

(1999) 07 AHC CK 0168

Allahabad High Court

Case No: Criminal Appeal No. 2465 of 1980

Shakeel alias Pappoo and
Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: July 27, 1999

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 363, 366, 368

Citation: (2000) CriLJ 153

Hon'ble Judges: B.K. Sharma, J

Bench: Single Bench

Advocate: R.K. Jain and J.J. Munir, for the Appellant; A.G.A., for the Respondent

Final Decision: Allowed

Judgement

B.K. Sharma, J.

This is an appeal against the judgment and order dated 17th October, 1980, passed by Sri Jaswant Singh, the then III Additional Sessions Judge, Bijnor in S.T. No. 122 of 1980, State v. Shakeel alias Pappu and Smt. Asghari whereby he convicted the accused appellant Shakeel of the offence u/s 366I.P.C. and sentenced him to undergo rigorous imprisonment for a period of one year and convicted Smt. Asghari of the offence u/s 368I.P.C. but instead of sending her to jail released her on probation for a period of one year.

2. The prosecution story was that Km. Jannati prosecutrix d/o Gulam Nabi informant of this case was aged 14 years on the date of the occurrence, that on 21-3-79, Gulam Nabi was away from the house and Alijan and Babu real brothers of the prosecutrix were employed in a crusher at Nagina and her mother was also not present at the house and had gone to another house, that at about 11.00 a.m. prosecutrix was going to see her tarseem field, that Shakeel accused appellant No. 1 and Islamuddin

co-accused met her in the way and enticed her to go with them, that the accused appellant Shakeel offered to marry her and to keep her well and provide her with clothes and ornaments and by this inducement they took her to rasta for Mirthapur where Hameed, P.W. 3 and Ashfaq, P.W. 2, who belonged to her village met them and when they asked Shakeel accused appellant and his companion as to where they were taking her the accused appellant shook and his companion Islamuddin told them that they are taking her to Barkha where her Khala lived, that however they did not take her to Barkha but took her to a sugarcane field and kept her in sugarcane field in the night and in the morning Shakeel accused appellant No. 1 took her to his own house where his mother accused appellant No. 2 was present, that at that time the father of accused appellant No. 1 was not present at the house, that Smt. Asgari, accused appellant No. 2 suggested her to marry with Shakeel accused appellant No. 1. It is also the prosecution story that Shakeel accused appellant No. 1 used to threaten her with Taiwal all along. The prosecution story further is that on the date of occurrence, when Gulam Nabi informant came back to his house, his wife told her that the prosecutrix had gone for a walk in the village but had not come back from the previous day, that thereupon he and his sons started making search for the prosecutrix that the next day in the morning after they came across Ashfaq, P.W. 2 and Hameed, P.W. 3 who told him that they had seen the accused appellant No. 1 Shakeel and co-accused Islamuddin taking the prosecutrix with them and that when they had asked them as to where they were taking her, they told them that they were taking her to the house of her Khala, that thereupon the informant went to the Police Station and lodged an F.I.R. about the occurrence at Police Station Sheohara on 22-3-79 at 12.15 p.m. Thereupon a case was registered against the accused appellant Shakeel and Islamuddin under Sections 363/366 I.P.C. Thereafter the prosecutrix was recovered from the house of Shakeel, accused appellant No. 1 where Smt. Ashgari, appellant No. 2 too was present. She was taken to the Police Station on 24-3-79 where the memo about her being recovered and taken to the Police Station was prepared by the police. In due course the Investigating Officer arrested both the accused appellants and submitted a charge-sheet. It is not clear as to what happened to the co-accused appellant Islamuddin nominated in the F.I.R.

3. The prosecutrix was medically examined by Dr. N. Sharma on 24-3-79 at 4.30 p.m. at the Women's Hospital, Bijnor who found the following on general examination :

General Examination.-- Weight 35 kg. Height 4" 9"

Teeth 14/14 space for third molar is formed.

Per Vagina Hymen is torn and replaced by old granular tags of tissues and is of normal size. Vagina admits one finger easily. There is no injury either external or internal on the private parts. Very thin growth of black hairs present on pubis. Vaginal smear slide is taken and sent to pathology for microscopic examination for evidence of any sperms. Exam, of sec. Sex Characters--Breast well formed and well

Developed. Hairs in the axilla are black and scanty.

The prosecutrix was referred to District Hospital, Bijnor for X-ray of wrist, elbow and knee joint.

The X-ray report reveals the following report :

Wrist Joint-- The epiphysis of lower ends of Radius and ulna have not fused.

Elbow Joint-- All the epiphysis around the elbow joint are fused.

Knee Joint-- The epiphysis of the lower end of femur is in the process of fusion and the epiphysis of upper ends of Tibia and Fibula are in process of union.

4. In the opinion of the doctor her age, according to X-ray was about 17 years. She could not give any definite opinion about rape.

5. At the trial the prosecutrix Km. Jannati was examined as P.W. 4. The informant of this case was examined as P.W. 1. Ashfaq and Hameed eye-witnesses were examined as P.W. 2 and P.W. 3. The lady Dr. N. Sharma was examined at the trial as P.W. 5. The prosecution did not examine the Investigating Officer of this case at the trial.

6. The learned Sessions Judge having believed the prosecution case convicted and sentenced the accused appellants as above. The learned Sessions Judge had held the age of prosecutrix as below 18 years at the time of occurrence.

7. I have heard learned counsel for the parties and have also gone through the record. The first question is the age of the prosecutrix on the date of the occurrence. Gulam Nabi, P.W. 1 father of the prosecutrix has given her age in the F.I.R. as 14-15 years. At the trial he testified that at the time of occurrence her age was 14 years. He did not disclose therein the date, month or year of her birth. The prosecutrix did not produce any extract from the Kutumb Register or any document from any educational institution about her date of birth. Km. Jannati, prosecutrix in her testimony at the trial on 6-9-80 which was about one and half years the occurrence gave her age as 15 years. She also has not disclosed her date of birth. Their testimony on the point of age has been challenged by the defence. It is difficult to place implicit reliance on the"" claim of these two witnesses even though made on oath. The opinion based on ossification test is to be preferred to the vague positive evidence of the nature led by the informant and the prosecutrix on the point of age.

8. The opinion of the lady Dr. N. Sharma based on the ossification test is that the age of the prosecutrix on the date of the medical examination was about 17 years. She gave a margin of six months either way in the estimate of age made by him.

9. The authority of the Apex Court in case of [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others](#), may be referred to here. In it the age of the detenu was in question. According to the opinion of the expert the age of

the detenu was around 17 years. The Apex Court observed :--

However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

In Shanmugham v. State 1984 CriLJ 1081 a Division Bench of Madras High Court has observed :

... The fusion of bones occurs for different persons at different times and the variation is due to the multiplicity of causes, such as the health conditions of the family in which the person was born, the climatic conditions in which he is living, the dietary habits he is accustomed to, the type of life he is leading etc. Consequently the determination of age on the basis of radiological examination can only be an approximate factor and it cannot be taken as a decisive and incontrovertible feature...Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person, but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error."

10. Then there was an authority of the Bombay High Court in [Balasaheb Vs. The State of Maharashtra](#), in which the opinion given in Modi's Medical Jurisprudence & Toxicology 22nd Edition was taken judicial notice of that the error in case of age based on ossification test may be three years. Modi in his 22nd Edition at page 53 quoted from Dr. H. S. Mehta, Medical Law and Ethics in India, 1963, who was of the view that a fairly close estimate within a margin of two years may be made, mainly on the progress of the epiphysial union (ossification test).

11. In Jhala Raju's Medical Jurisprudence, Sixth Edition it was said at page 197 :

Appearance of centres of ossification and fusion of epiphyses are more reliable factors, although opinion based on these factors is also liable to an error of about 2 years, i.e. one year on either side.

There can be considerable variation regarding the ages at which ossification in the epiphyses appear and at which the epiphyses fuse with the respective diaphyses. Brush observes thus :

From puberty until the consolidation of the skeleton (at 22 or 23 or at the most 25 years) a fairly close estimate within a range of 2 or 3 years may still be made, mainly on the progress of the union of the epiphyses. .

Opinion of age based on ossification is liable to an error of 2 years either way. If the opinion is to be exact it should be expressed in the form of upper and lower limits. Thus if a doctor gives an opinion based on ossification that in his opinion the age of Q is 15 years, that opinion is liable to an error of 2 years up or down. The exact age will be between 13 and 17.

12. In the case in hand, on a margin of one year given at the age of 17 years estimated by the doctor it can safely be held that the age of prosecutrix on the date of occurrence was about 18 years.

13. Now the offence u/s 366 I.P.C. covers the cases of kidnapping from lawful guardianship and cases of abduction. Since the prosecutrix has been held to be major on the date of occurrence the offence of kidnapping from lawful guardianship gets negatived and the question remains whether she was abducted with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person or 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.

14. In the present case, the defence made total denial of abduction and also of the recovery and there is also no evidence of recovery of the prosecutrix Km. Jannati being made by a Police Officer from the house of accused appellant Shakeel and her mother Smt. Asghari, "the Investigating Officer" having only made a memo about the bringing of the prosecutrix by her father the (informant) to the Police Station on 24-3-79 after which she was sent for medical examination from the Police Station.

15. Ashfaq, P.W. 2 and Hameed, P.W. 3 denied having seen them going together and resiled from their statements u/s 161, Cr. P. C. But the evidence is quite clear that the prosecutrix Km. Jannati went with Shakeel accused appellant willingly, that the witnesses Ashfaq and Hameed P.Ws. met them in the way, that Shakeel and his companion told them on a query that they were taking her to her khala's house, that she willingly went with him to a sugarcane field and willingly passed a night with him in it and in the next morning willingly went with him to his house where Smt. Asghari met them and that from there she was recovered by her father and her brothers and taken to the Police Station where Shakeel accused escaped.

16. The prosecutrix has testified that on the date of occurrence at 11.15 a.m. she was going to see her field where Shakeel accused appellant and his companion Islamuddin (not accused at the trial) met her in the way and asked her to accompany them stating that her mother and father are poor, that Shakeel accused appellant told her that he would marry her and keep her well and give her clothes and ornaments. She further testified that they took her to Pirthapur and in the way Hameed and Ashfaq met her and they asked Shakeel, accused appellant as to where they were taking her whereupon they said that they were taking her to Barkha, that they took to a sugarcane field and kept her in that sugarcane field in the night, that in the morning, Shakeel accused appellant No. 1 took her to his own house where her mother Asghari, accused appellant No. 2 was present. She further testified that Shakeel's father was not present at the house being employed at Bombay. She, also testified that Smt. Asghari accused appellant No. 2, had also suggested her to marry with Shakeel accused appellant No. 1. She had admitted that both the accused appellants were residents of her neighbourhood in the same village and that she and Shakeel, accused-appellant No. 1, used to visit each other's house from before

the date of occurrence, that when the accused appellant Shakeel used to visit her house he (Shakeel accused appellant) only used to request her to marry him but never teased her and only said that her parents were poor and suggested her to marry him. She also admitted that when Shakeel, accused appellant No. 1 suggested her to marry with him, she did not convey it: to her parents claiming that she did not make complaint out of shame. She further stated that in the days of occurrence the girls of the vicinity used to play sitting with her but she did not make any complaint of this offer even to them. It is obvious that during these visits between Shakeel, accused appellant No. 1 and herself prior to the occurrence relations developed between them resulting in the offer by Shakeel accused appellant to her to marry and that consequently she willingly went with him stealthily without telling her parents. Her testimony about her being kept silent, on point of tawal tamancha was highly improbable and devoid of credit. She claimed in her examination-in-chief that all along Shakeel, accused appellant No. 1 used to display Tawal to her and threaten her that if she raised an alarm or made any mention to anyone she would be done to death. If she was being threatened with Tawal she could have at least made a complaint to the witnesses aforesaid who met them in the way but she did not make any complaint at all. It cannot also be believed that she was being taken by the accused appellant No. 1 on the pretext that he was carrying her to her Khala's house. She did not say that she was suggested that her khala was ill or her khala had called her urgently. She admitted that when she was taken to the field in the day persons were working in the field. She did not make any complaint to them. She claimed that Shakeel was having tawal. She also claimed that when she was taken into the sugarcane field from the Rasta then also he was carrying it. She claimed that instead of being taken to her Khala's house she was taken to the field. When she was being diverted and taken to sugarcane field, it could only mean that she was being taken there for illicit connection. She claimed that the accused appellant No. 1 was carrying Taval fixed in a Lathi. Then she said that when she was being taken from the-rasta to the field at that time no person was working in the fields and that she did not see anybody coming or going there. She claimed that when she was taken by Shakeel accused appellant to the field she had not taken her lunch at her house, that when Shakeel, accused appellant carried her with him in the way he was carrying food with him. She claimed that in the noon she and Shakeel both took that food which Shakeel was carrying. She states that in the night they remained without food. She claimed that she had told the Investigating Officer that she was shown revolver (Tamancha) in the sugarcane field. As noted earlier her earlier plea was that tawal was used to threaten her. She now claimed that she had told the Investigating Officer that she was shown revolver (Tamancha) and she was shown Taval. She could not explain as to why this statement is not recorded in the case diary of the Investigating Officer. She claimed that while going from the sugarcane field to the village the next day she did not complain to anyone that she has been kept in the sugarcane field. She claimed that it was because nobody met her in the way. This explanation too is not convincing.

17. One important aspect in such matters is whether the victim of such an incident made any complaint to other at the earliest opportunity on her recovery. Such a complaint if made is a strong circumstance to corroborate her testimony. Here on her own showing she has not made any complaint to any one on her recovery. She admits her recovery from the house of Shakeel, accused appellant No. 1. She also states that her father was present at that time. As noted earlier, there is no evidence to show that the recovery was made by the police as stated by herself. However, if the statement made by her on the point of recovery is taken as such it is apparent that she did not make any complaint to her father or brothers against the accused Shakeel about her abduction as soon as they met with her at the time of recovery. Her father Gulam Nabi, P.W. 1 testified to her recovery from the house of Shakeel, accused-appellant No. 1 but did not say that the prosecutrix made any complaint to him that she was kidnapped at point of Taval or at point of Tamancha or both and that she went with him out of fear.

18. The Investigating Officer in this case has not entered the witness-box at all. This shows as to why casually the prosecution has proceeded in the case and how casually the learned Sessions Judge has held the trial of the case.

19. Here it may be mentioned that the prosecutrix testified that accused appellant No. 1 Shakeel used to offer marriage with her even before the occurrence at the time of their visits at each other's houses and yet she claimed that instead of being taken to her Khala's house she was taken to the sugarcane field. It is anybody's guess as to what they would have done in the Sugarcane field in the night before going to the house of Shakeel, accused-appellant No. 1 in the morning but in her testimony, she nowhere testified that Shakeel accused appellant No. 1 raped her by showing Taval or Tamancha. Obviously she went willingly with Shakeel accused-appellant to live with him as man and wife. So in regard to Shakeel, accused-appellant No. 1 the offence u/s 366 IPC cannot be said to have been made out.

20. Coming to Smt. Asgari, the charge was u/s 368 IPC. In this charge, it was necessary to show that the prosecutrix had been kidnapped or that she was abducted and that she had been concealed or confined. Since the prosecutrix was found to be major on the date of occurrence it could not be a case of kidnapping from lawful guardianship. Furthermore from the above discussion, it is clear that it was not even a case of abduction by force or fraud with the offence u/s 366 IPC. Furthermore, if the prosecutrix came to her house with Shakeel, accused-appellant No. 1 as a consenting party if she suggested to her to marry with Shakeel, accused appellant No. 1, it did not amount to any offence by her also. So the charge u/s 368 IPC against Smt. Asgari also falls to the ground. Consequently the conviction of the accused appellants cannot be sustained.

21. For the reasons mentioned above, the appeal succeeds. The conviction of the accused appellant No. 1 Shakeel for the offence u/s 366 IPC and of the accused

appellant No. 2 Smt. Asgari for the offence u/s 368 IPC are set aside and they are acquitted of the same. They are on bail from this Court. They need not surrender to it. Their bail bonds are cancelled and sureties discharged.

22. Let a copy of this judgment be sent at once to the Additional Sessions Judge, Bijnor for information and compliance.