

Aash Mohammad Alias Aasu and Another Vs. State of Uttarakhand

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Court : Uttaranchal

Decided On : Jun-14-2013

Judge : U.C. Dhyani

Appeal No. : Criminal Appeal No. 58 of 2010 & Criminal Jail Appeal No. 24 of 2010

Appellant : Aash Mohammad Alias Aasu and Another

Respondent : State of Uttarakhand

Judgement :

U.C. Dhyani, J. (Oral)

Informant Ved Pal wrote a complaint to Station Officer, police station Gangnagar, Haridwar on 13.03.2009, enumerating the facts contained therein that his daughter Manisha, aged 13 years, who studied in Primary School, Ibrahimpur Deha was missing since 12.03.2009. Manisha went to school on 12.03.2009, but did not return by evening. A frantic search for her was made, but to no avail. Co-villagers Neetu and Rajesh Kumar informed Ved Pal that they saw victim in the company of accused Intzar. Chik FIR (Ext. Ka-7) was registered as case crime no. 50 of 2009, on 13.03.2009, at 10:30 P.M., in respect of offences punishable under Sections 363, 366A of IPC.

2) After the investigation, a charge-sheet was submitted against the accused Intzar and Aash Mohammad for the offences punishable under Sections 363,

366A, 376 and 120B of IPC. The case was committed to the Court of Sessions for trial. When the trial began and prosecution opened its case, charges for the offences punishable under Sections 363, 366A, 376 and 120B of IPC were framed against both the accused persons, who pleaded not guilty and claimed trial.

3) PW1 Ved Pal, PW2 Manisha, PW3 Rajesh Kumar, PW4 Dr. Kamal, PW5 Dr. Yogesh Kumar, PW6 Sanjay Rai Goswami, PW7 S.I. Govind Kumar and PW8 Poonam Agarwal were examined on behalf of the prosecution. Incriminating evidence was put to the accused persons under Section 313 of Cr. P.C., in reply to which they said that they were falsely implicated in the case. Accused (Intzar) said that he had acquaintance with the victim, but the prosecution story was false. No evidence was given in defence.

4) After considering the evidence on record, learned Addl. Sessions Judge, Roorkee exonerated both the accused persons of the offence punishable under Section 363 of IPC. Accused Aash Mohammad was also exonerated of the offence punishable under Section 376 of IPC. Accused Intzar and Aash Mohammad were convicted of the offences punishable under Section 366A and 120B of IPC. Accused Intzar was also convicted of the offence punishable under Section 376 of IPC. Both the convicts were sentenced appropriately. Aggrieved against said order, present criminal appeals were preferred separately by the convicts.

5) Prosecution led the evidence through victim PW2 Manisha. In her examination-in-chief, she said that she was studying in primary school in the village. On the fateful day, when she was coming back from her school, accused Intzar administered some sedative or intoxicating substance to her, as a result of which she became unconscious. When PW2 regained consciousness, she found herself in Manglaur in the house of Aash Mohammad. Aash Mohammad and intzar were having conversation with each other that the police was after them and therefore made a plan to take PW2 elsewhere. Then PW2 was taken to another place, but before that, Intzar committed rape with her. Intzar took her to Meerut where she was kept in the house of one of his acquaintance. Intzar insisted PW2 to solemnize marriage with him (which PW2 refused). Intzar committed rape with her

in Meerut also. Thereafter, Intzar brought PW2 to Roorkee, where they were apprehended by the police. Victim and accused Intzar were brought to the police station. PW2 was medically examined. Her wearing apparel were taken by the police in their possession, a memo (Ext. Ka-2) whereof was prepared, which was signed by PW2.

6) PW2 also said that her statement under Section 164 of Cr. P.C. was got recorded before a Magistrate on the next day. PW2 affirmed that she gave the statement (Ext. Ka-3) before the Magistrate. In the cross-examination, PW2 said that she went to school in the school uniform. The children of the co-villagers also studied in the same school. When she was kidnapped, no other child accompanied her. Mid-day meal was not served in the school on that day. The location of the school and place of incident was also asked from PW2 in the cross-examination. PW2 replied those questions. PW2 denied the suggestion that she was served with some eatables by the accused Intzar on the fateful day. PW2 became unconscious when she was given sedative or intoxicating substance. She regained consciousness only at Manglaur in the evening. She was kept for two nights at Manglaur. PW2 admitted that there was abadi in the vicinity of the place of occurrence. PW2 also added that she was kept inside the room and was not permitted to go outside. PW2 had never been to Manglaur before this incident. She was also kept in a house at Meerut. When PW2 returned from Meerut to Roorkee, she along-with accused Intzar travelled in a bus. In para 12 of the cross-examination, PW2 admitted that she was married to someone else about 7-8 months (of the date of deposition). PW2 knew what was meant by rape. Intzar used to come to PW2s shop for taking tea. PW2 was studying in class IV when the incident took place. PW2 did not see any policeman at the bus station. Police took her wearing apparel in its possession.

7) PW2 also said that her tea stall was situated at Roorkee-Bhagwanpur road. She had seen Aash Mohammad before this incident. PW2 admitted in her cross-examination that when Intzar took her to Aash Mohammads house, Aash Mohammad was not present in his house. He (Aash Mohammad) came to his house at a subsequent point of time. When Aash Mohammad came, he stayed there for 1-1 hours. Thereafter, he never came back to his house. Many other

questions were asked in the cross-examination of PW2, which are not worth mentioning.

8) It is established on the basis of evidence of PW2 that accused-appellant Intzar kidnapped the victim by administering some sedative substance, took her from one place to another until they were apprehended at the Roorkee Railway Station. Whereas, the offence against accused-appellant Intzar is established on the strength of oral testimony of PW2 alone, there was no evidence regarding the involvement / conspiracy between Aash Mohammad and Intzar, in as much as Intzar took PW2 to Aash Mohammads house, when Aash Mahammad himself was not present at his house. Aash Mohammad was not aware as to whether the victim was brought to his house by Intzar. When Aash Mohammad came to his house, he came to know of the said fact for the first time. Perhaps he was taken by surprise. He stayed in his house for 1-1 hours, but never returned to his house thereafter, as was evident from the evidence on PW2. Thus, the charge of conspiracy was also not established against either accused-appellant Intzar or Aash Mohammad. Accused-appellant Aash Mohammad therefore, is liable to be exonerated of the charges levelled against him. Accused-appellant Intzar too is liable to be exonerated in so far as the charge under Section 120B of IPC is concerned. But the fact remains that the offence punishable under Sections 366A and 376 of IPC were established on the basis of the reliable oral testimony of PW2. The victim did not say anything against Aash Mohammad in her statement under Section 164 of Cr. P.C.

9) PW1 Ved Pal was the informant and father of the victim, who supported prosecution story in his examination-in-chief and also said that his daughter studied in a Government school. When his daughter did not return from the school, he made a frantic search for her, but to no avail. Co-villagers Rajesh and Neetu informed PW1 that they saw victim in the company of Intzar. PW1 proved the complaint (Ext. Ka-1) and also said that the victim was aged 13 years when the incident took place. The victim was studying in class IV. In the cross-examination, PW1 said that he did not know Aash Mohammad. Nobody told anything regarding involvement of Aash Mohammad. PW1 also said that he got his daughter Manisha married about 8 months ago (from the date of his deposition). Thus no case was

made out against accused-appellant Aash Mohammad on the basis of evidence of PW1 also.

10) PW3 Rajesh Kumar was the person, who informed PW1 that the victim was seen in the company of accused Intzar. PW6 Sanjay Rai was a formal witness, who proved chik FIR (Ext. Ka-7) and entry of the same in the GD (Ext. Ka-8). PW7 S.I. Govind Kumar was the Investigating Officer of the case.

11) PW4 Dr. Kamal, Medical Officer, examined the victim on 16.03.2009, at 02:30 P.M. PW4 was not of definite opinion whether the rape was committed with the victim or not? PW4 proved the report (Ext. Ka-4) and supplementary report (Ext. Ka-5). The Medical Officer did not find any injury on the private parts of the victim. Vagina admitted one finger easily. Hymen was ruptured. No bleeding was present in vagina. Vaginal smear was taken and sent for hystopathological examination. The victim was also referred to the Radiologist for determination of her age. After receiving the report of PW5 Dr. Yogesh Kumar, PW4 gave the supplementary report holding that Manisha was more than 16 years and less than 17 years of age. No spermatozoa, dead or alive, was seen. PW5 Dr. Yogesh Kumar, Radiologist found complete epiphyseal fusion at lower end of humerus bone and upper end of radius and ulna bone. Partial epiphyseal fusion was seen at lower end of femur and upper end of tibia bone. Epiphyseal fusion was not seen at lower end of radius and ulna bone. PW5 proved his report (Ext. Ka-6). In his statement PW5 did not rule out the possibility that the victim might be below 16 years.

12) The controversy regarding age of the victim was set at rest by PW8 Smt. Poonam Agarwal, who was In-Charge Principal of Govt. Primary School, Ibrahimpur Deh, Roorkee. PW8 said that the date of birth of Manisha is 07.05.1999. Manisha was a student of class III. PW8 proved the school leaving certificate (Ext. Ka-12). She brought original documents while coming to depose before the trial court. Since victim's date of birth is 07.05.1999 and the incident took place on 12.03.2009, by this analogy, the victim was nearly 10 years old as on the date of occurrence. Thus, there was no conflict between the school leaving certificate and the statements of PW1 and PW2, so far as the status of minority of the victim is concerned. PW1 said that his daughter was aged 13 years when the

incident took place. When PW2 Manisha came to depose, she said that she was 13 years of age. PW5 Dr. Yogesh, Radiologist, did not rule out the possibility of victims being under 16 years of age. In the circumstances, the consent, if any, of the victim was immaterial, in as much as, the age of reckoning for the purpose of Section 375 of IPC is 16 years, as is evident from the scheme of the said Section.

13) Section 375 of IPC defines rape as 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:-

..

..

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

...

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14) In other words, if the victim was below 16 years when the incident took place and even if it is conceded for the sake of argument that the victim consented to go with the accused, such consent was immaterial. The framers of the Law were conscious in holding that the consent of a girl, who is below 16 or 18 years, when she is sexually assaulted or kidnapped by the accused, is of no relevance. Considering these aspects of the case, this Court is of the view that the accused Intzar was rightly convicted by the court below in respect of offences punishable under Sections 366A and 376 of IPC. The findings of the court below are affirmed to this extent.

15) Learned Amicus Curiae submitted that the accused-appellant Intzar is in jail for more than four years. Learned Amicus Curiae contended that there was no other earning member in the family of Intezar. He also contended that the accused-appellant was a young man when the crime was committed by him. Accused-appellant Intezar is in jail for sufficiently long period and he has no previous criminal history. This Court is therefore, persuaded to reduce the sentence

awarded to the accused-appellant Intzar by the court below.

16) The criminal appeal filed by accused-appellant Aash Mohammad is therefore allowed. The conviction and sentence recorded by the trial court against him in respect of offences punishable under Sections 366A and 120B of IPC is hereby set aside. He is acquitted of the said charges. Accused-appellant Aash Mohammad is on bail. His bail bonds are cancelled and sureties stand discharged. He need not surrender. The criminal Jail appeal filed by accused-appellant Intzar is allowed in part. The conviction and sentence recorded by the trial court against him in respect of offence punishable under Section 120B of IPC is hereby set aside. He is acquitted of said charge. His conviction in respect of offences punishable under Sections 366A and 376 of IPC awarded by the court below is affirmed / maintained, but the sentences recorded by the court below on both the counts is modified. The Accused-appellant shall undergo rigorous imprisonment for a period of seven years and a fine of Rs.10,000/-, in default of payment of which, he is required to further undergo imprisonment for a period of one year under Section 366A of IPC. He shall also undergo rigorous imprisonment for a period of seven years along-with a fine of Rs.10,000/-, in default of payment of which, he is required to further undergo imprisonment for a period of one year under Section 376 of IPC. Both the sentences shall run concurrently. Accused-appellant Intzar is in jail. The trial court shall ensure that the accused-appellant Intzar serves out the sentences as modified by this Court.

17) Let a copy of this judgment be sent to the Superintendent of jail concerned, where the accused-appellant Intzar is currently serving out his sentence.

18) A copy of this judgment along-with the lower court records be also sent to the court below for ensuring compliance.

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