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Court : Uttaranchal

Decided On : Jun-18-2013

Judge : U.C. Dhyani

Appeal No. : Criminal Appeal No. 274 of 2012

Appellant : Sunil Kumar @ Sonu

Respondent : State of Uttarakhand

Judgement :

U.C. Dhyani, J. (Oral)

1. Informant Bhuvnesh Kumar wrote a complaint to Inspector Incharge, PS Kotwali Jaspur, on 10th May, 2011, enumerating the facts contained therein that on 05.05.2011, co-villager Sunil Kumar alias Sonu S/o Bhagat Ram kidnapped his brother Chandrabhans daughter Menka alias Neha, aged 14 years. Bhuvnesh Kumar stated that he belonged to Diawala. He has been searching for the missing girl Neha, since morning of 08.05.2011. The missing girl was seen in the company of Mulakhraj and Dharmveer by the villagers on 08.05.2011, at about 5:00 p.m.

2. Chik FIR was lodged in PS Jaspur, on 10th May, 2011, at 7:30 a.m. The same was registered as case crime no. 62 of 2012, under Sections 363 and 366A IPC. After the investigation, charge sheet against accused-appellant Sunil Kumar was submitted for the offences punishable under Sections 363, 366A and 376 IPC in the Court of Magistrate. The case was committed to the Court of Sessions.

3. When the trial began and prosecution opened its case, charge in respect of selfsame offences was framed against accused Sunil Kumar alias Sonu, to which he pleaded not guilty and claimed trial. Nine witnesses, namely, PW 1 Km. Neha, PW 2 Bhuvnesh, PW 3 Chandra Bhan, PW 4 Mulakhraj, PW 5 Dr. Archana Chauhan, PW 6 SI Revti Nandan Datt, PW 7 Dr. T.K.Pant, PW 8 Aakesh Kumar and PW 9 SSI Dharendra Kumar were examined on behalf of the prosecution. Incriminating evidence was put to the accused under Section 313 Cr.P.C., in which he said that he was falsely implicated in the case. He also said that he was physically challenged person, who suffered from polio. He was unable to run. No evidence was given in defence. After considering the evidence on record, accused Sunil Kumar was convicted of the offences punishable under Sections 363, 366 and 376 IPC. He was sentenced appropriately. Aggrieved against the impugned judgment and order dated 18.09.2012, present criminal appeal was preferred.

4. Prosecution led the evidence through PW 1 Smt. Neha (victim). In her examination-in-chief, she said that she knew Sunil Kumar alias Sonu. He was related to her as uncle. Sunil Kumar alias Sonu was a frequent visitor to her house. On 08.05.2011, she went to relieve herself in the jungle. Accused came to her and said that he loved her. Accused said that he wanted to marry her. Victim said that he should talk to her parents. Accused replied that he will talk to PW 1s parents. Sunil took PW 1 to Nainital. They rode on motorcycle. Accused took PW 1 to Garjia Temple at Ram Nagar. There, he pretended to marry to PW 1 in the Garjia Temple. Accused again brought PW 1 to Nainital. There they stayed in a hotel. Accused sexually assaulted her twice in the night. In para 3 of her examination-in-chief, PW 1 elaborated as to what happened with her. In other words, she gave details of the rape as to how the accused committed rape with her ?

5. PW 1 said that her date of birth was 05.06.1996. The incident took place on 08.05.2011. By that analogy, she was about 15 years of age. PW 1 further said that accused took her to Nainital on 08.05.2011, at 9:00 a.m. They reached Garjia Temple on the same evening at 3:00 p.m. They left the Garjia Temple at 4:00 p.m. and reached Nainital at 8:00 p.m. The accused committed rape with her in the night. Then, he sexually assaulted her again during the same night. On

09.05.2011, Bhuvensh Kumar (her uncle) brought police at 2:00 p.m. The victim along with the accused were apprehended by the police. The victim was taken to hospital for her medical examination on 10.05.2011, at 4:30 p.m. She said that she was medically examined. She told the medical officer that she was raped by the accused. The statement of PW 1 under Section 164 Cr.P.C. was recorded by the Magistrate on 11.05.2011. She was a pillion rider in the motorcycle. Accused threatened her not to raise alarm and said that she was being taken for a ride. She did not jump from the motorcycle. She denied the suggestion of learned counsel for the revisionist that she went with the accused on her own. In the cross-examination, she reiterated that accused sexually assaulted her. Nothing material surfaced in her cross-examination so as to suggest that she was telling a lie. The offences complained of against the accused-appellant were proved on the strength of the testimony of PW 1 alone.

6. PW 2 Bhuvnesh Kumar was the uncle of PW 1. PW 2 said that on 08.05.2011, when the victim did not turn up, he along with others started making a search for her. Co villagers Mulakhraj and Dharmveer met PW 2 in the evening, who said that they saw victim in the company of the accused on the selfsame day at 5:00 p.m. When PW 2 went to the house of the accused, he was not found present at his home. On 10.05.2011, he gave a complaint (Ext. Ka-2) regarding the incident. On 10.05.2011, the victim was found in the company of the accused. They were apprehended. Accused was having a motorcycle. Accused was taken by the Police to the Police Station, Jaspur. PW 2 said that her date of birth was 5th June, 1996 according to school transfer certificate.

7. PW 3 Chandrabhan was the father of PW 1. He said that, on 08.05.2011, his neighbour Sunil Kumar kidnapped his daughter (PW 1). On 10.05.2011, his daughter was found with the accused by the Police. Although accused was physically challenged, but he drove motorcycle. He was also a farmer (who involved himself in the farming activity).

8. PW 4 Mulakhraj was the witness of having last seen victim in the company of accused-appellant. He said that on 08.05.2011, when he was returning from his field at 4:00 a.m., he saw accused taking the victim along with him.

9. PW 6 SI Rewati Nandan was a formal witness, who proved chik FIR (Ext. Ka-6) and entry of the same in G.D. (Ext. Ka-7). PW 9 SSI Dhirendra Kumar was the investigating officer.

10. PW 5 Doctor Archana Chauhan, Medical Officer, L.D. Bhatt Government Hospital, Kashipur examined the victim on 10.05.2011. PW 5 said that there was no mark of injury on the private parts of the victim. While proving Ext. Ka-3, PW 5 said that, on internal examination of the victim, vagina admitted one finger tightly. Hymen was ruptured and healed. She was referred to radiologist for determining her age. Her vaginal smear was sent to the pathologist for ascertaining the presence of spermatozoa, dead or alive.

11. PW 7 Dr. P.K. Pant was posted as radiologist in L.D. Bhatt Government Hospital at Kashipur. Her x-ray was conducted for ascertaining her age. PW 7 proved x-ray plates (Exts. 1 and 2) and also proved Ext. Ka-4. According to PW 7, all the epiphysis round the elbow were fused (hence, her age was above 14). Epiphysis of tip of acroman and head of humerus were not fused. Hence, her age was below 15 years. Distal femoral and proximal libia and fibular epiphysis were not fused (hence, her age was below 16 years). Distal radial and ulnar epiphysis were not fused (hence, her age was below 18 years). According to PW 7, the radiological age of the victim was above 14 years.

12. The pathological report (Ext. Ka-5) said about the outcome of the examination of vaginal smear. According to Ext. Ka-5, vaginal smear revealed presence of mostly superficial epithelial cells. There was no evidence of spermatozoa. [Mere penetration is sufficient to constitute rape.]

13. PW 8 Aakesh Kumar Biswas, Principal of B.S.B. Inter College, Jaspur said that Menka d/o Chandrabhan was enrolled in his school on 15.07.2008. Earlier, she was studying in Government Higher Secondary School, Sanyasiwala, District Udham Singh Nagar. She was admitted to BSB Inter College on the basis of the transfer certificate issued by Government Higher Secondary School, Sanyasiwala. According to PW 8, Menkas date of birth is 5th June, 1996. He brought the original scholars register of his college and submitted the photocopy of the same, which was exhibited as Ext. Ka-6.

14. The above discussion would reveal that the accused-appellant, who was a frequent visitor to PW 1, aged about 15 years, kidnapped PW 1 and committed rape with her. The accused-appellant allured PW 1 that he will marry her. He took PW 1 to Garjia Temple at Ram Nagar and purportedly solemnized marriage with her. Thereafter, accused-appellant brought PW 1 to Nainital, stayed in a hotel and sexually assaulted her. The marriage, in fact, was never solemnized and the accused-appellant in the garb of marriage, committed rape with her. The fact remains that the victim, in any case, was below 16 years.

15. Learned counsel for the appellant laid much emphasis on the fact that the same was a consent-sex (consensual sex) between the victim and the appellant. It may be noted here that the consent, if any, of the victim, was immaterial, if she (victim) was below 16 years of age, as on the date of occurrence. A perusal of Section 375 IPC will reveal the same. The said Section is reproduced herein below for the sake of convenience:

375. Rape.- A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-

First.- ..

Secondly.-

Thirdly.-

Fourthly.-.

Fifthly.-..

Sixthly.- With or without her consent, when she is under sixteen years of age.

16. Thus, if the victim, in any case, is below 16 years of age and it is found that she was kidnapped and sexually assaulted with her consent, then such consent carries no meaning in the eye of law, as would be evident from the scheme of Section 375 IPC. Similar is the position in respect of offence punishable under Sections 363 and 366A IPC. If it is found that the victim is below 18 years of age,

then, even if she went with the accused on her own volition, it would be taken as if the victim was taken away or induced by the accused from her (victim's) lawful guardianship. In the instant case, exactly the same happened. Although, it was open to the victim to have raised hue and cry and could have got rid of the accused, but as said earlier, the victim was allured to accompany the accused on the false pretext that the accused will be marrying with the victim. This fact is under no dispute and is established by the prosecution that she was below 16 years of age as on the date of occurrence. Thus, the prosecution story was proved against the accused-appellant beyond reasonable doubt. The prosecution story, as well as the prosecution evidence was dealt with by the trial court in a reasoned and methodical way. The impugned judgment and order do not require any interference. This Court is not inclined to take a view contrary to what was taken by the Court below. The Criminal Appeal is liable to be dismissed.

17. Learned counsel for the appellant also placed reliance on ruling of Krishna Kumar Malik vs. State of Haryana, 2011(2) NCC 327 and Alamelu and another vs. State, 2011 (1) NCC 487. Learned counsel contended that non-raising of alarm after alleged abduction rendered the evidence of prosecutrix shaky and untrustworthy. But, in the instant case, victim, who was below 16 years of age, was not lifted by the accused-appellant, but she (victim) was allured to accompany him (accused-appellant) on the false pretext that he would marry her. The facts of Krishna Kumar Malik's case (supra) are distinct from facts of this case, also because the accused in Krishna Kumar Malik's case were not named, whereas in the instant case, she (victim) was apprehended from the custody of the accused-appellant on 10.05.2011. The accused-appellant was named in the first information report and therefore, there was no question of holding test identification parade, contrary to Krishna Kumar Malik's case. Every case is to be decided by the Courts on the basis of the totality of the circumstances. No case can be decided on the basis of an isolated sentence. The appellant in the instant case, therefore, does not get the benefit of Krishna Kumar Malik's case. It is therefore, not necessary to go into the question of getting the DNA test for matching the semen. Krishna Kumar Malik's case has altogether different facts in comparison with the facts of this case.

Whereas on the internal examination, the vagina of the victim admitted one finger tightly in the present case, the vagina of the victim of Krishna Kumar Malik's case admitted two fingers easily and she was habitual of sexual intercourse.

18. In *Alamelus* case (supra), the victim was abducted by car and was forcibly married to the accused. The victim was romantically involved with the accused. The victim was more than 16 years of age, on the date of alleged incident. The burden of proof was not discharged by the prosecution. The headmaster of the school was not examined. The facts of *Alamelus* case were distinct from the case in hand. The girl did not willingly go with the accused. She went with him on the false pretext that he would marry her. In other words, she was allured to marriage. Even if she was a willing partner in the entire episode, the same carried no meaning, in as much as, she was definitely below 16 years of age. She was taken by the accused on a motorcycle. He claimed himself to be a handicapped and yet had the strength and potential to ride a motorcycle. The percentage of his physical disability was not brought on record. If he could ride a motorcycle, it cannot be said that he was a physically challenged person. When he can travel from Jaspur to Ram Nagar and Ram Nagar to Nainital on a motorcycle, it cannot be said that he was not capable of kidnapping and sexually assaulting the victim. PW 1 has said, in no uncertain terms, as to what happened with her. The same is appropriately dealt with by the trial court in internal page no. 10 of the impugned Judgment. As said earlier, there was no infirmity in the judgment under Appeal.

19. The Criminal Appeal thus fails and is accordingly dismissed. The conviction and sentence awarded to the accused-appellant, vide impugned Judgment and Order dated 18.09.2012, is affirmed. The bail of the accused-appellant is cancelled. He is directed to surrender before the Court below to serve out the sentence, as awarded by the trial court, which is affirmed by this Court as well. Period already undergone by the accused-appellant during the investigation and during the trial shall be set off.

20. Let a copy of this judgment along with the Lower Court Record be sent to the Sessions Judge, Udham Singh Nagar, for causing surrender of the accused-appellant and sending him to prison for serving out the term of imprisonment.

