
(1989) 07 AHC CK 0113

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No. 379 of 1982

Ram Swaroop

APPELLANT

Vs

State

RESPONDENT

Date of Decision: July 7, 1989

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 363, 366, 376

Citation: (1990) 14 ACR 66

Hon'ble Judges: Virendra Kumar, J

Bench: Single Bench

Advocate: Basant Lal Gupta, for the Appellant;

Final Decision: Dismissed

Judgement

Virendra Kumar, J.

This is an appeal by convict Ram Swaroop against the judgment dated 30-4-82 convicting him under Sections 376, 366 and 363 IPC and sentencing him to RI for 4 years, 3 years and 2 years respectively. The sentences were to run concurrently.

2. Prosecution case is stated briefly. Km. Munni prosecutrix aged about 14 years lived with her mother Ram Kali in village Pataura Sakinpur P.S. Kakori, district Lucknow. The Appellant who happened to be the maternal uncle of Km. Munni by way of distant relationship, used to visit the house of Ram Kali. On 21-2-78 at about 11 A.M. the Appellant took away Munni on the pretext of taking her to the place of marriage of his sister's daughter. Ram Kali was away from her house in connection with the earning of her livelihood. Thus, Munni was kidnapped with intention to commit illicit intercourse with her. Ram Kali returned home at about 4.00 P M. She found Munni absent and suspected the Appellant. She lodged First Information Report on 22-2-78 at about 11.30 A.M. at P.S. Kakori. The Appellant detained the girl who was recovered from his house on 18-5-78 in presence of Kamla PW 2 and her

mother by Sub-Inspector Anwar Mohd. who was investigating the case. Munni was raped between 22-2-78 to 18-5-78 by the Appellant. After recovery of the girl her medical examination was conducted by Dr. Archana Misra PW 3 who suggested X-ray examination and also examined X-ray plate and gave her report. In her opinion the age of the girl was about 15 years.

3. The Appellant pleaded not guilty and alleged his false implication due to enmity. The prosecution has examined six witnesses in all. They are PW 1 Smt. Munni, the prosecutrix, PW 2 Smt. Ram Kali, mother, PW 3 Smt. Archana Misra, PW 4 Kishan Chand, ward boy of Balrampur hospital, PW 5 Kamla, witness of recovery and PW 6 Anwar Mohammad, I.O.

4. No evidence was adduced from the side of the Appellant in his defence.

5. Km. Munni the prosecutrix PW 1 has fully supported the prosecution case. She as well as her mother Ram Kali PW 2 have affirmed that she was taken away by the Appellant when Ram Kali the mother had gone away from her house on 21-2-78 at about 11 A.M. PW 2 Ram Kali had sworn that the Appellant is the brother of the wife of Mahabir and Mahabir was her uncle-in-law. Thus, she has made out that the Appellant happened to be the maternal uncle of Km. Munni. Testimony of Munni and Smt. Ram Kali make out that the Appellant used to visit their family hence he was not at all a stranger to their family. Ram Kali stated that on finding her daughter (Munni) talking to Ram Swaroop she had rebuked Munni. PW 1 Munni seems to be trying to suppress this fact in her deposition. The prosecutrix has sworn that after being taken away from her house, the Appellant kept her and detained her for about 3 months and also committed illegal intercourse, with her. According to her she was not allowed to move out freely. She has clearly stated about commission of rape by the Appellant. Her testimony shows that she was not taken to the place to which the Appellant had promised but she was taken and detained at Debi Jagdishpur at the house of Kali Charan, The testimony of Munni PW 1, her mother Ram Kali PW 2 and the Investigating Officer Sri Anwar Mohammad PW 6 coupled with the recovery memo (Ext. Ka 4) clearly make out that Km. Munni was recovered from the house of the Appellant on 18-5-1978. Smt. Ram Kali had gone with the Investigating Officer when the latter visited to the house of the Appellant in connection with the recovery of the girl. PW 5 Kamla who is also a recovery witness, seems to have connived with the Appellant and was declared hostile. Kamla PW 5 is a High School pass person who has signed recovery memo (Ext. Ka 4) which is to the effect that Km. Munni at the time of recovery was found sitting inside the KOTHARI of the house of the Appellant but in her deposition she resiled from her statement u/s 161 Code of Criminal Procedure and went to the extent of deposing that the girl was not recovered in her presence but was just sitting there. She has been won-over from the side of the defence. Recovery of the girl from the house of the Appellant on 18-5-78 is consistent with the prosecution case that Km. Munni was kidnapped from the house of her mother and was detained by the Appellant till she was recovered

on 18-5-78.

6. The prosecution version that Km. Munni was a minor aged about 14 years at the time of her kidnapping, is denied from the side of the Appellant. According to him, her age was 20 years. On the point of age of the girl PW 2 Ram Kali mother of the girl as well as the prosecutrix herself have no doubt deposed that her age was 14 years but both of them were illiterate and do not know counting of numbers. Medical evidence consisting of testimony of Dr. Archana Misra PW 3 coupled with the medical report Ext Ka 13 particularly on the basis of the examination of the X-ray plate Ext-1 goes to make out that the age of the prosecutrix was about 15 years when she was kidnapped. Doctor on examination of the X-ray plate Ext 1 relating to the prosecutrix, has found epiphysis around the knee. Lower end of the radius ulna medial epicondyle of humerus do not show fusion. Epiphysis around upper end of radius is fused.

7. On external examination the Doctor found breast well developed. Pubic hair well grown. Axillary hair not yet grown. No mark of injury on any part of the body was found. She has clearly stated that it was on the basis of the X-ray plate examination she had formed her opinion that the age of the prosecutrix was 15 years. In this connection she has borne in her mind the relevant material of the treatise on the Medico-legal Jurisprudence by Modi. It is, thus, clear that the age of the prosecutrix was about 15 years at the time of her recovery from the house of the Appellant. It may be recalled that she was kidnapped about 3 months earlier.

8. The defence contention that the X-ray plate Ext-1 did not pertain to Munni and that it has not been duly proved, does not carry force. In this connection testimony of Dr. Archana Misra PW 3 and the Ward Boy of the Balrampur Hospital from where X-ray plate was brought, go to make out that the X-ray plate pertained to Km. Munni. Her X-ray examination was conducted at the advice of Dr. Archana PW 3. PW 4 Kishan Chand, Ward Boy through whom X-ray plate was sent, has given the numbers entered in the Register relating to the X-ray examination. There is also written the name of Munni together with the date of X-ray on the X-ray plate itself.

9. The testimony of prosecutrix clearly shows that sexual inter-course was committed at her by the Appellant after she was kidnapped on 21-2-1978 from the lawful guardianship of her mother Ram Kali against the latter's consent and before she was recovered from the Appellant's house on 18-5-1978. On being recovered after about three months from the house of the Appellant, when she was medically examined, the Doctor found that her hymen was torn and she was menstruating.

10. According to the defence version the Appellant has been implicated falsely. He has not produced any evidence in support of it. His suggestion that he has been implicated falsely because he refused to marry Munni PW 1 when she and her mother were greedy on account of the land he possessed, stands repelled. Smt. Ram Kali PW 2, to whom the suggestion was made in her cross-examination, has

denied it. On the other hand, the evidence shows that at the time of the kidnapping Munni stood engaged with another person but that marriage broke down after the incident and she was married to the other person.

11. Learned Counsel for the Appellant has cited two cases, namely, *Mushroo alias Rustam v. State of U.P.* 1985 ACC 387 and *Kacheru v. State of U.P. (II)* 1984 ACC 58. Both the cases are quite distinguishable on fact. In those cases the prosecutrix was found to be of above 16 years in age and a consenting party. In both the cases age of the girl was considered to be on border line of 18 years. In the instant case age of the girl was about 15 years and she had not at all reached the age of 16 years at the time of the occurrence. Further, she was not at all a consenting party. Unlike, the case of *Kacheru* in which the court was of the opinion that the girl herself had gone out to her paramour accused in the instant case it is the Appellant who had taken away the girl with him on false pretext. Hence, these cases are of little avail to the Appellant.

12. The prosecution case having been fully established the trial court has rightly accepted it and found the Appellant guilty for the offences u/s 363, 366 and 376 IPC.

13. From the side of the Appellant it has been argued that it is a fit case in which sentence of the Appellant should be reduced to the period already undergone in jail. This contention has no force and substance having regards to the facts and circumstances of the case that the Appellant whose relations with Munni were that of a maternal uncle and neice, kidnapped the minor girl of about 15 years by duping her, detained her for about three months with him and did not let her go to her mother in the meantime and further committed rape with her repeatedly. Kidnapping was with the intention to commit illicit intercourse. The sentences awarded against him by the trial court are on the side of the leniency. Ends of justice do not require further deduction of the sentence.

14. The appeal has no force and is, therefore, dismissed. The Appellant is on bail. His bail bonds are cancelled and sureties discharged. He will be taken into custody immediately to serve out the sentence awarded by the trial court. The Chief Judicial Magistrate, Lucknow shall submit compliance report to this court within six weeks.