

**Reserved
A.F.R.**

Court No. - 15

Case :- CRIMINAL APPEAL No. - 474 of 2017

Appellant :- Arun Singh

Respondent :- State Of U.P.

Counsel for Appellant :- In Person, Mohd. Sahid
Akhtar (Amicus)

Counsel for Respondent :- Govt. Advocate

S.T. No. 204 of 2013
Case Crime No. 249 of 2012
Under Sections 363, 366 and 376(2) I.P.C.
P.S. Majhila.
District-Hardoi.

Hon'ble Satya Narain Agnihotri, J.

1. Instant appeal is directed against the judgement and order dated 27.09.2016 passed in Session Trial No. 204 of 2013, under Sections 363, 366 and 376(2) I.P.C., arising out of Case Crime No. 249 of 2012, P.S. Majhila, district-Hardoi, whereby learned Addl. Sessions Judge/F.T.C., Hardoi hold guilty to the accused-appellant Arun Singh under Sections 363, 366 and 376 I.P.C. and sentenced 3 years R.I. and a fine of Rs. 3000/-, 5 years R.I. and a fine of Rs. 5000/- and 8 years R.I. and a fine of Rs. 8000/-, in default of fine further undergo one year simple imprisonment, two months simple imprisonment and three months simple imprisonment respectively.

2. According to prosecution in the intervening night of 26/27.5.2012 accused-appellant Arun Singh with the assistance of other named persons in the first information report (Ext.Ka-1) enticed the minor daughter of complainant and carried away her out of his guardianship to Shahjahanpur, Roorkee and Delhi where the accused-

appellant confined to the daughter of complainant who was aged about fifteen years and committed rape upon her without her consent so many times.

3. It is further alleged by the prosecution that the victim was recovered from the company of appellant on 7.12.2012 at Kumrawan Canal Bridge by the police and the appellant was fled away. The medical examination of victim was conducted on 31.7.2012 and the supplementary medical report was prepared on 1.8.2012.

4. Accused-appellant in his statement recorded under Section 313 Cr.P.C. denied the allegations leveled against him by the prosecution and stated that he is innocent and on the alleged date of incident he was in the city of Lucknow, where he was earning his livelihood by pulling rikshaw. Since there is enmity with other accused Veerpal Singh that is why he has been falsely implicated in this case.

5. To prove the guilt of the accused-appellant, prosecution has examined PW1 informant Sarvesh Singh, father of the victim, who narrated on oath that on the date of incident, i.e. 26.5.2012 he had gone with his wife to Shahabad to consult with the Doctor and due to night he stayed with his wife in his sister's house in Village-Singoha. When he came back on the next day he came to know that his daughter is missing, then he tried to search out her daughter and when he did not find her then he approached to the police station and submitted a written complaint (Ext.Ka-1) on 14.6.2012. It is

further narrated by this witness that his daughter (victim) was minor on the date of occurrence.

6. PW2 the victim herself was examined on oath who narrated that she is literate and class-VIIIth passed. She further narrated that on the date of occurrence she had gone for nature call at about 9:00-9:30 P.M. in the field where accused Smt. Chandrakanta met her who detained her there and a few minutes later accused Dharampal and Veerpal also came there, who enticed her and brought her near the road, where a four Wheeler (Bolero car) was parked, in which accused Rakesh, his wife Roopa and Arun Singh were seated. All the accused persons compelled her to sit in the Bolero Car and carried her away Shahjahanpur, from there she was escorted to Roorkee, where she was confined for 2-3 days. Later on she was escorted to Delhi. Only accused Rakesh, Smt. Roopa and Arun accompanied her from the place of occurrence to other places.

7. Victim also narrated on oath that in Roorkee accused-appellant Arun Singh and Rakesh made physical relations with her forcibly without her consent. She also narrated that from the date she was brought at Roorkee, both the accused started to make physical relations with her till the date she was kept confined in Delhi. Both the accused were making physical relations with her without her consent. When she tried to resist, Smt. Roopa enticed her and told her that she was brought here for this job only and if you tried to raise an

alarm you would be killed. Due to threat and fear she kept mum and did not tell to anyone about her plight. She further narrated that when she was coming back with accused-appellant Arun Singh she was apprehended by police at Kumharawan Canal Bridge at about 11 A.M. Her statement under Section 164 Cr.P.C. was recorded before the Magistrate.

8. PW3 Om Prakash Pandey is an Assistant Teacher of Junior High School, where the victim got her education upto class-VIII. PW3 proved school leaving certificate (Ext.Ka2) and the entries of admission register (Ext.Ka-3) and stated on oath that according to school documents the date of birth of the victim is 10.7.1997, thus, the prosecutrix was below the age of sixteen at the time of occurrence.

9. PW4 S.I. Jagendra Singh has stated on oath that the first Investigating Officer S.I. Raghuvir Singh has died, who had prepared site plan (Ext.Ka-4) and memo of recovery of victim (Ext.Ka-5)

10. After the death of Sri Raghuvir Singh, first Investigating Officer of the case the investigation was entrusted to PW4 S.I. jagendra Singh, who after completion of investigation submitted charge sheet (Ext.Ka-6) against the accused-appellant Rakesh Singh, Smt. Roopa, Veerpal Singh, Dharampal Singh and Smt. Chandrakanta. Thereafter the investigation was transferred to S.I. Ram Chandra Sonkar

who submitted charge sheet (Ext.Ka-7) against the accused-appellant Arun Singh under Sections 363, 366 and 376 I.P.C.

11. PW4 S.I. Jagendra Singh further narrated on oath that the scribe of chek F.I.R. Ram Awadh Singh was posted with him and he is familiar with the writing and signature of Ram Awadh Singh who tendered the secondary evidence and proved chek F.I.R. (Ext.Ka-8) and General Diary (Ext.Ka-9)

12. PW5 Dr. Saulat Rizvi has stated on oath that she had examined the victim on 31.7.2012 at about 9:00 A.M. and her medical examination report (Ext.Ka-10) was prepared. The victim was referred to Pathologist and Radiologist for the investigation of spermatozoa and to ascertain the age of victim. She further narrated on oath that as per report of the pathologist (Ext.Ka-11) no spermatozoa was found in the vaginal smear and as per report of the Radiologist (Ext.Ka-12), the age of the victim was more than eighteen years.

13. Learned Amicus Curiae submitted that at the time of occurrence the age of victim was eighteen years as opined by PW5 Dr. Saulat Rizvi, thus, she was fully aware of the pros and cons and she had gone with the accused-appellant with her own free will and developed physical relations with the accused-appellant, that is why the offence under Section 376 I.P.C. is not made out against the accused-appellant.

14. Learned A.G.A. submitted that as per the evidence of PW3 Om Prakash Pandey, who is Assistant Teacher of Junior High School, proved that in the record of the school the date

of birth of the victim has been recorded 10.7.1997. The counter foil of school leaving certificate and original admission register, the photocopies of which have been filed in the Court, these both documents depict that the date of birth of the victim was recorded 10.7.1997 in the school documents.

15. According to learned Amicus Curiae the age of the victim was more than eighteen years at the time of occurrence that's why no offence is made out against the appellant. It is true that the age of victim at the time of occurrence ascertained by the Doctor was more than eighteen years, but the evidence of Doctor is only an opinion. In the circumstances where the primary and documentary evidence is available on the record, the opinion of the Doctor would be excluded as per section 45 of evidence Act. It is well settled that medical evidence is only an evidence of opinion and it is not conclusive and when oral evidence is found to be inconsistent with medical opinion, the question of relying upon one or the other would depend upon the facts and circumstances of each case. Doctor opined and ascertained the age of the victim, after observing the development of the body of the victim and other surrounding facts and circumstances which may vary place to place and person to person. If any person lives in good living conditions and finds good nutrition, the body of such person shall develop early in comparison to those persons who are not getting

good nutrition and good living conditions. There is no such type of evidence available on record that the victim was living in poor condition and was getting ill food. In the circumstances if the body development of victim finds place much early then it cannot be said that she was more than eighteen years of age at the time of occurrence. PW1 complainant Sarvesh Singh and PW2 victim herself proved that at the time of occurrence she was under fifteen years of age. The accused-appellant did not cross-examine both these witnesses on the fact of age. Thus the evidence tendered by these two witnesses has become final and it could not be agitated at the stage of appeal. PW3 Om Prakash Pandey, Assistant Teacher also proved the documents of Junior High School, Majhila, where the victim has got education upto VIIIth standard. According to these both documents, the date of birth of the victim is 10.7.1997. Thus it is proved beyond doubt that at the time of occurrence the victim was below the age of sixteen years and as such she was minor and was not able to think about her good and bad and pros and cons of her consent, if any, was given by the victim.

16. Learned Amicus Curiae further submitted that according to PW2 victim when she had gone for answering the call of nature accused Smt. Chandrakanta met her there and none accused except Smt. Chandrakanta was present there at that very time but at the other place she admitted that accused Veerpal Singh and Arun Singh were also present there. Thus

the evidence of the prosecutrix (PW2) is wholly untrustworthy.

17. Learned A.G.A. has countered the submissions advanced by learned Amicus Curiae and submitted that there is no such type of discrepancy and for the sake of argument, if it is assumed that there is discrepancy which hardly touches the root of crime and devastate the case of prosecution and accused-appellant is not entitled to get any benefit from this.

18. I agree with the submissions advanced by learned A.G.A. because at the time of occurrence the victim was below the age of sixteen years and at the time of her examination in the Court she was of tender age and if some discrepancy arise in her statement that is immaterial. The person of such age group can not be expected to give graphic and parrot like evidence of the happening of events. The discrepancy which touches the root of crime are material and if it does not touch the root of cause then it is immaterial. If it is assumed that there is some discrepancy as mentioned by learned Amicus Curiae then it hardly benefited to the accused-appellant.

19. Learned Amicus Curiae further submitted that prosecution has failed to prove the number of Bolero car which was used in the kidnapping of the victim as alleged by PW2 (victim) herself.

20. I do not find any substance in the submission of learned Amicus Curiae because if the prosecution fails to detect the

number of Bolero car which was used in the kidnapping of the victim then it hardly shattered the case of the prosecution, because the use of vehicle is not under controversy and consideration.

21. Learned Amicus Curiae further submitted that according to PW2 victim she has travelled with the accused-appellant Arun Singh to several places including acquitted accused Smt. Roopa and Rakesh, but she did not raise alarm anywhere in Shahjahanpur, Roorkee or Delhi. Thus, it is obvious that the prosecutrix had several opportunities to escape from the clutches of the accused-appellant but she did not do so. She admitted that she was living with accused-appellant Arun Singh in Delhi as husband and wife, thus the allegations of the prosecution are totally false.

22. I do not find force in the submission of learned Amicus Curiae as discussed above. At the time of occurrence the victim was aged about fifteen years and in that circumstances the admission regarding her living with the accused-appellant as husband and wife is immaterial and as far as the question of raising alarm is involved, it also has no relevance because according to the victim she was accompanied by three accused persons and according to victim (PW2) she was threatened with dire consequences by these accused-persons, if she raised alarm then her only brother shall be killed. Thus, due to threat and fear and to save the life of her younger brother she did not raise an

alarm and submitted herself before the accused-appellant to live with him as his wife shall has no significance.

23. Learned Amicus Curiae further submitted that as per the version of F.I.R. (Ext.Ka-1) the occurrence took place on 26/27.5.2012 in the night but the F.I.R. was lodged after an inordinate and unexplained delay of more than two weeks on 14.6.2012 and no satisfactory explanation was given by the prosecution regarding this inordinate delay.

24. I do not find any substance in the submission of learned Amicus Curiae because PW1 complainant Sarvesh Singh in his first information report (Ext.Ka-1) itself has explained the delay and stated on oath that he has remained in search of the victim till 14.6.2012 and when he failed to search out the victim and came to know that she has been kidnapped by the accused-appellant then he submitted Ext.Ka-1 F.I.R. in the police station-Majhila for legal action. Thus, the explanation given by PW1 Sarvesh Singh is reliable because in Indian society generally parents do not publicise this fact due to fear of future of their daughter and tried to search and the missing girl themselves without telling others. Thus the accused-appellant is not entitled to get any advantage.

25. In the last Learned Amicus Curiae submitted that the victim is a consenting party in making physical relations with appellant. Thats why appellant is entitled for acquittal.

26. I do not find substance in the submission of learned Amicus Curiae because the age of victim at the time of occurrence was below sixteen years as proved by PW1 complainant, PW2 victim herself and PW3 teacher Sri Om Prakash Pandey. As discussed above the age of victim was below sixteen years at the time of occurrence, hence the consent, if any, given by her to make physical relations by the appellant is immaterial. According to section 375 the consent given by a girl under the age of sixteen for making physical relations has no significance. A girl under the age of sixteen years is not capable to think about her good and bad and the pros and cons of her consent.

27. In view of the above discussion, facts and circumstances of the case, I find that the prosecution succeeds in proving the guilt of the accused-appellant beyond all reasonable doubts. The impugned judgement and order of learned trial Judge does not suffer from any illegality or irregularity requiring any interference by this Court.

28. In the facts and circumstances, the appeal is devoid of merits and is liable to be dismissed.

29. Consequently appeal is hereby dismissed.

30. Let the judgement be notified to the learned trial Judge for compliance, learned trial Judge shall submit his report regarding compliance within one and half month.

Dt. / /
Faridul.

(S.N. Agnihotri, J.)

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Counsel for Respondent :- Govt. Advocate

Hon'ble Satya Narain Agnihotri, J.

Learned Amicus Curiae, Sri Mohd. Sahid Akhtar and learned AGA present.

Perusal of the record shows that at the time of engagement of Sri Mohd. Sahid Akhtar as Amicus Curiae, the order of remuneration is not being made. Therefore, it is being passed today.

Seeing the facts and circumstances of the case, it will be just and proper to give order to Senior Registrar of this Court to pay Rs.10,000/- remuneration to Sri Mohd. Sahid Akhtar, Amicus Curiae who represented the accused and assist the Court.

Order Date :- 30.8.2017

Sarika