

(2008) 12 P&H CK 0202

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal No. 97-SB of 1998 and Criminal Appeal No. 107-SB of 1998

Naresh Kumar

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2009) 1 RCR(Criminal) 775

Hon'ble Judges : S.D. Anand, J

Bench : Single Bench

Advocate : Parmodh Saini, as Amicus Curaie and Mr. Maharaj Kumar, for the Appellant; S.S. Mor, D.A.G., Haryana, for the Respondent

Final Decision : Allowed

Judgement

S.D. Anand, J.—The appellants (in both the appeals aforementioned) were convicted by the learned Trial Judge for the offences under Sections 376, 366 and 363 IPC. For the offence u/s 376 IPC, both the appellants were directed to undergo imprisonment for a period of seven years and to pay a fine of Rs. 5000/- each. For the offence u/s 366 IPC, both the appellants were directed to undergo imprisonment for a period of five years and to pay a fine of Rs. 2000/- each and, for the offence u/s 363 IPC, both the appellants were directed to undergo imprisonment for a period of three years and to pay a fine of Rs. 1000/- each.

2. The prosecution allegations upheld at the trial were as under:

Appellant Naresh Kumar is a tailor by profession and so also is appellant Isham Singh. On 23.4.1996, prosecutrix V and the prosecutrix M, who were class mates in the same educational institution, went over to the shop of the appellants in order to get their clothes stitched. They were persuaded by the appellant to stay on at the shop with a promise that they would stitch their clothes there and then. However, appellant Isham Singh suddenly put down shutter of the shop. On

finding that, prosecutrix M went to the enclosed Bara through back side window of the shop while the prosecutrix V continued to remain in the shop; Appellant Naresh Kumar followed the prosecutrix M. Thereafter, appellant Isham Singh raped prosecutrix V. She did not raise a raula as that appellant held out a threat that she would be killed if she raised a raula. When, (after the act) she came out of the shop through that very window, she found her friend the prosecutrix M standing in the corner of the Bara. Prosecutrix M told prosecutrix V that former had been raped by appellant Naresh. Like-wise, the prosecutrix V informed her friend the prosecutrix M that Isham Singh had likewise ravished her. Both prosecutrix M and prosecutrix V came over to their houses but did not share anything with the members of their families out of a sense of shame. After about one month thereof, prosecutrix V started vomiting. She got suspicious that she might have become pregnant. She brought the fact to the notice of Isham Singh. He advised her to finish her examination and assured her that, thereafter, she would be taken to a Doctor at Karnal for treatment. On the asking of appellant Isham Singh, both the girls came out of their respective home on 23.4.1996 and reached Bus Stand in the area of village Sandhir where appellant Isham Singh again met them. Both the girls came up to Nilokheri in a Tonga where appellant Isham Singh met them and the trio were joined soon thereafter by appellant Naresh Kumar. All four of them reached Karnal by bus. Isham Singh went alone to find out the availability of the Doctor. He returned some time thereafter and informed the rest of the party that the Doctor was not available. Thereafter, all of them came over to Delhi. Both the girls stayed over at Bus Stand; while Isham Singh and Naresh Kumar went over to contact a Doctor. They returned sometime thereafter and informed that the hospital would open at 5.00 P.M. After 5.00 P.M. Appellants informed the girls that hospital would not open on that day. From there, they boarded a train and reached Banaras. There, both the appellants raped prosecutrix V and M respectively. From there, they came over to Ambala where they reached on the evening of 26.4.1996. On 27.4.1996, they reached Rajpura and spent two nights in a park at Rajpura. In the course of the stay, Isham Singh raped prosecutrix V and Naresh raped prosecutrix M. From there, they came over to Karnal by bus. They boarded a train from Karnal and reached Nilokheri. It is there that they were apprehended.

3. There is plethora of evidence on the file that prosecutrix V and prosecutrix M were consenting party to their elopement from their respective homes and the ravishing of their person by the appellants. It is in the evidence that they had been travelling by train, bus and also by Tonga. All the means of transport aforementioned had the availability of other persons but the girls did not make a grievance against the appellant. In view of the fact that there is no controversy (as between the appellants and also the State) about it all having been consensual affair, the fate of the prosecution shall, thus, turn upon the question of age of prosecutrix V and prosecutrix M. The evidence adduced by the prosecution in the context consists of the statements of PW-1 Dr. G.S. Arora (who had conducted the ultrasound examination) of prosecutrix V, PW-11 Dr.

Nirmal Bhatia, who conducted the medico legal examinations of prosecutrix V and prosecutrix M on 29.4.1996, PW-6 Bhagat Ram, Headmaster, Government Middle School, Sandhir, PW-7 Pawant Kumar, brother of prosecutrix V and PW-8 Ramesh Chand, father of prosecutrix M.

4. Insofar as PW-1 Dr. G.S. Arora is concerned, he did aver in the course of examination-in-chief that he had recorded the age of the prosecutrix as 16 years. However, in the course of cross-examination, he conceded that he had recorded the age of the prosecution on the basis of what already stood recorded in the MLR.

5. PW-11 Dr. Nirmal Bhatia also recorded the age of prosecutrix V as 16 years and age of prosecutrix M as 14 years respectively. In the course of the cross examination, she testified that "I have given the age of Vijay Laxmi by approximation as told by her. I did not examine the girls regarding age medically."

6. PW-6 Bhagat Ram, Headmaster, Government Middle School, Sandhir proved certificates Ex. PG/2 and Ex. PF/1 respectively as per which the age of the prosecutrix M is recorded as 10.1.1982 and that of prosecutrix V is recorded as 12.1.1981.

7. PW-7 Pawan Kumar testified that age of prosecutrix V was less than 16 years because she is 12 years younger to him. He had given his age as 27 years.

8. PW-8 Ramesh Chand gave the age of prosecutrix M as 14 years.

9. It is apparent from the record that the prosecution has not placed on record any birth certificates of prosecutrix V and also prosecutrix M. We have to ultimately adjudicate upon the relevant controversy on the basis of the value to be attached to the testimony of PW-6 Bhagat Ram. He could not say who exactly had filled up the admission forms, copies of whereof were placed on record Ex. PG/2 and Ex. PF/1. It is also in his statement that "there is no other proof of date of birth of..... and..... given in our school alongwith admission form". Though he claimed to have had brought along original admission forms pertaining to prosecutrix V and prosecutrix M, he conceded that he had not brought along the complete file and that he had taken those forms out of the record from the main file in which those were lying pasted. He also conceded that the file in which the admission forms were lying pasted does not have any paging. He also conceded, as correct, a suggestion that "there is no date under the signature of the the then Head Master on admission forms copies of which are Ex. PF/1 and Ex. PG/2" He further conceded, as correct, a suggestion that such like "blank admission form are available in our school as well as in the market".

10. The persons who got the prosecutrix V and prosecutrix M admitted to the school were not examined at the trial. The prosecution, thus, has not been able to prove at all the basis where upon the date of birth of prosecutrix V and

prosecutrix M had been recorded in the school admission record.

11. The present is, thus, a case in which the following inference is deducible :-

- a) No birth record pertaining to prosecutrix V and the prosecutrix M was produced; There is no affirmative evidence either that their birth was not notified.
- b) There is no proof on the record to indicate the basis where upon the date of birth of prosecutrix V and prosecutrix M had been recorded in the school admission form;
- c) the persons who got prosecutrix V and prosecutrix M admitted into the school were not examined at the trial.

In the light thereof, the only inference which is deducible in the circumstances of the case is that the prosecution has not been able to prove the age of prosecutrix V and prosecutrix M. The benefit thereof has to accrue to the appellants, particularly in view of the evidence that it was all a consensual affair, as between prosecutrix V and prosecutrix M and the appellants. The appeals shall stand allowed. The impugned finding of conviction is set aside. The appellants are acquitted of the charge.