

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1367-SB-2013 (O&M)
Date of Decision : July. 2019

Amar Kumar Petitioner
Versus

State of Punjab Respondent

CORAM : HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present : Ms. Raminder Partap Kaur, Advocate
for the appellant.

Mr. Sukhbeer Singh, AAG, Punjab.

RAJ SHEKHAR ATTRI, J. (Oral)

Feeling aggrieved against the judgment of conviction and order of sentence dated 08.03.2013, vide which the appellant was convicted and sentence to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for a period of 06 months under Section 376 IPC and rigorous imprisonment for a period of 01 year under Section 342 IPC, he has preferred the instant appeal.

Briefly stated, it is the case of the prosecution that minor prosecutrix, aged about 12 years was taken away by the appellant on 05.03.2011 at about 7/8 p.m. She was given tea containing some intoxicating substance and thereafter she was subjected to sexual intercourse. After registration of the FIR, the investigation was concluded and the final report was submitted before the concerned court.

The appellant was charge-sheeted for the offences under Sections 376 and 342 IPC to which he pleaded not guilty and claimed trial.

The prosecution, in order to prove its case, examined **PW1** ASI Rajinder Kumar; **PW2** Bhajan Singh; **PW3** Dr. Balwinder Singh; **PW4** Head Constable Madan Lal; **PW5** Som Nath, **PW6** prosecutrix; **PW7** Dr. Hitender Kaur; **PW8** Amarjit Singh, clerk in the office of Municipal Corporation, Ludhiana and **PW9** Head Constable Harkesh Kumar.

After closure of the prosecution evidence, the appellant was examined under Section 313 Cr.P.C. in order to afford them an opportunity to explain the incriminating evidence appeared against them. However, he pleaded his false implication. In defence, the appellant examined retired DSP Leela Devi as **DW1**.

On appreciation of evidence, the appellant was convicted and sentenced under Sections 376 and 342 IPC, as stated above.

I have heard learned counsel for the parties and have gone through the record.

Learned counsel for the appellant has vehemently contended that there is no direct or circumstantial evidence if the appellant had kidnapped or committed rape upon the prosecutrix and that the trial court failed to appreciate the defence evidence as well as the statement of the prosecutrix Ex.D1, recorded before the police.

I have given my thoughtful consideration to the rival contentions.

In this appeal, the following points have arisen for determination:-

(i) What was the age of the prosecutrix

(ii) Whether the prosecutrix was kidnapped by the petitioner'

(iii) Whether the prosecutrix was subject to sexual intercourse, if yes, then by whom

(iv) What was the purpose of kidnapping

(v) Whether the prosecution evidence is reliable and acceptable.

So far as the age of the prosecutrix is concerned, this fact is not in dispute. The prosecutrix as well as her father have stated that her date of birth is 03.05.1998 . Apart from it, her birth certificate Ex.PW8/A is also placed on record. The said certificate was registered with Municipal Corporation, Ludhiana on 07.05.1998 showing the date of birth of the prosecutrix as 03.05.1998. This document is per se admissible as the same has been issued under Section 12/17 of Registration of Birth and Death Act, 1969. Thus, it is established that the date of birth of the prosecutrix is 03.05.1998 and at the time of occurrence i.e. 06.03.2011, she was minor.

So far as the fact with regard to the kidnapping of the prosecutrix is concerned, the prosecution has produced the victim, who herself has stated that on 05.03.2011 at about 7:30 p.m., she was playing in the street. Then appellant Amar Kumar, who was also present in the street, called her. When she refused to go with him, he slapped her and forcibly took her to his house where he forcibly administered tea to her and after taking tea she became unconscious. This fact has also been corroborated by her father PW5 Som Nath. PW2 Bhajan Singh has categorically stated that on 06.03.2011 at about 11:30 p.m., he saw appellant Amar Singh in the company of the prosecutrix on the backside of his house and he also saw them together on the roof of the house of Amar Kumar. He has categorically stated that appellant Amar Kumar was

dragging the victim behind his house.

After going through the evidence of PW2 Bhajan Singh and the prosecutrix, it is well established that the prosecutrix was kidnapped by the appellant from the street where she was playing. The kidnapping was without the consent of her parents and guardians. Thus, the fact of kidnapping has been fully proved.

So far as the commission of sexual intercourse is concerned, the prosecution has adduced ocular as well as medical evidence. The prosecutrix herself has stated that accused accompanied by his few friends committed sexual intercourse with her. This Court would like to reproduce the relevant part of the examination-in-chief of the prosecutrix hereunder:-

“The accused alongwith two other persons started fondling me. Thereafter I became unconscious and I regained conscious in the morning and then my whole body was in severe pain including my abdomen. I also came to know that some bad thing had happened to me and blood was oozing out from my private part and I feel that I was raped by above said persons. I identify accused Amar Kumar present in the court today. When my parents took me to the house, then many people gathered there and we went to the police station, where our statements were recorded. Thereafter, the police personnel got conducted my medical examination. Thereafter, I went to court where my statement was recorded.”

The prosecutrix has testified that accused Amar Kumar alongwith two of his associates firstly started fondling her then she became unconscious and when she regained consciousness in the morning, she felt that her whole body having severe pain including her abdomen and blood was oozing out from her private part. She observed that all the abovesaid

three persons had committed rape upon her. She did not name the said persons for raping her but the condition of her body establishes that she was subjected to sexual intercourse. Apart from it, she was medico legally examined and spermatozoa was found on the vaginal swabs but no DNA was conducted to ascertain that accused Amar Kumar was the actual rapist or two other persons were the real culprits.

The prosecutrix has stated that infact she became unconscious, therefore, she could not tell who actually committed sexual intercourse with her. Whether it was Amar Kumar alone or his associates or only his associates committed rape upon her ? The evidence is silent to this extent.

Although, it is well established that she was subjected to sexual intercourse without her consent when she was unconscious. Further, the accused cannot be convicted for the offence of rape as the prosecutrix has not seen him while committing sexual intercourse with her. Thus, it has been observed that the prosecutrix was kidnapped by the accused and then in the company of two of his associates, they all did fondling and when she became unconscious any of them had committed rape upon her. But it could not be ascertained if appellant was the rapist.

The purpose of kidnapping

The factum of kidnapping has been well established. It is also established that she was subjected to sexual intercourse and rape but the prosecutrix became unconscious, therefore, she could not tell who was the real rapist.

The overall conclusion of the evidence establishes that the offence under Section 366 is well established against the petitioner.

In order to establish the offence under Section 366 IPC, the

prosecution has to establish the following ingredients:-

- (i) Kidnapping or abducting of any woman;
- (ii) Such kidnapping or abducting must be --
 - (i) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will ; or
 - (ii) in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse;
or
 - (iii) by means of criminal intimidation or otherwise by inducing any woman to go from any place with intent that she may be, or knowing that she will be, forced or seduced to illicit intercourse.

Thus, from the close scrutiny of the evidence, it has been concluded that the prosecutrix was kidnapped by the appellant with the purpose and knowledge that she may be forced or seduced to illicit intercourse. The appellant was indulged in this illegal act in the company of two unknown associates whose name have not been put forth during the trial.

Thus, on the critical examination of the evidence, available on record, this court is of the view that the prosecution has well established its case for the offence under section 366 IPC. However, the accused is given benefit of doubt qua the offence under section 376 IPC and he stands acquitted for the said offence yet he stands convicted for the offence under section 366 IPC. This offence is minor as compared to that of under section 376 IPC. Now the appellant stands sentenced to undergo rigorous

imprisonment for a period of 10 years and to pay a fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for a period of 06 months under Section 366 IPC. However, the sentence and conviction under Section 342 IPC stand upheld. Both the substantive sentences shall run concurrently.

Accordingly, the instant appeal stands dismissed with the aforesaid modification.

15 July, 2019
mamta

(RAJ SHEKHAR ATTRI)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No