
(2006) 04 P&H CK 0121

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 1930-SB of 2002

Rajesh

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: April 27, 2006

Acts Referred:

- Penal Code, 1860 (IPC) - Section 366A, 376

Citation: (2006) 3 RCR(Criminal) 777

Hon'ble Judges: Tej Pratap Singh Mann, J

Bench: Single Bench

Advocate: Jitender S. Chahal, for the Appellant; K.S. Godara, DAG, for the Respondent

Final Decision: Allowed

Judgement

T.P.S. Mann, J.

Vide judgment dated 12.9.2002, learned Sessions Judge, Yamunanagar at Jagadhri, convicted the appellant under Sections 363, 366-A and 376 IPC. Vide order dated 13.9.2002, the accused was sentenced to undergo RI for ten years u/s 376 IPC, RI for seven years u/s 366-A IPC and RI for five years u/s 363 IPC. Sentences awarded were ordered to run concurrently. Against the said judgment of conviction and sentence, the accused has preferred the present appeal.

2. The facts giving rise to the case are that Subhash Chand-complainant had three daughters and two sons. One of his daughters were prosecutrix, who was aged about 16 years and had passed 10th class and used to do house-hold work. On 12.2.2002, the complainant went out to the village of his brother in District Dehradun. The prosecutrix was left in the house. On the next day i.e. 13.2.2002, when the complainant returned to his house, he was told about the missing of his daughter i.e. the prosecutrix as well as of the accused who was living as a tenant along with his family members in a portion of the said house. The complainant searched for both of them. Ultimately on 15.2.2002, he reported the matter to the police, wherein he suspected the involvement of the accused.

During the investigation of the case, the prosecutrix was recovered from the company of the accused at Bus Stand, Ambala Cantt on 18.3.2002 and the accused was arrested. Statement of the prosecutrix was recorded, who stated that on 8.2.2002, at about 10.00 a.m., when she was all alone in the house, accused entered the house and observing that the prosecutrix was alone and cleaning room, he bolted the main door of the house and entered the room in which she was present. The closing of the main door of the house was objected to by the prosecutrix. However, the accused put his hand on her mouth besides extending a threat that in case she raised an alarm, it would not be good for her family members. The accused committed sexual intercourse with prosecutrix and thereafter went away. On 11.2.2002 also, the prosecutrix was alone in the house. The accused entered the house at about 10/11 a.m. and told her that in view of what had happened on 8.2.2002, she should leave the house and accompany him so that they may get married. Accused also offered her good clothes and ornaments besides money. Due to the said inducement given by the accused, the prosecutrix left the house of her parents at 10.00 a.m. on 12.2.2002 by telling her mother that she was going to the Bazaar. Accused met her in the Bazaar and took her to village Salo, District Kangra (H.P.) where his maternal aunt resided. He kept the prosecutrix there for 10/15 days and had forcible sexual intercourse with her daily. Thereafter, the accused took the prosecutrix to village Mather in Himachal Pradesh where daughter of his maternal aunt used to reside. The prosecutrix was kept there for a week by the accused, who committed forcible sexual intercourse with her during that period. Accused also purchased a red colour suit and choora of red colour and thereafter took the prosecutrix to a temple in village Salo, where they exchanged garlands. The accused told the prosecutrix that they were legally married after the exchange of garlands before a deity. From village Mather, the accused took the prosecutrix to Rado, where another maternal aunt of the accused used to reside. Even at that place, the accused kept the prosecutrix for 8-10 days and had forcible sexual intercourse with her. Ultimately, the accused and the prosecutrix left Rado for Saharanpur by bus and when they reached Bus Stand Ambala Cantt., they were spotted by the police and father of the prosecutrix. Both of them were apprehended and the accused was then arrested in the case. Dr. Deepika Gupta, Medical Officer, Civil Hospital, Jagadhri Medico-legally examined the prosecutrix on 18.3.2002. As per her opinion, she was habitual to sexual intercourse and possibility of rape having been committed upon her could not be ruled out. Dr. Dinesh Goyal, Medical Officer, Civil Hospital, Yamuna Nagar, examined Rajesh accused on 18.3.2002, on police request (Ex. PA/1). In his opinion, there was nothing to suggest that the accused was incapable of doing sexual intercourse.

3. During the investigation of the case, date of birth entered in respect of the prosecutrix was obtained from Municipal Committee, Yamuna Nagar as per which the prosecutrix was born on 11.3.1986. The names of the father and mother of the prosecutrix were mentioned in the said entry. Statement of the father of the prosecutrix was also recorded by the police u/s 161 of the Cr.P.C After completion of the investigation, challan was presented by SI Shamsheer Singh on 12.4.2002. Finding the case to be one which was exclusively triable by the Court of Sessions, learned JMFC, Jagadhri vide order dated

30.4.2002 committed the case to the Court of Sessions. On 13.5.2002, learned Sessions Judge, Yamuna Nagar at Jagadhri charged the appellant for the offences under Sections 376, 363 and 366-A IPC. Accused did not plead guilty to the charge and claimed trial.

4. Dr. Deepika Gupta, who had conducted medico-legal examination of the prosecutrix was examined as PW-2, while Dr. Dinesh Goyal, who medico-legally examined the appellant as PW-1. As per the testimony of Dr. Deepika Gupta, PW-2, the prosecutrix was examined on 18.3.2002. She found that the patient was conscious and cooperative. General examination findings were within normal limits. There was no mark of violence on the body. The examination further revealed that labia majora was separated. Bleeding through vagina was present. Hymen was ruptured. Vagina admitted freely two fingers. Cervix was downward and backward. In the opinion of the doctor, the patient was habitual to sexual intercourse and possibility of rape could not be ruled out. After seeing the report of FSL Madhuban (Ex. PC), doctor confirmed her opinion that the possibility of rape could not be ruled out.

5. Dr. Dinesh Goyal, PW-1 had given opinion that there was nothing to suggest that the accused was incapable of doing sexual intercourse.

6. The prosecutrix was examined as PW-9. She deposed on the lines as mentioned in the preceeding paragraphs of the judgment. Father of the prosecutrix was examined as PW-11, who deposed that when he left his house to go to his brother's village, the prosecutrix was present in the house. On his return on the next day, he was told that the prosecutrix was missing from the house since 12.2.2002 itself. He mentioned about the lodging of report Ex. PH with the police and thereafter, apprehension of the accused and the prosecutrix from Bus Stand, Ambala Cantt on 18.3.2002. PW-3 Rashida Balu, who was posted in Municipal Committee, Yamuna Nagar brought the original record relating to the birth of the prosecutrix. As per the same, the prosecutrix was born on 11.3.1986 and the entry regarding the same was recorded on 18.3.1986. She proved certificate Ex. PD which she had prepared on the basis of the said entry in the original register. Apart from the aforementioned witnesses, the prosecution examined Constable Ram Kumar PW-4, Head Constable Rishi Kumar PW-5, Constable Roop Lal PW-6, ASI Prem Singh PW-7, Constable Lachhman Dass PW-8, S.I. Shamsheer Singh PW-10 and ASI Yash Pal PW-12. The other police officials had also participated in the investigation at one point of time or the other. The evidence on behalf of the prosecution was closed on 27.7.2002.

7. The prosecution case was put to the accused when he was examined u/s 313 Cr.P.C. The appellant denied the prosecution case and pleaded false implication. He admitted that he along with his family members used to reside as tenant in a portion of the house of Subhash Chand-complainant. He also admitted that prosecutrix is daughter of Subhash Chand. However, he has denied that her date of birth is 11.3.1986. Rather, he took the plea that the prosecutrix was 19 years of age on the date of occurrence. He denied having committed rape upon her on 8.2.2002 when she was alone in the house. He also denied having given threat to her. He also denied that he induced the prosecutrix

to go with him. He admitted that he was medically examined on 18.3.2002. He took the plea that prosecutrix had gone, stayed and married with him with her free consent. He further took the plea that documents were prepared regarding proof of marriage with her free consent and that she also posed for photographs. He denied having committed sexual intercourse with her. He further deposed that police had arrested him from the house of prosecutrix's father after his return to the house. He denied that he was arrested by the police from Bus Stand, Ambala Cantt.

8. When called upon to lead evidence in support of his plea, the appellant examined his maternal aunt namely Sheela Devi as DW-1, who deposed that in the month of February, 2002 accused along with his wife whose name was told as Monika had come to her. She further deposed that she enquired from the accused as to who was the girl accompanying him and that he replied that she was his wife and that they stayed with her for 6 or 7 days. She further deposed that there is only one room in their house and that the accused and the girl did not sleep together and that accused did not have sexual intercourse with her during their stay in her house and that after 6-7 days both of them left her house. She also deposed that girl told her that accused was her husband. Though she deposed that accused had shown her documentary proof regarding their marriage yet she deposed that she is illiterate. Accused also tendered in his defence letter allegedly written by the prosecutrix as mark-A, affidavit of prosecutrix as mark-B and that of accused as mark-C regarding their marriage and the photographs mark-D to mark-K.

9. After perusing the records and hearing the arguments raised by the learned counsel representing the parties, learned trial Court held the prosecutrix to be below 16 years of age on the date of occurrence. The argument of the defence that the prosecutrix was a consenting party was held to be without any legal basis as the prosecutrix was below 16 years of age when the accused had sexual intercourse with her. The delay in lodging of the FIR was held to be properly explained. Regarding the defence plea it was concluded that the accused induced the prosecutrix to accompany him and thereafter took her to various places and had sexual intercourse with her. Mere exchange of garlands or signing affidavit were held to be not sufficient to hold that the prosecutrix married the accused with her free consent.

10. I have heard Mr. Jatinder S. Chahal, learned counsel appearing on behalf of the appellant and Mr. K.S. Godara, learned DAG, appearing for the State of Haryana. The records of the case have been perused by me with the assistance of the counsel.

11. Main question for determination in the case is the age of the prosecutrix. Birth entry Ex. PD clearly mentions the date of birth as 11.3.1986. The occurrence in question took place first on 8.2.2002 and thereafter on 12.2.2002. At that time the prosecutrix was not yet 16 years of age. According to the father of the prosecutrix, who was examined as PW-11, the prosecutrix was aged about 15-1/2 years. He mentioned about getting the date of birth recorded with the Municipal Committee as he was given a slip by the mid-wife, who conducted delivery of his wife at the time when the prosecutrix was born.

The prosecutrix while appearing as PW-9 before the learned trial court on 26.7.2002 stated her age to be 16 years. She had studied upto 10th class. In her cross-examination when she was asked about her date of birth as mentioned in the school record, she gave out the said date as 27.2.1986. Even as per that date of birth, the prosecutrix was less than 16 years of age on the day when she was first raped by the accused on 8.2.2002 and thereafter kidnapped on 12.2.2002. The prosecutrix was examined medically on 18.3.2002. On that day she was 16 years of age and it was so stated by her before the doctor. The prosecution made no attempt to mislead either the police or the Court about the exact age of prosecutrix.

12. Once it is held that the prosecutrix was less than 16 years of age on the date of the occurrence, she was not in a position to give any valid consent either to the sexual intercourse by the accused with her or to her kidnapping. She was induced by the accused on the false pretext of marrying her. There is no sufficient evidence on the file that there was any valid marriage solemnized between the accused and the prosecutrix. Mere exchange of garlands before a deity was not sufficient to establish the factum of marriage. As a result of my above discussion, it is clear that the appellant has been rightly convicted by the learned trial Court for the various offences. Accordingly, I maintain the conviction of the appellant under Sections 376, 366-A and 363 IPC.

13. Coming to the sentence, it is a case where though the prosecutrix was less than 16 years of age yet factually it was a border-line case. After a month or so after the date of occurrence, the prosecutrix was to turn 16. The present case is one where the accused may have erred in judging the age of the prosecutrix precisely. Even the prosecutrix may not have told her exact age to the accused when she was sexually assaulted by the accused on 8.2.2002 and thereafter kidnapped on 12.2.2002. Medical evidence also suggested that the prosecutrix was habitual to sexual intercourse. Apart from that, the appellant was arrested on 18.3.2002 and ever since he is in jail, first as an under trial up to 12.9.2002 and thereafter as a convict. He has undergone an actual sentence of more than four years and one month till date. He had pleaded before the learned trial Court that there was nobody to look after his old parents in the house. Stay of more than four years in jail would have a salutary effect on the appellant.

14. In view of the above and especially in view of the fact that it was a border-line case regarding age of the prosecutrix, ends of justice would be amply met if the sentence imposed upon the appellant under Sections 376 and 366-A is reduced to RI for 5 years on each count. The same would run concurrently with the sentence imposed u/s 363 IPC, which was already RI for 5 years. Order accordingly.

The appeal is, thus, partly allowed to the extent indicated above.