
(2007) 06 AHC CK 0067
In the Allahabad High Court
Case No : Criminal A. No. 5703 of 2006

Jai Prakash

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 01-06-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 363, 366, 367, 375, 376

Citation : (2007) 3 ACR 2722

Hon'ble Judges : M.K. Mittal, J

Bench : Single Bench

Advocate : Brij Raj Singh and Shyam Sunder, for the Appellant; A.G.A., for the Respondent

Judgement

M.K. Mittal, J.—This appeal has been preferred by Jai Prakash against the judgment and order dated 18.9.2006 passed by Additional Sessions Judge, Court No. 2, Aligarh in S.T. No. 585 of 1998 whereby he found the Appellant guilty under Sections 366 and 376, I.P.C. and sentenced him to undergo rigorous imprisonment for five years and seven years respectively. He also imposed fine of Rs. 1,000 and 2,000 respectively under these sections and directed the Appellant to undergo additional imprisonment for one month and two months in default of payment of fine. He further directed that both the sentences shall run concurrently. The Appellant has been acquitted of the charge u/s 363, I.P.C. The co-accused Malkhan has been acquitted of the charges under these sections.

2. In this case, Shankerpal, resident of village Chirolia, lodged a written report (Ex. Ka-1) on 26.5.1997 at P.S. Quarsi, Aligarh alleging that his minor daughter aged 15 years and niece aged 14 years (daughter of his brother Ramswaroop) had gone to ease themselves in the day time at about 12 in the jungle and alongwith them small children had also gone. After some time the children returned and told that Malkhan son of Om Prakash and Jai Prakash son of Ram Prakash Jatav (the Appellant) had kidnapped these two girls and had taken them

in a Maruti car towards Aligarh. The accused are also the residents of village Chirolia, P.S. Quarsi. Ramswaroop and Thakurdas, who were returning from Aligarh to the village saw that the two girls and the accused Jai Prakash and Malkhan were sitting in the car. The report was lodged the same day at 3.15 p.m.

3. The case was investigated by Sri Krishan Mehra, P.W. 7. The case was registered in his presence and investigation was entrusted to him. He visited the village Chirolia where the incident had taken place on 31.5.1997. He inspected the spot and prepared the site plan (Ex. Ka-3). Search for accused was made on several dates but they could not be found. On 28.8.1997, he came to know that the two girls were at railway station, Aligarh and on that information he went there and recovered them. He prepared the recovery fard (Ex. Ka-2) and the site plan of the place of recovery (Ex. Ka-5). They were given in the supardagi of their guardians on 30.8.1997 vide supardaginama paper (Ex. Ka-6). He interrogated the two girls on 29.8.1997 and sent them for medical examination. Initially the case was registered under Sections 363 and 366, I.P.C. but on the basis of the statements of the girls he added Section 376, I.P.C. The two girls stated that they were taken by the accused Jai Prakash and Malkhan by putting some handkerchief on their face, as a result of which they became unconscious. First they were taken to Sikandararau and then they were taken to Kanpur. The accused Malkhan did not accompany them as he deboarded the bus for arranging the money. According to both the girls the accused Jai Prakash kept them in a room at Kanpur for three months and committed rape on them.

4. The statements of the two girls u/s 164, Cr. P.C. were also recorded. Girls were given in supurdagi of their guardians again on 1.9.1997 after their statements were recorded u/s 164, Cr. P.C. Supurdaginama is Ex. Ka-7.

5. P.W. 8 Dr. Yamna Sharma was posted as Medical Officer in Government Female Hospital, Aligarh on 29.8.1997. She examined prosecutrix P.W. 4 at 1.00 p.m. and found that the hymen was torn and old tear was present. It admitted two fingers easily. Vaginal smear was taken for pathological examination and X-ray was also advised. According to Dr. Sharma she was habitual of intercourse. The medical report is Ex. Ka-8. Dr. Sharma prepared the supplementary report (Ex. Ka-9) on 18.11.1997 and according to this report the epiphysis of right elbow joint, the right knee joint and the distal ends of right ulna and radius bones had fused and according to the doctor the age of the girl was 18 years. She had undergone recent intercourse.

6. The Medical Officer examined prosecutrix P.W. 3 on 29.8.1997 at 1.00 p.m. and found that hymen was torn and old tear was present. It admitted two fingers easily. Vaginal smear was taken for pathological examination and X-ray was also advised. According to Dr. Sharma she was used to sexual intercourse. The medical report is Ex. Ka-10. The supplementary report Ex-Ka-11 was prepared on 18.11.1997 and according to this report the epiphysis of right elbow joint, right knee joint and the distal ends of ulna and radius bones had fused. The age of the girl was about 18 years and had undergone recent intercourse.

7. Dr. V. P. Sharma P.W. 9 was posted as radiologist in District Hospital, Mainpuri on 30.8.1997. Under his supervision, technician took X-ray of the two girls and this witness on the basis of the X-ray plates prepared. X-ray report Exts. Ka-12 and 13. According to these reports the epiphysis of the right elbow and right knee joint and the distal ends of ulna and radius bones were fused.

8. The Investigating Officer submitted the charge-sheet Ex. Ka-4 against the accused persons. The case was committed to the Court of Sessions by the 3rd Additional C.J.M., Aligarh by order dated 3.7.1998. The accused were charged on 11.3.1999. They pleaded not guilty and claimed trial.

9. In support of its case the prosecution led evidence and besides the above noted formal witnesses examined Shankerpal, the informant P.W. 1, Ramswaroop P.W. 2, daughter of Shankerpal P.W. 3 (prosecutrix) daughter of Ram Swaroop P.W. 4, (prosecutrix) Pappu P.W. 5, Rajjo P.W. 6 as witnesses of fact and occurrence.

10. Accused was examined u/s 313, Cr. P.C. According to accused Appellant he has been falsely implicated and report with wrong allegation was lodged. The witnesses have deposed falsely. The papers were wrongly prepared. He denied having committed any rape on these girls. Accused did not adduce any evidence in defence.

11. Learned trial court after considering the evidence on record came to the conclusion that the age of the girls was more than 18 years and therefore they were major on the day of the incident. However, he concluded that the accused Jai Prakash had forcibly kidnapped two girls and had also committed rape on them. He did not find Malkhan guilty of any offence. Consequently, he acquitted the accused Malkhan and convicted Jai Prakash. Feeling aggrieved, he has come up in this appeal.

12. I have heard Sri B. R. Singh, learned Counsel for the Appellant, learned A.G.A. and have perused the trial court record.

13. Contention of the learned Counsel for the Appellant is that he has been wrongly implicated in this case and learned trial court has not properly appreciated the evidence on record. According to him, prosecution has failed to establish that the girls were kidnapped by the accused. According to him, the circumstances of the case show that they were consenting parties and had gone with the accused themselves and stayed with him for three months and that no rape was committed on them and that they had sexual intercourse with their consent.

14. Learned A.G.A. has contended that the accused forcibly took the two minor girls and kept them for three months in a room at Kanpur and subsequently they were recovered from Aligarh, Railway Station. He has also contended that accused committed rape on them against their consent.

15. Before holding a person guilty under Sections 363, 366 and 376, I.P.C., it is

important to determine the age of the prosecutrix at the relevant time. In this case the prosecution came with a case that the two girls were 15 and 14 years old. But according to the defence case, the two prosecutrix were major at the relevant time as according to medical evidence also their age was 18 years. In this connection, the informant P.W. 1 has stated that the age of his daughter was 15 years and that of his niece was 14 years. But the informant has not given any date of birth or the year of birth of these two girls and simply on the basis of the statement of the informant the age of the prosecutrix cannot be determined. It is settled law that if any authentic document regarding the date of birth like school certificate or birth register certificate or the reliable evidence of the parents supported with some evidence, is available it has to be accepted. In this case, it has come in evidence that daughter of the informant had studied up to Class 8 but no document to show her date of birth has been filed by the prosecution. In case such documents or reliable evidence of the parents of the prosecutrix is not available, then the reliance has to be placed on the medical evidence to determine the age of the victim prosecutrix. Dr. V. P. Sharma, P.W. 9 took X-ray of both the girls and found that the epiphysis and the distal ends, were fused and on that basis the medical officer Dr. Yamna Sharma, P.W. 7 has given the age of these two victims as 18 years. Regarding the medical assessment based on the radiological observation judicial notice can also be taken giving margin of two years as has been held in the case of *Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others*, In that case, it has been observed by the Hon''ble Apex Court that 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.

16. It is also settled law that if two views are possible then the one favourable to the accused has to be adopted. In the case of *Harendra Narian Singh, etc. Vs. State of Bihar*, the Hon''ble Apex Court has observed that the basic rule of criminal jurisprudence is that if two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the Court should adopt the latter view favourable to the accused.

17. In the instant case, Dr. Sharma has mentioned the age of P.W. 4 as 18 years and that of P.W. 3 as about 18 years. The epiphysis and the distal ends were completely fused. In the circumstances, in any case, the age of the two girls can be taken to be more than 18 years at the relevant time and on this point, the finding as recorded by the learned trial court is correct. The contention of the learned A.G.A. that girls were minor at the relevant time, as based on the statement of the informant, is therefore not tenable and cannot be accepted.

18. Now, it has to be seen if these two girls were kidnapped by the accused Jai Prakash or they were consenting parties and went with the accused person of their own free will and whether the Appellant Jai Prakash committed rape on them. In this connection, it will be relevant to refer the statement of the

witnesses. P.W. 1 is the informant and he is not an eye-witness of the incident. According to him these two girls and his another daughter Rajjo and nephew Pappu had gone in the day time in the jungle. The children came back and told that accused had taken two girls in a Maruti car. Ramswaroop and Thakur Das had also seen the accused taking the girls in a Maruti car towards Aligarh. His brother informed him at the karkhana. In the cross-examination he has stated that Ramswaroop came to him at about 2.30 p.m. The karkhana is about 7 kilometres from his village. They had come on foot. He went to Masoorabad to meet Bahanji to enquire if the girls had come to her house. He reached there in 35 minutes but Bahanji told that the girls had not come there. Thereafter he came back to karkhana and then went to police station and lodged the report. In cross-examination he also stated that before lodging the report he had no talks with Rajjo and Pappu. Ramswaroop had told him that it appeared that two girls were sitting in the car. He had lodged the report as told by Ramswaroop. He denied the suggestion that girls were not kidnapped by any one and that they went in some relationship.

19. P.W. 2 Ramswaroop has stated that when he and Thakurdas were coming from Aligarh he saw his daughter and niece going in a Maruti car alongwith two accused. In cross-examination he has stated that at that time he could not realise that the accused had kidnapped the girls. He had waived for stopping of the car but it did not. He denied that he did not see the girls going in the car.

20. P.W. 3 the prosecutrix has stated that she alongwith her cousin sister, Rajjo and Pappu had gone to ease in the day time at about 12. When they were sitting for that purpose the accused came and put handkerchief on their face and thereafter they were taken in the Maruti car. When they regained consciousness they were in the car in Sikandararau and she saw five persons in the car. Jai Prakash and Malkhan took both the sisters in the bus but Malkhan got down and Jai Prakash took them to Kanpur. First he kept them in a hotel for two days. Thereafter he took a house on rent in Mohalla Prem Nagar, Kanpur. The accused used to commit rape on them one by one and also used to threaten them. He kept them in the house of Bajpayee for three months. In cross-examination this witness stated that it is wrong to say that she was not kidnapped and she went of her own free will. When the handkerchief was put on her face, she was sitting. She became unconscious. Subsequently, she stated that when she had stood up and was tying her nara, handkerchief was put on her face. When she regained consciousness she was having the clothes on her person. Several people were coming and going near the Maruti when she was in Sikandararau but because of the threat given by the accused she did not tell any body about her kidnapping. She was threatened with tamancha. They took the bus for Kanpur at the road. There were several passengers in that bus but because of the threat she did not tell any passenger that" the accused was forcibly taking them. Where he put the tamancha she could not tell. After sitting in the bus no tamancha was shown by the accused and only threat was given. By the time they reached the bus, it was evening. They changed two buses between Sikandararau to Kanpur. There was

no constable at the bus stand or in the bus. She had asked the accused as to where he was taking them but he did not reply. After getting down from the bus they went in a rickshaw to the house of Bajpayee. There again she asked as to where he was taking them but he did not tell. Three persons were in the rickshaw ; she, her sister and Jaiprakash. They did not oppose Jaiprakash because of the threats. They lived in one house for three months. Jai Prakash used to bring flour, pulse, vegetables from the nearby shop. The toilet and bathroom were inside the room and when Jai Prakash used toilet, they remained outside. There was no other tenant in that house. The landlord was living in upper floor and they were in the lower portion. Accused did not allow them to go to landlord.

21. P.W. 4 the prosecutrix has stated on oath that she her cousin sister, Rajjo and Pappu had gone to ease in the day time and when they had stood up after that work the accused put some cloth on their face as a result of which they became unconscious. She regained consciousness in a house. She does not know as to by which vehicle accused took her there. When she regained consciousness there were no clothes on her body. The accused Jai Prakash committed rape on her. When she opposed, she was threatened with her life and katta was also shown to her. They remained in that house for three months where the accused took them. She was not allowed to come out of that house. In cross-examination she has stated that she had not told the Investigating Officer that she had love affair with Jai Prakash prior to this incident. If the Investigating Officer mentioned this fact she could not explain. She also did not tell the Investigating Officer that there were talks about her affair with Jai Prakash and that of her cousin with Malkhan in the village. She also could not explain as to how the Investigating Officer mentioned this fact in her statement. She did not tell the Investigating Officer that no one committed rape on her cousin sister. If it has been written she could not explain. She had become unconscious as soon as she was caught by the accused. At that time she could not see that man. She remained in that room for three months where she had regained consciousness. The toilet and bathroom were inside the room. There was only one door in the room and for three months they did not come out of the house. She denied the suggestion that she and her sister were beaten by their parents on account of their affairs. She also denied that they went with their consent.

22. P.W. 5 Pappu, a child witness, has stated that he had gone with his sisters in the day time and when they were sitting a Maruti car came and Jai Prakash and Malkhan came out of that car. Jai Prakash had katta in his hand. They put handkerchief on the face of her sisters and took them in the Maruti car. Accused had also threatened to shoot them. He told the details to his parents. In cross-examination he has stated that he has deposed what he had seen. He and Rajjo were sitting under babool tree when the accused put handkerchief on the face of his sisters and took them. He had raised alarm but no body came. The accused had lifted his sisters in their lap. He also stated that when his sisters had stood up and were tying the "nara" accused had put handkerchief. He did not tell the

Investigating Officer that his sisters directly went to the car and sat therein. If it has been written so he could not explain.

23. P.W. 6 Rajjo also a child witness has stated that she, Pappu and her sisters had gone in the jungle. Rajjo and Pappu were sitting under the babool tree and her sisters were easing when a white Maruti car came and Jai Prakash and Malkhan got down, Jai Prakash had katta in his hand. They put handkerchief on the face of her sisters and took them in the car. She was also threatened with katta and asked to run away otherwise she would be shot. She told the incident to her tai and tau. In cross-examination, she stated that they had gone in the day at about 12.00. Her sisters had not gone directly to the car. When they reached, the car was standing at the Chakroad. First Jai Prakash got down from the car and then Malkhan. They dragged her sisters to the car. She also raised alarm but no one came. She did not tell the Investigating Officer that her sisters went direct to the car standing on the Chakroad and thereafter that car went to Aligarh. She could not know as to how the Investigating Officer mentioned this fact in her statement.

24. P.W. 7 the Investigating Officer has stated that Pappu and Rajjo had told him that both the sisters went directly to the car standing at the Chakroad. Both the girls had told him that they had come from the house on the pretext of easing and they did not sit for that purpose.

25. Contention of learned Counsel for the Appellant is that in this case the facts and circumstances as have come on record clearly indicate that the prosecutrix went with the accused of their free will and they were not abducted. But according to learned A.G.A. accused alongwith Malkhan had kidnapped these girls. In the first information report it has been mentioned that the accused enticed and forcibly took the girls in a Maruti car. But the evidence as has come on record indicates that there were some affairs between the two girls and the two accused persons and there were also some talks in the village and it appears that even the parents of the girls were annoyed. According to the witness Rajjo when they reached in the jungle, Maruti car was already standing at the Chakroad. It appears that the accused and the girls had pre-planned as to how they were to leave the place and in order to give it colour of kidnapping the girls also took two minors to witness the alleged kidnapping.

26. The two girls have stated that the accused persons put some handkerchief or cloth on their face and they become unconscious. The two witnesses P.Ws. 5 and 6 also state that these girls had become unconscious and according to P.W. 5 the accused took the girls in their lap whereas according to P.W. 6 they dragged the two girls to the car. But it appears that these girls had not become unconscious and they were only pretending to be unconscious in order to give colour to the elopement plan. It has come in evidence of Ramswaroop that when he was returning from Aligarh, he saw two girls and the accused sitting in the Maruti car and at that time he did not imagine or apprehend that they were being kidnapped. According to these girls they had become unconscious as soon as the

handkerchief was put on their face. Had it been so Ramswaroop must not have seen them sitting in the car as an unconscious person cannot sit of his own in a running car. Again according to prosecutrix, P.W. 3, she and her sister regained consciousness in Sikandararau but according to P.W. 4 she regained consciousness in the room where they stayed for three months. It shows that she regained consciousness in Kanpur. But these statement cannot be accepted. It is not disputed that the accused took both the sisters in roadways bus from Sikandararau to Kanpur and in the way they also changed two buses. Had P.W. 4 been unconscious as alleged, it would not have been possible for the accused to take her in the bus. Although P.W. 4 says that she does not know as to in which vehicle accused brought her to Kanpur but against his statement cannot be accepted. Therefore it is clear that the two girls were not made unconscious by the accused and when they went in Maruti car they were conscious. These two witnesses P.W. 5 and P.W. 6 stated before the Investigating Officer that these girls directly went to the car and did not sit to ease. It appears that the theory of going to ease was only a pretext to leave the house. Had there been no earlier planning, there was no occasion for the accused persons to have been present therewith Maruti car at that hour of the day. In this background, the fact that they directly went to the car and did not sit to ease becomes important and shows their consent in going with the accused. Therefore no allurement or force was used in taking the girls who were major at the relevant time and they went of their own will.

27. It is further alleged that the accused committed rape on the two girls when they were kept by him in a rented house of Bajpayee in Premnagar, Kanpur. P.W. 3 has also stated that accused had also taken them first to hotel where they stayed for two days and thereafter to the house of Bajpayee. But no such statement has been made by the other prosecutrix in the Court. P.W. 3 has stated that the toilet etc. was inside the room and accused used to bring edible products like flour, pulses, vegetables etc. Although the prosecutrix have stated that they were not allowed to go out of the room and to meet the landlord who was living with his family, but this statement cannot be accepted to be correct. It is not probable that two girls would live with one man in a room against their wishes and would not be able to over power him or to object to his acts and designs. Although the girls stated that when the accused took them he had shown them katta, but subsequently it appears that no katta was shown as the witness says that she did not know as to where the katta was kept. There is also no allegation that the accused ill treated them or caused them any injury. Even the medical report does not suggest that accused caused any injury to them. It is not the case of the witnesses that the accused used to put lock from outside the room. Admittedly, the accused had to go out to bring eatables. If the girls were being detained against their wishes they could have escaped or could have informed the landlord or his wife. But it did not happen. It appears that they even used to prepare food from the items that were brought by the accused from nearby shop. Thus the conduct of the prosecutrix speaks volumes about their

consent.

28. Prosecution case is that the girls were recovered at the police station by the Investigating Officer on 28.8.1997. The recovery memo Ex. Ka-2 also mentions this fact. The Investigating Officer P.W. 7 has also stated on oath that on getting the information he went to Railway Station and there he recovered the two girls and Ramswaroop and Shankerlal, father of the girls also came there. But in this connection, Ramswaroop, P.W. 2 has stated that the police had come to his house and he was taken to police station where the girls were also present and he was made to put his thumb impression on the papers. His statement does not show that the recovery was made from the railway station. P.W. 3 has also stated that the accused, three days prior to their recovery had brought them to the house of Ganga Singh, his bahnoi in Etah. He took them to Police Chowki, Jwalapuri and they described the incident and from there they were taken to Police Station. This statement has been made in the cross-examination and it also shows that the recovery was not made in the manner as alleged by the prosecution. It is also important to mention the statement of P.W. 4 who says that before taking to the house of Ganga Singh accused made her unconscious. But again this statement is not corroborated even by the P.W. 3 or the circumstances of the case as unconscious person could not be taken from Kanpur to Etah in a bus without being noticed. It appears that the accused Jai Prakash came to his bahnoi Ganga Singh for financial help as his money was spent during the period of three months of their stay at Kanpur. Ganga Singh, instead of giving him any money took the girls to the police Chowki and this could result in the recovery of the girls.

29. In this case the two prosecutrix have stated that the accused committed rape on them. According to Section 375, I.P.C., in order to constitute the offence of rape, penetration may be slight, has to be proved. In the instant case, both the prosecutrix did not mention about any penetration or the manner in which the rape was committed on them. No injury was found on their private parts. Although the medical officer on the basis of the finding of sperms states that one day prior to medical examination the intercourse was possible but according to prosecutrix P.W. 4 no rape was committed at the house of Ganga Singh, where they stayed for three days. Therefore the statement of the medical officer is not corroborated by the prosecutrix. Simply saying that the rape was committed is not sufficient.

30. It is settled law that in case u/s 376, I.P.C. the sole testimony of the prosecutrix is sufficient to sustain the conviction of the accused provided Court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity Gurdev Kaur and Others Vs. Kaki and Others, In the instant case, testimony of these two witnesses is not of sterling quality on whose testimony conviction could be sustained. There are differences even in the statements of the two prosecutrix on material points.

31. Therefore the facts and circumstances as have come on record clearly show that the prosecutrix had preplanned to go with the accused person and they were ready to take them in Maruti car and only to give the episode a colour of kidnapping, two children were also taken by them to witness the planned kidnapping and to inform the elders in the house. The theory that they were made unconscious is not substantiated. They willingly went with the accused Jai Prakash to Kanpur, although one of the accused Malkhan dropped in the way. They lived willingly, with the accused for three months in the room and if had any intercourse, it was with their consent. Therefore the prosecution has failed to establish any offence against the accused person. The two girls being major could take their own decisions. Learned trial court has wrongly appreciated the evidence on record and has erred in concluding that the two girls were not the consenting parties and that the accused committed the offence under Sections 366 and 376, I.P.C. The facts and circumstances of the case amply show that they were consenting parties. Learned trial court has wrongly convicted the accused under these sections and he is entitled to be acquitted. Therefore the appeal is to be allowed.

32. The appeal is hereby allowed. The conviction and sentence of the accused Jai Prakash under Sections 366 and 376, I.P.C. is set aside and he is hereby acquitted of the same. The accused is in jail. He shall be set at liberty forthwith unless wanted in any other case, crime or matter.

33. Copy of the order be certified to learned lower court for compliance without any delay.