
(1993) 07 AHC CK 0019
In the Allahabad High Court
Case No : Criminal Appeal No. 2351 of 1979

Natthal	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 15-07-1993

Acts Referred:

Citation : (1993) 07 AHC CK 0019

Hon'ble Judges : Virendra Saran, J

Final Decision : Allowed

Judgement

Virendra Saran, J.—Natthal son of Harmal resident of village Janipur P. S. Thana Bhawan district Muzaffarnagar has filed the present appeal against the judgment and order dated 3171979 by Sri G. R. S. Tandon, II Additional Sessions Judge, Muzaffarnagar in Session Trial No. 189 of 1978 convicting and sentencing the appellant under Section 366,1. P. C. to three years R. I. and under Section 376,1.P.C. to three years R. .1. The sentences have been ordered to run concurrently.

2. According to the prosecution, the prosecutrix, Km. Bindeli aged about 14 years was living alongwith her brother P. W. 1 Brijendra. On 25101977 Brijendra had gone to see Mela of "Shakumber Devi". In his absence in the evening of 25101977 the appellant along with coaccused Jai Prakash and Prem kidnapped Km. Bindeli. It may be mentioned here that Jai Prakash and Prera have already been acquitted by the Court of Sessions. Informant returned home on 27101977, and thereupon his father and P.W s. Shishupal and Nawal narrated the entire incident to him. No report was lodged even on that date and after two days a first information report was lodged on 29101977 at P. S. Thana Bhawan which is hardly 4 Km, front the spot. After about 1\$ month the informant could know that the prosecutrix was living with the appellant in district of Karnal. Hence he went and met his sister. According to P.W. 8 Ram Pratap Singh he arrested the appellant on 16121977 and he recorded the statement of Km. Bindeli on 17121977. Km. Bindeli was sent for medical examination. She was medically

examined by P.W. 6 Dr. S. Giriwal on 17121977 at 5 p.m. According to the doctor the hymen had old tears and admitted two fingers easily. Uterus was in normal position and shape. No injury was noted by the doctor anywhere on the person of Bindeli or on her private parts. The doctor opined that no opinion of rape could be given as Bindeli was used to sexual intercourse. Km. Bindeli was subjected to Xray examination and on Xray examination it was found that all the epiphysis at the lower end of humerus bone had fused with the shaft and the epiphysis at the lower end radius and ulna bone had not fused with their shafts.

3. After completing the investigation the Investigating Officer submitted chargesheet and the appellant was tried. On the trial, the prosecution examined Bijendra P. W. 1 who is informant, P.W. 3 Shishpal who has deposed that he saw the prosecutrix going along with appellant; P.W. 4 Nawal who stated that at about 7*30 p m. he was returning from jungle to his house and he saw appellant and prosecutrix Bindeli standing on the road at about mid night news spread that Bindeli had eloped. P.W. 5 is Bindeli, the prosecutrix. P.W. 6 is Dr. (Mrs.S. Giriwal. P.W. 7 Phimmi is the father of Bindeli, P.W. 9 Dr. S. C. Gupta had taken the Xray of the right elbow and wrist of Smt. Bindeli. Lastly there are two police witnesses namely, P.W. 2 Bhai Chand, who is the clerk constable and who has recorded the first information report, and P. W. 8 Ram Pratap Singh S. I. who investigated the case. At the close of the evidence the appellant was examined under Section 313, Cr. P. C. and he has denied the correctness of prosecution case against him. On appraisal of entire prosecution evidence the learned Sessions Judge has convicted and sentenced the appellant as mentioned above.

4. I have heard Sri V. S. Chaudhari, learned counsel for appellant and Sri K. C; Saxena, learned counsel for State and have perused the record. Learned counsel for appellant has submitted that in any case even according to the learned Sessions Judge the age of prosecutrix Bindeli was not less than 18 years and the facts and circumstances of the case go to show that she had herself gone with the appellant and lived with him and she had stolen the ornaments of her sister-in-law so as to sustain her living for some time.

5. The learned Sessions Judge has discussed the 3 question of age of prosecutrix Bindeli and he has recorded the following finding :

"In view of the medical evidence discussed above, since the distal end of ulna and radius have not fused and humerus is fused, the age of the girl according to the medical evidence comes out to about 18 years but for abduction it is not necessary that the person abducted must be a minor and he should be removed from the lawful guardianship of anybody."

The fusion of distal ends of ulna and radius, according to Modi take place at about 19 years (See Modi Medical Jurisprudence and Toxicology]. Even the learned Sessions Judge has held that Bindeli was about 18 years of age. Even otherwise there can always be a difference of a year or two in assessment of age and as such in the case of present nature the benefit should be extended to the

appellant. Even if it is held that Km. Bindeli was of 18 years of age no offence of kidnapping is made out. So far as the offence of rape and abduction are concerned the anchorsheet of the prosecution case is the evidence of Smt. Bindeli. I have carefully perused the evidence of Smt. Bindeli and I am of the opinion that she had gone away with the appellant and she lived of her own free will and consent along with the appellant and the appellant and Bindeli were living as man and woman at Karnal without any duress or coercion. Smt. Bindeli had told a bundle of lies in her evidence to support the prosecution case. In the examination in chief she stated that the appellant used to come to her very often and used to tell her that he will keep Bindeli with comfort. However, in cross examination she stated that it was for the first time that the appellant came to her on 25/10/1977 and she agreed to go away with the appellant. This change of stand in cross examination has come because Bindeli wanted to project that she was very innocent and only appellant was to be blamed. The totality of the circumstances would go to show that she was friendly with the appellant from before and appellant and Bindeli used to meet each other often and on and on and she decided to leave the parental roof and live with appellant. In cross examination Bindeli further stated that in Chorpura district Karnal she and appellant were living all alone in a house. The conduct of the prosecutrix in stealing the ornaments of her sister-in-law also goes to show that she has gone fully prepared and she has taken ornaments with a view to sell them and raise some money for her livelihood for some time. It appears that Bindeli was having an affair with appellant for quite some time as the evidence of Shishpal and Nawal goes to show that they saw the appellant and Bindeli together away from their house but they did not even question them. This goes to show that it was quite usual for the appellant and Km. Bindeli to loiter together and hence the two witnesses did not question them. Thus the evidence on the record leaves no room for doubt that Bindeli had decided to go with the appellant out of her free will and consent and Bindeli was a major girl having attained the age of 18 years. Thus, even the charge of rape and abduction cannot be sustained against the appellant who is entitled to clear acquittal.

6. In the result this appeal is allowed. The conviction and the sentence passed against the appellant is set aside and he is acquitted. The appellant is on bail. He need not surrender. His bonds are discharged.