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Court : Rajasthan

Decided On : Mar-26-1980

Reported in : 1980WLN(UC)268

Judge : M.B. Sharma, J.

Appeal No. : S.B. Criminal Appeal No. 570 of 1979 and Jail Appeal No. 37/1980

Appellant : ishwar Singh

Respondent : State of Rajasthan

Judgement :

K.D. Sharma, J.

1. The learned Additional Sessions judge No. 1, Jodhpur, has convicted both the above named accused appellants under Section 366, IPC and each of the accused has been sentenced to undergo four year's rigorous imprisonment and to pay a fine of Rs. 200/-, in default of payment of fine, to suffer further one months simple imprisonment. Accused Babulal has preferred a jail appeal whereas Ishwarsingh has preferred a re> presented appeal. As both the appeals arise out of the same judgment, they are being disposed of by this common judgment.

2. Briefly stated, the prosecution story is that Mst. Galuri, a girl aged about 14 years, resident of Ramdeora, on January 16, 1979, had gone to Pokaran to make

some purchases. When she was at the meat shop of Shafi Mohammed PW 11, it is alleged that both the accused persons came to her and took away the said Galuri PW 5 on cycle on the pretext that she was being taken away to village Ramdeora to the house of her father. The accused persons are alleged to have taken her from place to place and they also subjected her to sexual intercourse. It was only on January 24, 1979, when Galuri was staying with the accused appellants in room No. 17 in Panchayati Dharamshala, Sriganganagar that the police suspected the commission of some offence and Galuri was recovered from the possession of both the accused persons. After investigation, a charge sheet was filed and the accused appellants were tried for offence under Section 366 and 376, IPC. On behalf of the prosecution, as many as 15 witnesses were examined including Galuri PW 5. The statements of each of the accused were recorded thereafter under Section 313, Cr. P.C. and they denied that they took away Galuri from the lawful guardianship of her father. Accused-appellant Ishwarsingh also pleaded that it was a chance that Galuri met him in the market of Pokaranand and she prevailed upon him to take her with him. In short, his plea was that Galuri was not taken or enticed away by him but she, of her own free will and voluntarily, accompanied him. The accused person did not examine any witness in defence.

3. The learned Additional Sessions Judge reached the conclusion that the age of Mt. Galuri PW 5 on the date of the occurrence, was about 14 years and as such, she was a girl aged below 18 years in any case. He also held that Galuri was taken away by the accused persons on the pretext that she was being taken to Ramdeora to the house of her father.

4. The first contention of the learned advocate for the accused appellant Ishwarsingh is that from the material on record, it is not satisfactorily established that Mst. Galuri was below 18 years on the date of the occurrence. It is contended by him that though the medical experts have stated that Galuri was aged about 14 years but there is a margin of three years, this way or that way and, therefore, it cannot be held to have been established that she was aged below 18 years. In support of his submission, he has placed reliance on *Shantilal v. State of Rajasthan* Cr. L.R. (Raj) 1979 P. 514. In this case, it was observed by the learned Judge by reference to Modi's Medical Jurisprudence and Toxicology that the range

of error may be up to three years either way but in that case, the opinion was based on the evidence of the epiphyseal union of the iliac crest. It may be stated in the facts and circumstances of this case, even assuming that the range of error may be three years either way, the age of Galuri cannot be said to be 18 years or above on the date of the occurrence. As per the opinion of the medical experts, she was aged about 14 years and, therefore, she could not be aged more than 17 years. Dr. R. Shrimali is Professor of Radiology, Mahatma Gandhi Hospital, Jodhpur. He has stated that he had taken the x-ray of wrist, elbow and pelvis of Mst. Galuri vide x-ray films Ex. 3 to Ex. P. 6. The x-ray report showed that epiphysis at the medial epicondyle of humerus is separate, the epiphysis at lower end of radius and ulna and metacarpal heads are separate, the iliac crest epiphysis had just appeared. Hence he opined that the girl was aged about 14 years. Looking to the fact that epiphysis of the medial epicondyle of humerus was separate and so was the epiphysis at lower end of radius and ulna and metacarpal heads, it cannot be said that in any case, the age of Galuri was more than 18 on the date of the occurrence. Dr. Jitendra Kumar PW 1 had examined Galuri clinically and he too had stated that she was aged about 14 years. Dr Naharsingh PW 15 was Medical Jurist Mahatma Gandhi Hospital, Jodhpur and he too examined Galuri and stated on the basis of the general findings and ossification of bones that the estimated age of Mst. Galuri was about 14 years. Jetharam PW 7, the father of Galuri had stated that the age of Galuri was about 13 years on the date of occurrence. Surprisingly, he was not put a single question in cross-examination which might have gone a long way in determining the age of Mst. Galuri. Therefore, it has been rightly held by the learned Additional Sessions judge that the age of Galuri was about 14 years on the date of the occurrence, that is, on January 16, 1979 and in any case, she was aged below 18 years.

5. The next question which is important for consideration is as to whether on the evidence on record, It can be held that Galuri was taken or enticed away out of the keeping of the lawful guardianship of her father Jetharam PW 7 If Section 361 is read, it will be clear that the consent of the minor taken away is wholly immaterial and it is only the guardian's consent which takes the case out of its purview It is not necessary that the taking of or enticing within the meaning of Section 361 of the Indian Penal Code must be shown to have been by means of force or fraud.

Persuasion by the accused persons which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardianship should be sufficient to attract Section 361, LP C. The question to be seen therefore is as to whether Galuri left the house of her father or accompanied the accused persons at Pokaran completely uninfluenced by any promise, fraud or threat or whether she left because of the enticement or allurement by the accused person? In the instant case, there is solitary statement of Mst. Galuri, who has stated that when she was in the market of Pokaran at the shop of Shafi Mohammad PH 11 accused Persons came to her and gave out that they will take her on their cycle to Ramdeora to the house of her father. First she refused to go but later on the accused persons insisted and she went with them. It has been stated by her that she was taken from place to place by the accused persons and there is material on record from which it can be said that she was recovered on January 24, 1979 from a Dharamshala at Sriganganagar. Both the accused persons had visited the house of her father Jesharam PW 7 and it was hardly a day or two earlier to the alleged incident. They stayed at the house of her father during the night, then left at 430 when Galuri was at the midst of her journey from Ramdeora to Pokarao and from there, she was taken by them on the cycle. Even when a minor girl goes from the house of her father who is her lawful guardian to make purchases in the market, she still continues to be in the lawful guardianship of her father and if she is taken away or enticed by the accused persons from the market, it can be said that she was taken by the accused persons within the meaning of Section 361, I.P.G. The circumstances of the case enumerated above that the accused stayed at the house of her father a day or two earlier, came to her when she was at the shop of Shafi Mohammed, go to show that she was allured by the accused persons to accompany them and as such, it can be said that she was taken away by the accused persons from the lawful guardianship of her father. No doubt from the evidence of the medical experts it appears that she was used to sexual intercourse but they have stated that from their examination, they came to the conclusion that she was used to sexual intercourse for the last about a month. The circumstance that she was used to sexual intercourse is not such which alone is sufficient to say that the statement of Galuri so far as the taking of her by the accused persons is concerned, can be excluded. But the fact that she was used to sexual intercourse

shall be taken into consideration while awarding sentence.

6. Galuri was found inside a room of the Dharmshala on a cot on a part of which Ishwar Singh was lying at that time and the other accused was also present. On examination, she was found to be u*ed to sexual Intercourse. Though the accused persons had been acquitted of the charge under Section 376, I.P.C. but in the circumstances of this case and on the material on recorded, there can be hardly any doubt that Galuri was kidnapped by the accused persons with intention that she may be compelled or knowing It to be likely that she may be forced or induced to Illicit sexual intercourse. There fore, both the accused persons have been rightly convicted under s. 366 of the Indian Penal Code. But the sentence, in the circumstances of the case, appears to be excessive.

7. In the result, both the appeals are allowed in part. So far as the conviction is concerned, the appeals are dismissed But each of the accused is sentenced to two years' rigorous imprisonment and a fine of Rs.50/-, in default of payment of fine, to further suffer rigorous imprisonment for one month Accused Ishwersingh is on ball. He shall surrender to his bail bonds to undergo the sentence as modified, failing which the trial Court shall take steps to take the accused in custody to undergo the sentences awarded or the remaining part thereof. Accused Balulal is in jail. He shall be informed of the result of this appeal.