

(2017) 12 AHC CK 0037
ALLAHABAD HIGH COURT
Case No: 880 of 2001

Shyam Dhar

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision: Dec. 14, 2017

Acts Referred:

- Indian Penal Code, 1860, Section 376, Section 375, Section 363, Section 366 - Punishment for rape - Rape - Punishment for kidnapping - Kidnapping, abducting or inducing woman to compel her marriage, etc

Hon'ble Judges: Dinesh Kumar Singh

Bench: Single Bench

Advocate: A.R Siddqui, S.D.Mishra, S.N.Mishra

Final Decision: Allowed

Judgement

1. Heard Shri A.R Siddqui, learned counsel for appellant, learned AGA and perused the record.

2. The present appeal arises out of the judgment and order dated 3.3.2001 passed by the learned Additional Sessions Judge, Faizabad in Session Trial No.240 of 1998, arising out of Case Crime No.249 of 1997 registered at Police Station Bewana, District Ambedkar Nagar convicting the appellant under Sections 363 and 366 of the Indian Penal Code (hereinafter referred to as "IPC") for five years rigorous imprisonment with a fine of Rs.3000/- and in default of payment of fine, to undergo further six months rigorous imprisonment and under section 376 IPC the accused-appellant was awarded punishment for seven years rigorous imprisonment with a fine of Rs.3000/- and in default of payment of fine, to undergo six months rigorous imprisonment. It was directed that all the sentences will run concurrently.

3. On a written complaint of the complainant Zokhu, P.W.-1 the father of the prosecutrix P.W.-2, Case Crime No.249 of 1997 under Sections 363, 376 IPC was registered on 23.9.1997. The allegations were that on 19.9.1997, at around 7:00 p.m., when the complainant was away from his house, the accused-appellant enticed away his daughter. It was alleged that the age of the prosecutrix at the time of incident was 13 years.

4. On the basis of the aforesaid F.I.R., the investigation was carried on and the prosecutrix was recovered from Khanna, District Ludhiana, Punjab on 26.10.1997 and was brought home by the police team. On 29.10.1997, her medical examination was conducted by Dr. Sushma Gupta, PW-7. After the report of radiologist, Doctor prepared the report Ext. Ka-7. The Doctor did not find any mark of external or internal injuries or any injury on private parts of the prosecutrix, her hymen was found to be old torn and healed. It was further opined that no definite opinion about rape could be given as she was habitual of sexual intercourse. Her age was found to be 17 years in the medical examination.

5. The learned Trial Court on the basis of evidence of the prosecutrix and his father opined that the prosecutrix was a minor and therefore, the offences under Sections 363, 366 and 376 IPC were committed by the accused-appellant. For coming to the conclusion that she was a minor, the trial Court reduced the medical age by two years and held that she was 15 years of age and also relied on the educational certificate which was not proved to say that the prosecutrix was a minor at the time of commission of offence.

6. Learned counsel for the accused-appellant submits that the Trial Court had grossly erred in coming to the conclusion that prosecutrix was a minor at the time of commission of offence inasmuch as medical age of the prosecutrix was found to be 17 years and the benefit has to be given to the accused-appellant by adding 2-3 years in the age as determined in the medical examination thus, the prosecutrix's age should have been taken as 19-20 years instead of 15 years as the Trial Court has determined while convicting the accused appellant.

7. Learned counsel further submits that when the educational certificate was not proved before the Court, the Trial Court had committed a serious error in taking that certificate in evidence to come to the conclusion that the prosecutrix was a minor at the time of commission of offence. He also submits that the medical report itself suggests that she was used to sexual intercourse and there was no external or internal injury found on the person of the prosecutrix. Her hymen was old torn and healed and there was no injury on her private parts. The offence of rape cannot be said to have been committed by the accused-appellant and therefore, the conviction is wholly erroneous, incorrect and liable to be set aside.

8. He further submits that the prosecutrix travelled through public transport with the accused-appellant for a long distance of 1400 kms from her house. She did not raise any alarm, neither she raised alarm during her stay at Khanna, Ludhiana. She did not tell neighbours that she was forcibly keeping the accused-appellant. Under these circumstances, it can be safely said that she was a consenting party and no offence under Sections 363 or 366 IPC can be said to have been committed by the accused-appellant.

9. On the other hand, Shri Abhayveer Singh, learned AGA submits that according to the educational testimonial, she was 13 years of age and therefore, even if she gave the consent, there was statutory rape by the accused-appellant. His conviction and sentence by Trial Court was correct. He further submits that since she was below the age of 18 years at the time of commission of offence, therefore, the ingredients of Section 363 and 366 of IPC are clearly discernible in the case. The accused-appellant was rightly convicted under Section 363 IPC and 366 of IPC.

10. Section 375 of IPC, before substitution by Act No.13 of 2013 stood as under:-

"375. Rape. -A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

(First) - Against her will.

(Secondly) -Without her consent.

(Thirdly) - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) - With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) -Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

11. Thus, if the prosecutrix age was below 16 years, then the consent was immaterial for charge under Section 376 IPC, if the accused-appellant had sexual intercourse with the prosecutrix.

12. The medical evidence clearly depicts particularly the report of Dr. Sushma Gupta-PW-7, that the prosecutrix was found to be 17 years age, she was used to sexual intercourse and no injury external or internal on her body or on her private parts was found. She travelled all through 1400 kms from her place to Khanna, Ludhiana, Punjab, from where she was recovered by the police party. She did not raise any alarm during her travel through public transport for 1400 kms, nor did she raise any alarm during her stay to tell the neighbours that she was abducted by the accused-appellant. Once no injury of physical violence was found in the medical examination and it was found that she was habitual of sexual intercourse and particularly, keeping in mind her age, which was determined in her medical examination, no offence under Section 376 IPC can be said to have been committed by the accused-appellant.

13. Further, even if believing that she was below 18 years at the time of commission of offence, since she willingly without any force or coercion accompanied the accused-appellant to a distant place of 1400 kms from her home, the offences under Sections 363 IPC and 366 IPC are not made out.

14. Considering the facts and circumstances of the case, as discussed above, the accused-appellant is acquitted of all charges. The judgment and order dated 3.3.2001, passed by the learned Additional Sessions Judge, Faizabad convicting and sentencing the accused-appellant in S.T. No.240 of 1998 is hereby, set aside. The bail bonds are cancelled, sureties are discharged.

15. The appeal is allowed.