We are of the considered opinion that the High Court was not at all right in reversing the findings of the trial court in exercise of its revisional jurisdiction. The entry of date of birth of Respondent 1 in the admission form, the school records and transfer certificates did not satisfy the conditions laid down in Section 35 of the Evidence Act inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country and, therefore, the entry was not relevant under Section 35 of the Evidence Act for the purpose of determining the age of Respondent 1 at the time of commission of the alleged offence.”

22. Their Lordships of the Supreme Court in **Satpal Singh vs. State of Haryana (2010) 8 Supreme Court Cases 714** have held that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court/authority to examine its probative value. Their Lordships have held as under:-

“28. Thus, the law on the issue can be summerised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the Court/Authority to examine its probative value. The authenticity of the entry would depend as to on whose

instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case.

29. In case, the issue is examined in the light of the aforesaid settled legal proposition, there is nothing on record to corroborate the date of birth of the prosecutrix recorded in the school register. It is not possible to ascertain as to who was the person who had given her date of birth as 13.02.1975 at the time of initial admission in the primary school. More so, it cannot be ascertained as who was the person who had recorded her date of birth in the primary school register. More so, the entry in respect of the date of birth of the prosecutrix in the primary school register has not been produced and proved before the trial court. Thus, in view of the above, it cannot be held with certainty that the prosecutrix was a major. Be that as it may, the issue of majority becomes irrelevant if the prosecution successfully establishes that it was not a consent case.”

23. Their Lordships of the Supreme Court in **Madan Mohan Singh and others vs. Rajni Kant and another, (2010) 9 Supreme Court Cases 209** have held that best evidence qua age is of parents. Their Lordships further held that the entries in school register/school leaving certificate are required to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. If a person wants to rely on a particular date of birth and wants to

press a document in service, he has to prove its authenticity in terms of Section 32 (5) of Sections 50, 51, 59, 60 and 61 etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date time, etc. mentioned therein. Their Lordships have held as under:-

“17. In State of Bihar & Ors. Vs. Radha Krishna Singh & Ors. AIR 1983 SC 684, this Court dealt with a similar contention and held as under:-

"40.....Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil.

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53.....where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight.

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145.(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be

*examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in **Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.***

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20. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School

Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

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22. *If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32 (5) or Sections 50, 51, 59, 60 & 61 etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. (Vide: **Updesh Kumar & Ors. Vs. Prithvi Singh & Ors., (2001) 2 SCC 524; and State of Punjab Vs. Mohinder Singh, AIR 2005 SC 1868**). ”*

24. Their Lordships of the Supreme Court in **Alamelu and another vs. State represented by Inspector of Police, (2011) 2 Supreme Court Cases 385** have held that the date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. The Headmaster has not been examined at all. Their Lordships have held as under:-

“40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15.6.1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31-7-1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the

Indian Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

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44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

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47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.”

25. The prosecutrix had gone voluntarily with the appellants from Gurgaon to Sohna, from Sohna to U.P., thereafter to Haridwar and back to Gurgaon. She did not raise any alarm from 26.11.2014 till her coming back to Gurgaon on 02.12.2014. There is confusion whether the prosecutrix had gone with the appellants on 24.11.2014 or on 26.11.2014. There is variance

in the statement of the prosecutrix recorded under Section 164 Cr.P.C., complaint Ex.PA as well as in her deposition as PW.1. In complaint Ex.PA, the prosecution stated that her husband had gone to buy fruits. Thereafter, she was forcibly taken by the appellants. In her statement recorded under Section 164 Cr.P.C., she deposed that she had stomach ache and her husband had gone to buy medicines. However, in her cross-examination while appearing as PW.1, she admitted that she did not mention to the lady doctor on 03.12.2014 that she was administered some intoxication by the appellants. The date of birth has not been proved in accordance with law.

26. Accordingly, the prosecution has failed to prove its case against the appellants beyond reasonable doubt. Both the appeals are allowed. The judgment dated 29.07.2015 and order dated 30.07.2015 are set aside. Appellants Rahul and Dharambir are acquitted of the charges framed against them by giving them benefit of doubt. Both the appellants are in custody. They be released forthwith, if not required in any other case. Their release warrants be issued.

(RAJIV SHARMA)
JUDGE

August 27, 2019
ndj

(HARINDER SINGH SIDHU)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No