

Rajan and ors. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jan-17-2002

Reported in : 2002CriLJ3152; 2002(4)WLN132

Judge : Sunil Kumar Garg, J.

Acts : Indian Penal Code (IPC) - Sections 120B, 266, 366, 366A, 376 and 376(1)

Appeal No. : S.B. Criminal Appeal No. 955 of 2001

Appellant : Rajan and ors.

Respondent : State of Rajasthan

Advocate for Def. : M.A. Bhurat, Public Prosecutor

Advocate for Pet/Ap. : Chaitanya Gehlot, Adv.

Disposition : Appeal allowed

Judgement :

Garg, J.

1. This appeal has been filed by the accused appellants against the judgment and order dated 29.11.2001 passed by the learned Addl. Sessions Judge(Fast Track), Ratangarh District Churu in Sessions Case No. 80/2001 (20/2000 ADJRatangarh) by which he convicted and sentenced the accused appellants in the following

manner:-

Name of accused appellants

Convicted u/Section

Sentence awarded

(1) Rajan

366/120-B IPC

Four years RI and to pay a fine of Rs.100/-, in default of payment of fine, to further undergo, RI for six months.

366-A/120-B IPC

Four years RI and to pay a fine of Rs.100/-, in default of payment of fine, to further undergo, RI for six months.

376 IPC

Ten years RI and to pay a fine of Rs.100/-, in default of payment of fine, to further undergo, RI for one year.

(2) Hariram (3) Ramsharan Das

366/120-B IPC

Four years RI and to pay a fine of Rs.100/-, in default of payment of fine, to further undergo, RI for six months.

366-A/120-B IPC

Four years RI and to pay a fine of Rs.100/-, in default of payment of fine, to further undergo, RI for six months. All the above substantive sentences were ordered to run concurrently.

The learned Addl. Sessions Judge also convicted the accused appellants for the offence under Sections 363/120-B IPC, but no sentence was passed for the said offence.

2. The facts giving rise to this appeal, in short, are as follows:-

On 19.3.2000 at about 11.30 a.m., PW1 Leeladhar lodged a written report Ex.P/2 with the Police Station Kotwali, Churu stating inter-alia that his niece Pinky, PW2 (hereinafter referred to as the prosecutrix) aged about 14 years, daughter of Nandlal (PW3) came to Churu, from Delhi and on 18.3.2000 at about 2.00 p.m., she was found missing and in that report, suspicion was placed on the accused appellant Pankaj @ Rajan that she had gone with the accused appellant Pankaj @ Rajan.

Thereafter, on 23.3.2000 PW1 Leeladhar lodged another report Ex.P/1 before Dy.S.P., Churu stating inter alia that on 18.3.2000, prosecutrix PW2 Pinky was being enticed by the accused appellant Pankaj 2 Rajan and his brother Hari Ram (accused appellant No. 2) and both had taken her from Delhi to Churu and he had come to know from reliable sources that they all are at Delhi. It was further stated in the report that age of the prosecutrix PW2 Pinky was 14 years and she was student of 8th Class and efforts be made to recover prosecutrix PW2 Pinky.

On that report, police registered the case for the offence under Sections 363, 366 IPC and chalked out regular FIR Ex.P/3 and started investigation.

During investigation, on 24.3.2000, prosecutrix PW2 Pinky was got recovered through Ex.P/4 and her medical examination was got conducted by PW8 Dr.Satyapal and her medical examination report is Ex.P/15, where doctor found that her vagina admits two fingers and her medical examination report Ex.P/15 further shows that she was experienced one for sexual intercourse. For the purpose of ascertaining her age, X-rays of her wrist, elbow and pelvis were taken and after seeing the X-rays, the doctor opined that her age was between 16 to 17 years and that Certificate of age is Ex.D/3.

During investigation, police also came to know that prosecutrix PW2 Pinky was student of Nigam Prathamik Vidyalaya, Rohini Sector 4, Delhi and in the TC Certificate (Ex.P/21A), her date of birth was shown as 16.10.1986. Ex.P/22A is the admission from submitted by PW3 Nandlal, father of the prosecutrix and in that also, the age of the prosecutrix PW2 Pinky was shown as 16.10.1986 and Ex.P/23A is the admission and withdrawal register of the school, namely Sarvodaya Girls School, Delhi, where the age of the prosecutrix was shown as 16.10.1986.

The accused appellants Rajan, Hariram and Ramsharan Das were arrested through Ex.P/7, Ex.P/8 and Ex.P/9 respectively.

After usual investigation, police submitted challan against the accused appellants in the Court of Magistrate, from where the case was committed to the Court of Session.

On 30.6.2000 the learned Addl. Sessions Judge, Churu framed charges for the offence under Sections 363/120-B, 366/120-B, 366-A/120-B IPC against accused appellants Hariram and Ramsharan Das. The charges were read over and explained to the accused appellants. The accused appellants denied the charges and claimed trial.

During trial, the prosecution in support of its case examined as many as 10 witnesses and got exhibited some documents. Thereafter, statements of the accused appellants under Section 313 Cr.P.C. were recorded. No evidence was produced in defence by the accused appellants. However, some documents were got exhibited in defence by the accused appellants.

After conclusion of trial, the learned Addl. Sessions Judge (Fast Track), Ratangarh through his judgment and order dated 29.11.2001 convicted and sentenced the accused appellants in the manner as stated above holding inter-alia:-

1. That on the date of the occurrence, the prosecutrix PW2 Pinky was below 18 years of age.

2. That accused appellant Rajan and sex with the prosecutrix PW2 Pinky against her will.
3. That if there was any consent on the part of the prosecutrix PW2 Pinky, that consent had no meeting in the eye of law, as she was minor.
4. That prosecutrix PW2 Pinky was kidnapped by the accused appellants by making conspiracy.

Aggrieved from the said judgment and order dated 29.11.2001 passed by the learned Addl. Sessions Judge (Fast Track), Ratangarh, this appeal has been filed by the accused appellants.

3. In this appeal, the learned counsel appearing for the accused appellants has made the following submissions:-

(1) That since in doctor's certificate Ex.D/3, by which the age of the prosecutrix PW2 Pinky was determined, it has been clearly mentioned that her age was between 16 to 17 years, therefore, preference should be given to the doctor's opinion, rather on school certificates and thus, prosecutrix PW2 Pinky should be declared as major one.

(2) That from the evidence on record, the fact that she was a consenting party to all the activities, right from the very beginning is well established and when she is a major girl, no offence was committed by the accused appellants.

(3) That so far as the accused appellants Hariram and Ramsharan Das are concerned, they have committed no offence.

Hence, it was prayed that this appeal be allowed and the impugned judgment and order be set aside and the accused appellants be acquitted of the charges framed against them.

4. On the other hand, the learned Public Prosecutor supported the impugned judgment & order passed by the learned Addl. Sessions Judge (Fast Track), Ratangarh.

5. I have heard the learned counsel for the accused appellants and the learned Public Prosecutor and perused the record of the case.
6. To appreciate the above contentions, first the age of the prosecutrix PW2 Pinky has to be determined.
7. The Hon'ble Supreme court in Sidheswar Ganguly v. State of West Bengal (1) has held that conclusive evidence of the girl's age may be the birth certificate, if it is not available then in conjunction with such oral testimony as may be available.
8. In Mohd. Ikram Hussain v. The State of Uttar Pradesh (2) the Hon'ble Supreme Court has held that certified copies from school registers while deciding the question of age of girl, amount to evidence under the Indian Evidence Act.
9. The above view was reiterated by the Hon'ble Supreme Court in Harpal Singh and Anr. v. State of Himachal Pradesh (3), where it has been held that entries in birth register made by concerned official in discharge of his official duties, are admissible evidence under Section 35 of the Indian Evidence Act.
10. In Bhoop Ram v. State of U.P. (4), the Hon'ble Supreme Court has held that on the point of proof of age, school certificate is the best evidence and so far as the medical certificate is concerned, the same is based on estimate and possibility of error cannot be ruled out.
11. Thus, it can easily be said that best evidence for determination of age is the birth certificate or the school certificate and in case it is available, that would be considered the best evidence and so far as the medical evidence is concerned, since it has margin of error, it would be taken into consideration, it would be taken into consideration only when primary evidence which is found in the birth certificate or school certificate is not available.
12. In the present case, School certificates Ex.P/21A, Ex.P/22A and Ex.P/23A of the prosecutrix PW2 Pinky have been produced by the prosecution and these documents show that her date of birth is 16.10.1986.

13. To prove the School Certificates Ex.P/21A, Ex.P/22A and Ex.P/23A of the prosecutrix PW2 Pinky, PW10 R.P. Bhuriya has been examined by the prosecution. He has stated on oath that he was Senior Clerk in the Sarvodaya Girls School, Delhi and Ex.P/21A is the Transfer Certificate of the prosecutrix PW2 Pinky and in that Transfer Certificate Ex.P/21A, her date of birth was shown as 16.10.1986 and this witness had himself brought with him the original Transfer Certificate. He has further stated that Ex.P/22A is the admission form of the prosecutrix PW2 Pinky and in that admission form also, her date of birth was shown as 16.10.1986. He has further stated that Ex.P/23A is the admission and withdrawal register in which also same date of birth is mentioned and this witness has deposed on oath all these facts after seeing the original documents. He has proved the School Certificate Ex.P/21 A, Ex.P/22A and Ex.P/23A of the prosecutrix PW2 Pinky.

14. Thus, from the statement of PW10 R.P. Bhuriya and from the School Certificates Ex.P/21A, Ex.P/22A and Ex.P/23A, it is very much clear that the date of birth of the prosecutrix is 16.10.1986.

15. In the present case, the alleged incident took place on 18.3.2000 and the date of birth of the prosecutrix PW2 Pinky is 16.10.1986 and thus, on the date of occurrence, her age was about 13 years 5 months and on the contrary, the doctor opined in the Certificate Ex.D/3 that on the date of occurrence, she was between 16 to 17 years, in my considered opinion, since school certificates of the prosecutrix PW2 Pinky are available in the present case, therefore, school certificates would be taken into consideration as it is based on estimate and possibility of error cannot be ruled out.

16. For the reasons stated above, it is held that prosecutrix PW2 Pinky was below 16 years of age on the date of occurrence, though the learned Addl. Sessions Judge observed that she was below 18 years of age on the date of occurrence.

17. The next question is whether irrespective of the fact that prosecutrix PW2 Pinky was minor or not, there was consent on the part of the prosecutrix PW2 Pinky or not.

18. PW1 Leeladhar is the Mama of the prosecutrix PW2 Pinky, who lodged the reports Ex.P/2 and Ex.P/1 on 19.3.2000 and 23.3.2000 respectively. He has admitted the following facts in his cross- examination:-

(1) That it is correct to say that on 19.3.2000 he lodged the report Ex.P/2 with the Police Station Kotwali Churu that the prosecutrix PW2 Pinky had gone with the accused appellant Pankaj @ Rajan.

(2) That earlier to that incident, he had gone to Delhi twice and the accused appellant Pankaj @ Rajan used to live near the house where the prosecutrix PW2 Pinky used to live, but seeing them, he had suspicion over both of them.

(3) That accused appellant Rajan used to come to the house of the prosecutrix PW2 Pinky and the other accused appellants Hariram and Rarnsharan also used to visit the house of the prosecutrix PW2 Pinky.

(4) That accused appellant Pankaj @ Rajan used to do telephone from Delhi to the prosecutrix at Churu.

(5) That on telephone, accused appellant Pankaj @ Rajan used to say whether he should take her or not and this fact was disclosed to him the prosecutrix herself.

(6) That thereafter, prosecutrix PW2 Pinky had gone with the accused appellant Pankaj @ Rajan.

(7) That when prosecutrix PW2 Pinky was recovered, she was having long in her Nose and Bichhua in the finger of her foot.

(8) That before the alleged incident, there was love between the accused appellant Pankaj @ Rajan and the prosecutrix PW2 Pinky and he had come to know this fact from the prosecutrix herself.

19. The best evidence in this case is of the prosecutrix PW2 Pinky herself. She has stated in her statement recorded in Court that on 18.2.2000 she herself left the house of her Nana in the noon and reached Railway Station where all three accused appellants met her and, thereafter, they took her to Bus Stand and they boarded the Bus going to Jaipur and then they reached Delhi in night and from

there, they boarded Auto Rickshaw and she was kept in a rented house at Delhi and in that house, accused appellant Pankaj @ Rajan had sex with her after putting off clothes. She has further stated that on 21.2.2000, accused appellant Ramsharan Das came and told accused appellants Rajan and Hariram that mother and father of the prosecutrix PW2 Pinky had come there and they were searching her, therefore, they should change the house. Thereafter, they took her to another house and she was introduced as wife of the accused appellant Pankaj @ Rajan and on the night of 22.2.2000, accused appellant Pankaj @ Rajan had sex with her again. She has further stated that on 23.2.2000, accused appellant Ramsharan Das again came and told that police had also come and searching them. Thereafter they took her to another house, where she was also introduced as wife of the accused appellant Pankaj @ Rajan. Thereafter, they went in the morning to a park, where they were apprehended by Churu Police.

In cross-examine, she has admitted:-

- (1) That since Oct. 1999, she had sex with the accused appellant Pankaj @ Rajan prior to alleged incident.
- (2) That no complaint about the conduct and behaviour of the accused appellant Pankaj @ Rajan was made by her to any body.
- (3) That Ex.D/1 is a love letter, which was also written by her to accused appellant Pankaj @ Rajan.

20. After carefully scrutinizing the evidence available on record, it can be concluded:-

- (1) That prosecutrix PW2 Pinky could have not left her Mama's house at Churu unless there was a definite plan arrived at between the prosecutrix PW2 Pinky and the accused appellants.
- (2) That the intimacy that had developed between the two (prosecutrix P.W. 2 Pinky and the accused appellant Pankaj @ Rajan) did play considerable part in the whole affair of elopement and the prosecutrix P.W. 2 Pinky could have not left the house of her Mama's at Churu, but for the instigation or cooperation or

accompaniment of the accused.

(3) That from Churu, she went to Delhi and there she lived in different houses and she was introduced as wife of the accused appellant Pankaj (a) Rajan and both the accused appellant Pankaj @ Rajan and prosecutrix PW2 Pinky had sex at Delhi many times and, therefore, in these circumstances, to say that she was raped by the accused appellant Pankaj @ Rajan against her will, cannot be accepted.

(4) That what was done between the accused appellant Pankaj @ Rajan and the prosecutrix PW2 Pinky in having sex and elopement, there was a tacit consent on the part of the prosecutrix PW2 Pinky.

(5) That the fact that prosecutrix PW2 Pinky remained in the company of the accused appellants and she was taken from one place to another and during that period she did not make any complaint to anybody, also goes to show that she was a consenting party right from the very beginning.

21. Looking to the above facts and circumstances, it is to be seen what offence or offences have been committed by the accused appellants.

Offence punishable under Section 376 IPC

22. As already stated above, the prosecutrix PW2 Pinky was below 16 years of age on the date of occurrence. It has also been held that prosecutrix PW2 Pinky was consenting party. However, if the victim is below 16 years, the question of consent does not arise, as held by the Hon'ble Supreme Court in Harpal Singh v. State of Himachal Pradesh (supra). Therefore, in this case, consent of the prosecutrix PW2 Pinky so far as the offence of rape is concerned, would have no effect. The theory of consent may be one of the factors for mitigating sentence, but this is another matter.

23. The fact that the prosecutrix PW2 Pinky was experienced girl for having sex would not exonerated the accused appellant Rajan from the offence of rape as she was below 16 years of age.

24. For the reasons stated above, the findings of the learned Addl. Sessions Judge (Fast Track) convicting the accused appellant Rajan for the offence under Section 376 IPC are liable to be confirmed.

Offence punishable under Sections 366/120-B, 366-A/120-B and 363/120-B IPC

25. In my considered opinion, where a girl of less than 18 years is taken away, or the girl has herself gone, the accused persons taking the minor girl should be held guilty for the offence under Section 366 IPC notwithstanding the fact that she accompanied the accused persons of her own accord and not as a result of force or misrepresentation.

26. Since in the present case, the prosecutrix PW2 Pinky was below 16 years of age, therefore, the offence of kidnapping punishable under Section 366 IPC is well proved against the accused appellants. So far as the participation of accused appellants Hariram and Ramsharan is concerned, from the statement of the prosecutrix PW2 Pinky, it is also very much clear that they were found on the Railway Station at Churu and they went alongwith the accused appellant Rajan and prosecutrix from Churu to Delhi and they also accompanied them from one place to another at Delhi and, therefore, it cannot be said that no offence was committed by them.

27. Thus, the findings of the learned Addl. Sessions Judge (Fast Track) convicting the accused appellants for the offence under Section 366/120-B IPC are liable to be confirmed.

28. So far as the conviction of the accused appellants for the offence under Section 366-A is concerned, that cannot be sustained because of the simple reason that Sections 366-A and 366B IPC have been introduced to punish the export and import of girls for prostitution and this is not the case of the prosecution in the present case, as from the evidence on record, it is very much clear that both prosecutrix PW2 Pinky and the accused appellant Rajan were having love affairs and because of that reason, she herself had gone alongwith the accused appellants from Churu to Delhi and the fact that she was having Bichhua in the finger of her foot also goes to show that she was very much close to the accused

appellant Rajan.

29. Thus, the findings of the learned Addl. Sessions Judge (Fast Track) convicting the accused appellants for the offence under Section 366-A/120-B IPC cannot be sustained and the same are liable to be set aside.

30. So far as the conviction of the accused appellants for the offence under Section 363 IPC is concerned, since Section 366 IPC is an aggravated form of the offence under Section 363 IPC, therefore, the same persons cannot be convicted on the same facts under both the sections. Therefore, the conviction of the accused appellants for the offence under Section 363/120-B IPC cannot be sustained.

31. Thus, the findings of the learned Addl. Sessions Judge (Fast Track) convicting the accused appellants for the offence under Section 363/120-B cannot be sustained and the same are liable to be set aside.

On point of sentence

32. It may be stated here that the question of sentence is a matter of discretion and it is well settled that when discretion has been properly exercised along accepted judicial lines, an appellate Court should not interfere.

33. Sentencing accused person is a sensitive exercise of discretion and not a routine or mechanical prescription acting on hunch.

The case of accused appellant Rajan

34. The proviso to Section 376(1) IPC provides that court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. Apart from this, if there are special circumstances for leniency on point of sentence for the offence under Section 376(1) IPC, the same can be considered by the Court.

35. In the present case, since it was found that the prosecutrix PW2 Pinky was a consenting party, therefore, it is a fit case where proviso to Section 376(1) IPC should be invoked.

36. Thus, looking to the entire facts and circumstances of the case, if the sentence of the accused appellant Rajan for the offence under Section 376(1) is reduced from ten years RI to three years RI, it would meet the ends of justice.

37. Similarly, if his sentence for the offence under Section 366/120-B IPC is reduced from 4 years RI to 3 years RI, it would also meet the ends of justice.

The case of accused appellants Hari Ram and Ramsharan Das

38. These two accused appellants are going to be convicted for the offence under Section 366/120-B IPC, From the record, it appears that they are in jail since 24.3.2000 and thus, they remained in jail for more than 21 months.

39. Looking to the entire facts and circumstances of the case and the fact that it was a case of consent and that prosecutrix PW2 Pinky herself went to Railway Station and that these two accused appellants have remained in jail for more than 21 months, in my considered opinion, if their sentence for the offence under Sec.366/120-B IPC is reduced to the period already undergone by them, it would meet the ends of justice.

40. In the result, this appeal is partly allowed in the following manner:-

(1) The conviction of the accused appellant Rajan for the offence under Sections 376(1) and 366/120-B IPC is maintained, after confirming the judgment dated 29.11.2001 passed by the learned Addl. Sessions Judge (Fast Track), Ralangarh.

However, the conviction of the accused appellant Rajan for the offence under Sections 366-A/120-B and 363/120-B IPC is set aside and the judgment and order dated 29.11.2001 passed by the learned Addl. Sessions Judge (Fast Track), Ratangarh convicting and sentencing him for the said offences are set aside.

However, the substantive sentence of the accused appellant Rajan for the offence under Sections 376(1) IPC is reduced from ten years RI to three years RI and his sentence for the offence under Section 366/120-B IPC is also reduced from four years RI to three years RI. Both the substantive sentences shall run concurrently. The order of sentence dated 29.11.2001 passed by the learned Addl. Sessions

Judge (Fast Track), Ratangarh for the said offences stands modified accordingly.

(2) The conviction of the accused appellants Hari Ram and Ramsharan Das for the offence under Section 366/120-B IPC is maintained, after confirming the judgment dated 29.11.2001 passed by the learned Addl. Sessions Judge (Fast Track), Ratangarh for the said offence.

However, the conviction of the accused appellants Hari Ram and Ramsharan Das for the offence under Sections 366-A/120-B and 363/120-B IPC is set aside and the judgment and order dated 29.11.2001 passed by the learned Addl. Sessions Judge (Fast Track), Ratangarh convicting and sentencing them for the said offences are set aside.

However, the sentence of the accused appellants Hari Ram and Ramsharan Das for the offence under Section 366/120-B IPC is reduced to the period already undergone by them. The order of sentence dated 29.11.2001 passed by the learned Addl. Sessions Judge (Fast Track) Ratangarh for the said offence stands modified accordingly. It is made clear that order of fine is maintained.

Since the accused appellants Hari Ram and Ramsharan Das are in jail, they be released forthwith, if not required in any other case.

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