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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1347-SB-2012

Date of decision: 17.05.2024

Shiv Kumar

....Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Ashish Gupta, Advocate
for the appellant

Mr. Vikas Bhardwaj, AAG, Haryana

HARPREET SINGH BRAR, J.

1. This instant appeal has been preferred by the appellant-accused against the judgment of conviction and order of sentence dated 02.01.2012 passed by learned Sessions Judge, Jind in Sessions Case No.50 of 09.05.2011 arising out of FIR No.43 dated 03.03.2011 registered under Sections 376, 342, & 506 of IPC at Police Station- Uchana, Jind, whereby, the appellant was sentenced as under: -

Under Section	Sentence
376 IPC	<i>R.I for 7 years along with a fine of Rs.7,000/- and in case of default on fine, R.I for 7 months.</i>
506 IPC	<i>R.I for 3 years along with a fine of Rs.3,000/- and in case of default on fine, R.I for 3 months.</i>
342 IPC	<i>R.I for 1 year along with a fine of Rs.1,000/- and in case of default on fine, R.I for 1 month.</i>

FACTUAL MATRIX

2. Succinctly, the facts are that on 30.03.2011, the prosecutrix aged 12-13 years made a statement before the concerned police, wherein, it was



alleged that on 29.03.2011, when she was present at her house along with her younger brother only, the appellant-accused came there and coaxed her to go along with him to see her mother. When they got out on the street, the appellant gagged her mouth and threatened to shoot her if she made any noise. Then the appellant took her to the *bitoras* (*cow dung heap*) behind her house, removed her *Salwar* (*Pants*) and forcibly committed rape upon her. After committing rape, when the appellant was about to leave, he was seen by someone passing by and under apprehension of getting caught, he confined the prosecutrix in the *bitoras* for 1 to 1 ½ hour and then left her. Upon return of her mother, the prosecutrix met her at the gate of her house narrated the entire incident to her. Then the prosecutrix and her mother along with her uncle went to the Police Station and made the aforesaid statement, in consequence of which, FIR (supra) was registered. Thereafter, the prosecutrix as well as the accused were medico-legally examined and the final report under Section 173 Cr.P.C. was submitted by the concerned police before the learned trial Court.

3. The learned trial Court upon finding a prima-facie case, framed charges against the appellant for commission of offences punishable under Sections 342, 376 and 506 of IPC, to which he pleaded not guilty and claimed trial.

4. After assessing the evidence available on record, the learned trial Court vide judgment dated 02.01.2012 convicted and sentenced the appellant-accused under Sections 342, 376 and 506 of IPC. Aggrieved by the same, the appellant has approached this Court by way of the present appeal.

5. The remaining portion of the sentence awarded to the appellant in the present case, after he had already undergone a custody of 6 years and 8 days



out of the maximum sentence of 7 years, was suspended by this Court vide order dated 02.07.2015.

CONTENTIONS

6. Learned counsel for the appellant-accused *inter alia* contends the learned trial Court ignored the fact there is an unexplained delay of 19 hours in lodging the FIR in the present case. He further submits that there were no external marks of injury on the body of the prosecutrix including her breasts, labia, hips and thighs as deposed by the Medical Officer examined as PW3 which clearly points towards innocence of the appellant. He also contends that the learned trial Court has erred by relying on the birth certificate Ex. PP of the prosecutrix produced by the prosecution since PW12 who proved the said document, categorically stated in his cross-examination that there was cutting in the name of the parents of the prosecutrix and further, it does not bear the stamp of the Registrar of Births & Deaths in the Register. Also, the statement of the mother of the prosecutrix examined as PW2 reveals that the date of birth of the prosecutrix was recorded by her grandfather who was not examined to prove the same. Moreover, the prosecution did not subject the prosecutrix to an ossification test in spite of the advice of the doctor concerned and an adverse inference should have been drawn. It is further contended that there is nothing on record to show that the date of birth of the prosecutrix is 11.12.1998 as wrongly observed by the learned trial Court and rather refers to a photocopy of the Aadhar Card of the prosecutrix showing her date of birth to be 01.01.1998 and submits that since her date of birth has not been properly established, the appellant deserves to be given the benefit of doubt in the case at hand. He further submits that letter marked as A to G which are the love letters written by



the prosecutrix to the appellant clearly showing that she was a consenting party, have been wrongly perfunctorily ignored by the learned trial Court

7. Learned counsel for the appellant further submits that the appellant was merely 19 years of age at the time of the alleged occurrence. Moreover, the prosecutrix is now happily married and is a mother of 5 children as per the Family Identity Card issued by the Government of Haryana. He submits that a lenient view should be taken by this Court in the case at hand given the fact that the appellant has already undergone more than 6 years out of the 7 years of sentence awarded to him and, in order to support his contention, he places reliance on the cases of *Nirmal Singh vs. State of Haryana, 2007(4) R.C.R. (Crl.) 271*; *Narender Singh vs. State of Haryana, 2003(4) R.C.R.(Crl.) 346*; *Dinesh vs. State of Haryana, 2007(3) R.C.R.(Crl.) 241*.

8. Learned State counsel contends that there is ample evidence on record to establish that the appellant committed rape upon the prosecutrix who was a minor and also wrongfully confined her and threatened her with death. He further submits that the age of the prosecutrix has been duly proven on record to be 12 years 3 months and 18 days on the day of the occurrence and therefore, the present appeal filed by the appellant is devoid of any merit and is liable to be dismissed. The custody certificate of the appellant dated 15.05.2024 which shows that he has already undergone 6 years and 13 days of custody, submitted by the learned State counsel, is taken on record.

OBSERVATIONS AND ANALYSIS

9. I have heard learned counsel for the parties and perused the paper-book with their able assistance. It transpires that that the Birth Certificate of the prosecutrix exhibited as Ex. PP was obtained on 05.04.2011 by the



Investigating Officer, examined as PW10 from the office of the Additional District Registrar, Births and Deaths, Jind. Although, the learned counsel for the appellant has produced a photocopy of the Aadhar Card and the Family Identity Card of the prosecutrix to contend that the learned trial Court has erred in recording the date of birth of the prosecutrix, the same cannot be considered as primary evidence by this Court since they have neither been produced as additional evidence nor proved before the learned trial Court, in accordance with the law. Pertinently, the clerk of the aforesaid department was examined by the prosecution as PW12, who deposed that date of birth of the prosecutrix as shown in their records is 11.12.1998 and entry qua the same was made on 29.12.1998. However, PW12 also admitted in his cross-examination that on the Birth Certificate of the prosecutrix Ex. PP there was modification in the column pertaining to the name of her parents and there was no stamp of the Registrar, Births and Deaths on the register. It is well settled through a plethora of judgements that any documents presented in order to establish the age of the prosecutrix must be proved in accordance with the law laid down, including the judgement rendered by a Division Bench of this Court in *State of Haryana Vs. Amarjit Singh @ Nevi, 2023(3) R.C.R (Criminal) 814*.

10. Furthermore, the prosecution did not conduct any ossification test to affirm the age of the prosecutrix in the absence of any convincing proof qua her date of birth. Therefore, this Court is of the view that the age of the prosecutrix has not been proven in accordance with law. Also, the letters written by the prosecutrix to the appellant, i.e., Mark A to G were compared by the FSL authorities with her specimen handwriting taken in the Court and were found be written by the same person. Even call records between the prosecutrix and the



appellant have been proved. This combined with the fact that the medical evidence on record reveals that no injuries were present on the body of the prosecutrix including her breasts, thighs and labia minora and majora leads this Court to believe that sexual act between the prosecutrix and the appellant were consensual in nature. Since, the age of the prosecutrix has not been established in accordance with the settled law and since the element of consent cannot be ruled out from the alleged act, this Court is inclined to hold that the prosecution has failed to establish the guilt of the accused beyond the shadow of reasonable doubt.

11. It is pertinent to note here that mere production of document is not sufficient but it has to be duly proved in accordance with the law. It has been settled through a catena of judgements. A two Judges Bench of the Hon'ble Supreme Court in **Roop Kumar vs. Mohan Thedani, AIR 2003 SC 2418**, speaking through Justice Arijit Pasayat, held as follows:-

"21. The grounds of exclusion of extrinsic evidence are N to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory."

12. Similarly, a two Judges Bench of the Hon'ble Supreme Court in **Narbada Devi Gupta vs. Birendra Kumar Jaiswal and another, 2003 (8) SCC 745**, speaking through Justice D. M Dharmadhikari, held as follows:-



"16. ...The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue..."

13. In the case at hand, the birth certificate admittedly carries cutting in the column regarding the name of the parents of the prosecutrix. The prosecution has neither made any effort to show if the said rectification was made in lieu of any application moved qua the concerned document nor has it examined the person who had made those modifications. As a result, the contents of the document are rendered doubtful. Since the age of the prosecutrix has not been established, the role of consent comes into play. Jowitt's Dictionary of English Law and Stroud's Judicial Dictionary provide an identical definition of consent which reads as follows:

"An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side."

The Black's Law Dictionary defines consent as:

"a concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. "

It further refers to **Hallmark vs. State 22 Okl. Cr. 422** to define consent qua rape wherein it was held that

"consent of the will, and submission under the influence of fear or terror cannot amount to real consent. There must be an exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent."

Valid consent necessarily requires due and active consideration of all the relevant circumstances, actions, and consequences that flow from the



said act, before assenting. Whatever choice one makes, it must be reasoned and adopted after being alive to all the probable outcomes. While adjudicating a case, the factum of consent is to be inferred after closely scrutinizing the surrounding and relevant circumstances. Taking into account the aforesaid discussion, the consensual nature of the relationship between the appellant and the prosecutrix cannot be ruled out..

14. In view of the above discussion, this Court finds that learned counsel for the appellant has been successful in establishing the case of the appellant. Hence, the present appeal is allowed and the impugned judgment of conviction and order of sentence dated 02.01.2012 passed by learned Sessions Judge, Jind, is hereby set aside.

15. The appellant is hereby acquitted of the charges framed against him in the present case and his bail bonds and surety bonds also stand discharged.

16. Pending miscellaneous application(s), if any, shall also stand disposed of accordingly.

(HARPREET SINGH BRAR)
JUDGE

17.05.2024
Neha

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No