

(2014) 11 KAR CK 0078
In the Karnataka High Court
Case No : Criminal Appeal No. 2504/2012

The State of Karnataka

APPELLANT

Vs

Fairoz Ahamed

RESPONDENT

Date of Decision : 18-11-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 344, 363, 366, 366A

Citation : (2014) 11 KAR CK 0078

Hon'ble Judges : Mohan M. Shantana Goudar, J;K.N. Phaneendra, J

Bench : Division Bench

Advocate : V.M. Banakar, Addl. SPP, Advocate for the Appellant; G.N. Badiger, Advocate for the Respondent

Judgement

Mohan M. Shantana Goudar, J.—The judgment and order of acquittal passed by the I Addl. District and Sessions Court, Dharwad, sitting at Hubli, in S.C. No. 64/2006, is called in question in this appeal by the State. The respondents were tried and acquitted for the offences punishable under Sections 366, 366-A, 376 and 344 of Indian Penal Code r/w Section 34 of the I.P.C.

2. Kum. Sheetal, aged about 16 to 17 years was kidnapped from the lawful guardianship of her parents by the respondents/accused herein at about 10.45 a.m. on 20.09.2005 at Hubli on the motor cycle belonging to the 1st respondent/accused No. 1. The First Information Report came to be lodged by Smt. Prabhavathi, mother of the victim at about 9 p.m. on 20.09.2005 as per Ex. P. 3 before the Sub-Inspector of Police, (PW-5), Old Hubli Police Station, Hubli, which came to be registered in Cr. No. 159/2005 for the offence punishable under Sections 366-A r/w 34 of I.P.C. During the course of investigation, the statements of victim (PW-4) as well as her brother P.W.-7 apart from other witnesses were recorded. At the time of incident, the victim had failed in her SSLC examination; however, she was pursuing her Diploma Course in Fashion Designing. The police after investigation laid the charge-sheet.

3. Accused No. 2 is the near relative of accused No. 1 and Accused No. 3 is the

mother of accused No. 1. The case of the prosecution is that accused Nos. 2 and 3 also supported Accused No. 1 in his attempt of kidnapping the minor girl.

4. In order to prove its case, the prosecution in all examined 35 witnesses and got marked 41 exhibits. On behalf of the defence, 9 exhibits were got marked. The trial Court, on evaluation of the material on record, acquitted the accused by giving them the benefit of doubt.

5. P.W.-1 is the receptionist in A.P. Lodge, Nampalli Hyderabad, who has deposed that Accused No. 1 was staying in the said lodge (Room No. 115) along with the victim girl for three days. P.W.-2 is the mother of the victim girl. She has deposed about the missing of her daughter and about searching and filing of the First Information Report. P.W.-3 is the father of the victim. His evidence is on par with the evidence of P.W.-2. P.W.-4 is the victim girl. She has deposed about kidnapping and sexual assault made by Accused No. 1. Her date of birth is 07.09.1989 as per Ex. P. 40. P.W.-5 is the PSI who registered Cr. No. 159/2005 based on the complaint lodged by P.W.-2. P.W.-6 is the sister-in-law of P.W.-3. She received anonymous call that the victim should not be sent to Design Class, inasmuch as, she would elope with a boy. Accordingly, P.W.-6 informed the same to P.W.-2 on 20.09.2005. P.W.-7 is the brother of the victim. According to him, Accused No. 1 took him to the house of Accused Nos. 2 and 3 in the afternoon wherein the victim was found in their house. P.W.-8 is the doctor who examined the victim on 07.03.2006 at 8 p.m. and issued medical certificate as per Ex. P. 9. She has opined that the victim was used to the act like that of coitus. P.W.-9 is the panch witness for scene of offence mahazar Ex. P. 8 wherein the victim was kidnapped. P.Ws.-9 to P.Ws.-17 are all mahazar witnesses for different mahazars as per Exs. P. 8, 10, 11, 12, 13 and 15. All of them have turned hostile. P.W.-19 is the father of Accused No. 1 who has deposed that he had advised his son to come back from Bombay. He has turned hostile. P.W.-20 is the sister of Accused No. 1. Her evidence is of no use, inasmuch as, she is an hear say witness. P.W.-21 is the teacher in Fashion Design School who has deposed that the victim was her student. P.W.-22 is the Woman Police Constable who has apprehended Accused Nos. 2 and 3 on 24.09.2005. She took the victim to the KIMS hospital on 07.03.2006 for examination. P.Ws.-23, 24, 25, 26, 28 and 29 are all Police Constables who participated in the investigation at different levels. Ex. P. 27 is the doctor who examined the victim and issued the Age Estimation Certificate as per Ex. P. 23 which discloses that the age of the victim was 16 to 17 years. He has also examined Accused No. 1 and issued Age Estimation Certificate as per Ex. P. 24. P.W.-30 is the Circle Inspector of Police who investigated into the crime partly. P.W.-31 is the receptionist at Embassy Hotel, Ahmedabad, as on 22.09.2005. He has deposed that Accused No. 1 came to the hotel along with the victim and booked room No. 213. He has identified Accused No. 1. Ex. P. 35 and Ex. P. 36 are cash memos. P.W.-32 is the goldsmith who has deposed about the purchase of silver thali chain and toe rings by Accused No. 1 and he has also identified Accused No. 1. P.W.-33 is the Circle Inspector of Police. He has investigated the crime in part. P.W.-34 is the Chief Officer of Hubli Dharwad

Municipal Corporation. He has issued the Birth Certificate of victim as per Ex. P. 40, which discloses the date of birth as 07.08.1989. P.W.-35 is the Inspector who completed the investigation and led the charge-sheet.

6. The case of the prosecution mainly rests on the evidence of the doctors i.e., P.Ws.-8 and 27 and the evidence of the victim i.e., P.W.-4 herself apart from the evidence of P.W.-7, brother of the victim.

7. Looking to me Birth Certificate Ex. P. 40 and the evidence of the doctor P.W.-27, it is clear that the victim was aged in between 16 to 17 years. The Birth Certificate discloses that the victim was born on 07.08.1989. The offence has taken place on 20.09.2005 which means as on the date of the incident, the victim was aged sixteen years and one month old. Even the doctor P.W.-27 who has issued the Age Estimation Certificate has clarified that the victim was in between the age of 16 to 17 years.

8. The doctor P.W.-8 who examined the victim and who issued the Medical Certificate Ex. P. 9 has deposed that the victim was used to the act like that of coitus, which means she was used to sexual intercourse.

9. The evidence of P.W.-4, the victim is perused by us meticulously. The complaint Ex. P. 3 lodged by the mother of the victim itself clearly reveals that she was informed by P.W.-6 i.e., sister-in-law of P.W.-3 that the victim should not be sent out of the house, inasmuch as, she is going to elope with a boy. The victim/PW-4 has deposed that she was taken by Accused No. 1 to various places such as Bombay, Ahmedabad and Hyderabad etc., from Hubli; they stayed together for more than 4 to 5 months. Accused No. 1 was arrested on 06.03.2006 which means from the date of the incident till that date, Accused No. 1 and P.W.-4 were leaving together; they had even hired houses at different cities including Hyderabad and Ahmedabad; P.W.-4 used to cook in the house; she was taken to market place by Accused No. 1; the houses in which Accused No. 1 and the victim were leaving at different places were in a crowded locality; there was no hurdle for the victim to raise hue and cry, if, really she was taken by Accused No. 1 against her consent; even the place where the victim was allegedly kidnapped by Accused No. 1 is a market place; Hubli Central Bus Stand is about 500 meters away from that place; the victim did not raise any objection for her accompanying Accused No. 1 on the motor cycle. Though in her deposition she has deposed that she did not know any of the accused till the date of the incident, the same is unbelievable. It seems it is a love affair. The victim has herself willingly gone with Accused No. 1 to different places; the documents Ex. D. 3 to Ex. D. 5 are the letters written by the victim to her parents as well as to the police station wherein she has clarified that she has on her own accord eloped with Accused No. 1 and that Accused No. 1 is innocent. Those letters also disclose that Accused No. 1 had married the victim and that they are living as husband and wife. The said letters also reveal that the love affair between Accused No. 1 and the victim was known to victim's brother as well as victim's uncle.

10. P.W.-7 is none other than the younger brother of Kum. Sheetal. In the examination in-chief itself, he has deposed that when himself and his parents were enquiring about the victim girl in STD booth, Accused No. 1 came there on a motor cycle and talked with them and he took P.W.-7 by telling him that they will search for the victim girl jointly; so saying Accused No. 1 took P.W.-7 to a house situated at Islampur where Accused Nos. 2 and 3 were also present. His elder sister/victim was also found in the said house. P.W.-7 called his elder sister/victim to his house, however, the victim refused to come along with P.W.-7 on the ground that Accused No. 1 will assault her. In the cross-examination, P.W.-7 has further admitted that he went to the house of Accused No. 1 at 12.30 noon and at that point of time, even the police officials had accompanied him which clearly shows that P.W.-7 knew very well about Accused No. 1; he had known his address also and he had taken the police to the house of Accused No. 1 to bring back the victim girl to his house. However, the victim girl refused to part the company of the accused. These facts clearly reveal that all the family members of the victim were knowing about the love affair. They tried their best to get back the girl on the date of the incident itself; but despite the same, they were not successful. It is also noticed that they had even taken the help of the police to get back the girl but the efforts went in vain. Hence, in our considered opinion, virtually it was the victim who wanted to live with Accused No. 1.

11. The entire material on record, if, perused carefully makes it clear that Accused No. 1 and the victim proceeded from Hubli to various places and they lived together for about more than six months. But, the fact remains that the victim was below 18 years of age. In law, her consent is no consent at all. In this view of the matter, in our considered opinion, the trial Court is not justified in acquitting Accused No. 1. Looking to the totality of the facts and circumstances of the case, we find that Accused No. 1 needs to be convicted for the offence punishable under Section 363 of I.P.C. i.e., kidnapping from legal guardianship.

12. The defence of Accused No. 1 that the girl voluntarily went along with Accused No. 1 on the date of occurrence is no defence at all. Undisputedly, the victim was below 18 years of age. In this view of the matter, the Court below ought to have convicted the accused for the offence punishable under Section 363 of I.P.C., inasmuch as, Accused No. 1 has kidnapped her from lawful guardianship.

13. The provision of Section 375 of I.P.C. as it stood on the date of the incident, makes it clear that a person is said to have committed the offence of rape, if, the same is committed with or without consent, when the girl is under sixteen years of age. [see Section 375 (Sixthly)]. Since the victim was above 16 years of age and as the material on record clearly reveals that she was a consenting party, the offence of rape is not made out by the prosecution. Therefore, we are of the opinion that Accused No. 1 has committed the offence under Section 363 of I.P.C.

14. We also do not find any ground to convict Accused No. 1 for the offence punishable under Section 366 of I.P.C., inasmuch as, there is nothing on record

to show that Accused No. 1 abducted/kidnapped with a view to compel her to marry him against her wish and will. As aforementioned, we find that the victim herself has voluntarily gone with Accused No. 1 and lived with him as his wife.

15. Heard the advocate for the accused on the question of sentence. He submits that Accused No. 1 has married and settled in his life. So also, the victim has married another person and she has also settled in life. Therefore, he pleads leniency while imposing sentence.

16. At the time of deposition, the victim had already married. She was examined in-camera on 20.02.2010. At that point of time, she was aged about 21 years and as on today, the victim may be aged about 24 years and must have settled in her life. So also Accused No. 1 by this time, would have also settled in his life.

17. Be that as it may. We find from the records that Accused No. 1 has already undergone imprisonment for certain period and the same may be sufficient sentence of imprisonment under the facts and circumstances. However, we propose to impose a fine of Rs. 1 lakh with default clause.

18. However, we find that the trial Court has rightly acquitted Accused Nos. 2 and 3, inasmuch as, there is nothing on record to show that they have supported Accused No. 1 for commission of the crime or have participated in the crime. Merely because they are the women folk in the family of Accused No. 1, they should not be held guilty. The State has not made out any case as against Accused Nos. 2 and 3. We do not find any material, muchless valid material against them to bring home guilt against them. Accordingly, the following order is made:

a) Accused No. 1 is convicted for the offences punishable under Section 363 of I.P.C. The sentence of imprisonment is confined for the period of imprisonment already undergone by him. He shall be given set off for the said period and therefore he shall not be imprisoned any further.

b) Accused No. 1 is also sentenced to pay a fine of Rs. 1 lakh. In case of default of payment of fine, he shall undergo further imprisonment for two years. In case of recovery of fine, the entire amount shall be paid to the victim, Smt. Sheetal (PW-4).

Appeal is allowed accordingly.