

(2008) 07 P&H CK 0135

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Appeal No. 112-SB of 1997

Kulwant Singh

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: July 31, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 366, 376

Citation: (2009) 4 RCR(Criminal) 660**Hon'ble Judges:** Vinod K.Sharma, J**Bench:** Single Bench**Advocate:** Baljit Mann, for the Appellant; K.S. Pannu, AAG, Punjab, for the Respondent**Final Decision:** Allowed

Judgement

Vinod K. Sharma, J.

This appeal is directed against the conviction and sentence awarded to the appellant by the learned Sessions Judge, Kurukshetra for an offence under sections 366/376 of the Indian Penal Code registered vide FIR No. 12 dated 9.4.1996 at Police Station, Babain.

2. The prosecution story is that FIR Ex.PC/2 was registered on an application Ex.PC moved by Ajmer Singh to the Inspector Sher Singh wherein it was stated that he is resident of village Mahuwa Kheri. His daughter Sheela Devi aged about 14-15 years has been enticed away by Kulwant Singh son of Jasmer Singh resident of Indira Awas Colony, Mahuwa Kheri at about 5 PM on 8.4.1996 i.e. a day earlier to lodging of the FIR. In the application allegations were also made against Jasmer Singh, father of accused Kulwant Singh to the effect that they were also hand in glove in kidnapping the minor daughter of the complainant. Allegations were also made against Rulia Ram grand-father, Sohan Lal brother and Yodha Bai and Kela Devi, mother of Kulwant Singh. After investigation was completed, the appellant was sent

up for trial under sections 363/366/376 IPC.

3. The appellant was thereafter charged for an offence under sections 366/376 IPC which he pleaded not guilty and claimed trial.

4. In support of its case, the prosecution examined PW 1 Dr. Bawa Singh, PW 2 Ajmer Singh, PW 3 Sheela Devi, PW 4 Kamla Devi, PW 5 Surinder Kumar, PW 6 Mukesh Kumar, PW 7 Dr. (Mrs.) Geeta Suri, PW 8 Sub Inspector Sher Singh, PW 9 ASI Piara Singh.

5. Naresh Kumar, Mohinder Singh and Hakam Singh were given up as having been won over by the accused and Pala Ram, constable Pala Ram, Rai Singh, Sohan Lal, Kishori Lal, ASI Jai Singh, ASI Nripjeet Singh and Shri Jagdeep Jain, JMFC, Kurukshetra were given up as unnecessary. Affidavits of constable Sat Pal, HC Des Raj, lady constable Rani, along with affidavit of HC Shiv Charan were also placed on record and prosecution evidence was closed.

6. Accused in his statement under section 313 Cr.P.C. stated that Sheela Devi prosecutrix was never forced by him to accompany him and as a matter of fact they had love affair with each other and she of her own accord with her free consent accompanied him from her house with a mutual agreement between him and the prosecutrix. It was also the stand of the accused that the prosecutrix even resisted an attempt of PW 5 Surinder Kumar to leave her at her residence at village Mahuwa Kheri. Stand was also taken that prosecutrix was taken from her residence to Ludhiana with the permission of her father and mother. Accused also claimed that he had committed sexual intercourse with the prosecutrix of her own accord when she consented to have sexual intercourse with him. The stand was also taken that the prosecutrix was not willing to leave Ludhiana and she accompanied constable Pala Ram and Hakam Singh etc. only when she was told that her parents had agreed to marry her with him.

In his defence, accused appellant also examined DW 1 Gobind Ram, DW 2 Gopal Krishan and DW 3 Mohinder Singh and also tendered in evidence report of handwriting expert Ex.DD, a photo copy of letter mark Ex.D.1 and closed his defence evidence.

7. Learned Sessions Judge, Kurukshetra came to the conclusion that age of the prosecutrix was less than 16 years. Evidence led by the prosecutrix was also believed and consequently the appellant stands convicted under section 366/376 IPC. The appellant has been sentenced to Undergo RI for a period of 5 years besides a fine of Rs. 250/- and in default to undergo RI for a period of one month for an offence under section 366 IPC and to undergo RI for a period of 7 years besides the fine of Rs. 500/- and in default to undergo R.I. for a period of 2 months for an offence u/s 376 IPC.

8. Ms. Kiran Bala Jain, learned counsel appearing on behalf of the appellant has challenged the findings recorded by the learned Sessions Judge, Kurukshetra on the point of age as well as on merits holding the appellant guilty for an offence under sections 366/376 IPC.

9. The contention of the learned counsel for the appellant is that in the present case a birth certificate issued by the School has been produced on record showing the date of birth of the prosecutrix to be 5.4.1979 and thus, according to the school certificate the prosecutrix was of the age of more than 16 years.

10. Learned counsel for the appellant also referred to Ex.DC i.e. the birth certificate issued by competent authority on the basis of entry made in the Birth and Death Register. Said certificate stands duly proved in the statement of the Investigating Officer who was examined as PW 9 where he admitted having collected the certificate after moving an application. The date of birth as shown in the birth certificate of the prosecutrix is 4.1.1978. Thus, on the date of occurrence the prosecutrix was more than 18 years of age.

11. The contention of the learned counsel for the appellant, therefore, is that once the birth certificate was produced on record then the presumption of truth was attached to such certificate and in the absence of any other evidence to rebut the same the age of the prosecutrix was required to be calculated on the basis of certificate Ex.DC and not on the statement of the parents of the daughter or the school leaving certificate or medical evidence.

12. The contention of the learned counsel for the appellant, therefore, was that even the statement of doctor with regard to the date of birth of the prosecutrix loses all importance once positive evidence showing the age was proved on record.

13. There is force in this contention of the learned counsel for the Appellant and therefore, the finding recorded by the learned Sessions Judge holding the prosecutrix to be less than 16 years of age as on the date of occurrence cannot be sustained and in view of the certificate 1 Ex.DC produced on record the date of birth of the prosecutrix has to be taken to be 4.4.2008. Thus, it is held that the prosecutrix was more than 18 years of age on the date of occurrence.

14. Learned counsel for the appellant has also challenged the conviction of the appellant u/s 376 IPC primarily on the plea that there was a positive evidence on record to show that the prosecutrix was consenting party.

15. This plea of the learned counsel for the appellant has to be accepted in view of the evidence brought on record. In the present case except for the bald statement of the prosecutrix there is no evidence on record in support of the version given by the prosecutrix. The medical evidence also did not prove the commission of rape on the prosecutrix. Learned Sessions Judge, Kurukshetra has been pleased to convict the appellant u/s 376 IPC by relying on the statement of the prosecutrix alone.

16. No doubt the conviction u/s 376 IPC can be maintained on the solitary statement of the prosecutrix. However, this can only be done if it is supported by circumstantial evidence on record. In the present case evidence brought on record goes contrary to the version set up by the prosecutrix. The prosecutrix in her statement herself admitted that she was taken to different places by the accused and ultimately they had taken a room on rent where they stayed together. It is admitted by the prosecutrix that she had not reported the matter about her abduction or wrote to anybody during her stay at Ludhiana. The only reason stated for this conduct is that she was under threat of the accused.

17. The accused in his defence has examined DW 3 Mohinder Singh in whose house the appellant and the prosecutrix stayed as tenants. In his statement he categorically admitted that the prosecutrix was staying with the accused as his wife. Mohinder Singh DW 3 was staying in that very house with his family members. He categorically stated that the prosecutrix was in touch with his family members including ladies but at no stage she lodged a complaint about her abduction or questioned the act of the accused. He further categorically stated that when police raided the premises she had also taken a positive stand that she was willingly staying with the accused. Learned Sessions Judge has merely rejected the statement of DW 3 on the basis that this was contrary to the statement recorded u/s 161 Cr.P.C. However, his statement stood the test of cross examination.

18. It is also pertinent to mention here that driver of taxi in which the prosecutrix was said to have been adducted and subjected to rape was examined by the prosecution as PW 5. He in his statement did not support the prosecution version, rather categorically stated that the prosecutrix had willingly gone with the accused. In his statement he also pointed out that she was more eager than the accused to go to the destination for which the taxi was hired. He was declared hostile and subjected to cross-examination. However, nothing could be brought out against the accused-appellant.

19. In view of the positive evidence brought on record and the conduct of the prosecutrix in staying with the accused for a period of 8 days at rented premises where she had free access to meet different people, it can safely be said that she was consenting party and her statement regarding rape having been committed on her is not supported by any other evidence or circumstantial evidence, rather evidence collected goes against her.

20. In view of the positive evidence brought on record it would not be safe to maintain the conviction of the appellant merely on the statement of the prosecutrix.

21. For the reasons stated above, this appeal is allowed. The conviction and sentence awarded to the appellant is set aside and the appellant is acquitted of the charge framed against him.