

Jamal Ahmed . Vs. the State .

Jamal Ahmed . Vs. the State .

SooperKanoon Citation : sooperkanoon.com/906811

Court : Delhi

Decided On : Dec-08-2010

Judge : V.K. Jain .J.

Acts : Indian Penal Code (IPC) - Section 376, 34, 366, 363, 366A, 366/34; Code of Criminal Procedure (CrPC) - Section 313,

Appeal No. : CrI. Appeal No. 312/1999

Appellant : Jamal Ahmed .

Respondent : The State .

Advocate for Def. : Mr. Amit Sharma, Adv

Advocate for Pet/Ap. : Mr. Sudhir Nandrajog; Ms. Saahila Lamba,Adv

Judgement :

1. These are two criminal appeals arising out of the judgment dated 29th May, 1999 and the Order on Sentence dated 31 st May, 1999 whereby both the appellants were convicted under section 366 of IPC read with section 34 thereof and under section 376 of IPC. Both the appellants were sentenced to undergo RI for 4 years and to pay fine of Rs.2000/- each or to undergo SI for 2 months each in default under section 366 of IPC read with section 34 thereof. They were further sentenced to undergo RI for 7 years each and to pay fine of Rs.3000/- each or to undergo SI for 3 months each in default under section 376 of IPC. The sentences were directed to run concurrently.

2. The FIR in this case was lodged by deceased Prabhu Dayal, father of the prosecutrix. He alleged that he had two children one son and one daughter, the son being elder. He further stated that his daughter, who had gone to house of her friend in Noida on 24th November, 1989, informed her cousin Satish Anand on 25th November, 1989 that she would be going to Pragati Maidan to visit the exhibition being held there and that he should come there to pick her up from Ahmad Food Stall, where Mohd. Imran Khan and Jamal Ahmed were working. He further alleged that when Satish Anand went to Ahmad Food Stall in Pragati Maidan, neither the prosecutrix nor the appellant Mohd. Imran Khan and Jamal Ahmed met him. He further CrI.Appeals 311-312/1999 Page 2 of 33 alleged that he was informed that the prosecutrix was seen in the exhibition ground along with the appellants and was to come back home in evening. When she did not come back till evening he went to Pragati Maidan on 26th November, 1989 and came to know that his daughter was seen with the appellants. He also informed that in the year 1988 he had put up a stall in Pragati Maidan, in front of a shop in which the appellants were working and that his wife Devki and his daughter also used to visit the stall for helping him. He further informed that a missing report was lodged by him at PS Vinay Nagar on 27th November, 1989.

3. The prosecutrix came in the witness box as PW 3 and stated that on 25.11.1989 she had gone to Pragati Maidan as her cousin Satish Anand had to pick her up from there. On reaching Pragati Maidan at about 1.30 P.M. she did not find her cousin at gate No.1 where he was supposed to meet her. She kept looking for him for about 2-3 hours, but did not find him. She further stated that she had told her brother to meet her at Ahmad Food Stall and since she did not find him at gate No.1, she went to Ahmad Food Stall, where both the appellants met her. They were already known to her as her father had put up a stall in Pragati Maidan in the year 1988, opposite the stall of the appellant. She further stated that the appellants told her that her brother was waiting for her at the gate and took her to gate No.3. The moment they came out they whipped out a knife and CrI.Appeals 311-312/1999 Page 3 of 33 told her that in case she tried to run away and raised alarm, they would kill her. She was forcibly taken by them to ISBT, in a three wheeler scooter, and from there she was taken to Merrut by a bus. In Merrut she was taken to hotel Ajanta and both the accused raped her in room No.101 of the

hotel. In the morning she was taken to the house of their sister and from there she was brought back to Delhi to the house of elder brother of appellant Jamal. There also she was raped by both the appellants in the night. On 27th November, 1989 they locked her inside the house and went away. They returned in the evening and again committed rape on her. In the evening of 28th November, 1989 the appellant Jamal Ahmed came along with elder brother and brother in law of Mohd. Imran Khan and left her in their custody. They took her to Pragati Maidan and from there she was taken to a flat behind G.B. Pant Hospital where both the appellants were present. After some time the police arrived there and recovered her. Her underwear P1 was seized by the police. She was produced before a Magistrate where her statement Ex.F3/A was recorded.

4. PW 7 Dr. R.K. Sharma, CMO, NDMC has proved the Birth Certificate Ex.PW7/A prepared by his staff and signed by him at point A. During cross-examination he admitted that another Birth Certificate Ex.PW7/DA was also signed by him. PW 9 Vijay Kumar is the Medical Record Officer of the Safdarjung Hospital Crl.Appeals 311-312/1999 Page 4 of 33 who brought the original birth register dated 2 nd September, 1974 and stated that as per the birth register there was entry regarding birth of a female child to Devki wife of Prabhu Dayal on 2nd September, 1974. The copy of the birth entry is Ex.PW9/A.

5. PW 12 Data Ram is the Reception Officer of Ajanta Hostel, Delhi Road, Merrut. He has stated that on 25 th November, 1989 one Manoj had come to the hotel along with a girl. He identified the appellant Jamal Ahmed as the boy referred by him a Manoj and also produced the entry made in the register regarding stay of Manoj and a girl Mohini. PW14 Inspector R.K. Gulia has stated that on 28.11.1989 they conducted a raid at Government flat No.36/96 in G.B. Pant Hospital. The prosecutrix was found there along with both the appellants. According to him he was taken to that house by Mahboob Khan, brother-in-law of the appellant Mohd. Imran Khan Khan. PW13 constable Samunder Singh has corroborated the deposition of PW14 regarding the recovery of the prosecutrix.

6. In his statement under section 313 Cr.PC the appellant Jamal Ahmed denied having taken the prosecutrix with him and having raped her. He claimed that he

was introduced to the prosecutrix by Mohd. Imran Khan and she used to treat him as her brother. The appellant Mohd. Imran Khan also denied Crl.Appeals 311-312/1999 Page 5 of 33 having taken the prosecutrix with him and having raped her. He has claimed that Jamal Ahmed used to visit his place and had introduced him to the family of the prosecutrix.

7. Two witnesses have been produced in defence. DW1 M.M. Alam has stated that in the year 1989 the appellant Jamal Ahmed had come to him regarding marriage of the appellant Mohd. Imran Khan with the prosecutrix who told him that she wanted to marry Mohd. Imran Khan . DW2 Sayeed Akhtar is the brother-in-law of the appellant Mohd. Imran Khan . He has stated that on 27th November, 1989 police officials took Mohd. Imran Khan with them. DW4 Mohd. Shaqir has stated that on 27.11.89 some police officials had taken Mohd. Imran Khan to police station from U.P. pavilion in Pragati Maidan. The appellant Mohd. Imran Khan has himself come in the witness box as DW 5 and has stated that he had become friendly to the prosecutrix and on 25th November, 1989 she met him at his residence and told her that her mother had turned her out of the house. He stated that the prosecutrix and the appellant Jamal Ahmed went to Merrut to consult Shri Mustaq Alam, Advocate who was known to Jamal. Jamal Ahmed went to the house of the advocate along with the prosecutrix and asked him to bring his brother Zaheer, who was a friend of the advocate. He could not reach Bahadurgarh and came to home. Thereafter he had no contact with the prosecutrix or Jamal. On 27 th November, 1989 Crl.Appeals 311-312/1999 Page 6 of 33 he was arrested from his restaurant from Pragati Maidan and was taken to the police station.

8. The first issue which comes up for consideration in this case is as to what was the age of the prosecutrix on the date she is alleged to have been kidnapped and the dates she is alleged to have been raped. When the prosecutrix came in the witness box on 21st May, 1992, after about 21/2 years of the alleged kidnapping and rape, she stated that she was aged 17 years. The documents available on the trial court file show that the complainant Shri Prabhu Dass, father of the prosecutrix, who was cited as a prosecution witness died, during pendency of the trial. On the summons issued to Shri Prabhu Dass as a witness for 7th May, 1996

it was reported that he had died and a copy of his death certificate was also submitted by his wife Devki to the police official who went for service of summon upon him. The death certificate would show that Shri Prabhu Das died on 10th November, 1995. This factual position was admitted by the learned counsel for the appellants during arguments. It was for these reasons that the father of the prosecutrix despite being the informant could not be produced in the witness box.

9. The mother of the prosecutrix having not been cited as a witness was not produced in the witness box. Obviously, while conducting investigation, the Investigating Officer could never CrI.Appeals 311-312/1999 Page 7 of 33 have anticipated that the father of the prosecutrix would die during pendency of trial and will not be able to come into witness box. Therefore, it was not necessary for him to cite the mother of the prosecutrix as a witness, in order to prove her age. Therefore, no adverse inference can be drawn against the prosecution on account of non-production of the parents of the prosecutrix in the witness box to prove her date of birth.

10. As per the Birth Certificate Ex.PW7/A produced by the prosecution the date of birth of the prosecutrix was 2 nd September, 2004. The authenticity of this document has been duly proved by PW 7 Shri R.K. Sharma, CMO, NDMC who has signed this document at point 'A'. This public document finds corroboration from the birth register of NDMC which was brought by PW 9 Shri Vijay Kumar Harnal of Safdarjung Hospital and a true copy of the relevant entry made in that register is Ex.PW9/A. The particulars given in Ex.PW 9/A match those given in the certificate Ex.PW7/A. Therefore, both the documents are corroborative of each other.

11. The Investigating Officer who came in the witness box as PW 15, specifically stated that this Birth Certificate was given to him by the father of the prosecutrix and that he had also obtained the photocopy of proof of the birth of the prosecutrix from Safadarjung Hospital, which is Ex. PW15/B. A perusal of CrI.Appeals 311-312/1999 Page 8 of 33 Ex. PW 15/B would show birth of a female child to Smt. Devki in Safdarjung Hospital on 2nd September, 1974. This is yet another document which corroborates the authenticity of Ex.PW 7/A and PW 9/A. The Birth

Certificate Ex.PW7/A having been produced by none other than the father of the prosecutrix and its authenticity having been duly verified by the Investigating Officer from the record of the hospital and the document finding full corroboration from the Birth Register of NDMC, I see absolutely no reason to doubt its authenticity. As regards the certificate Ex.PW 7/DA produced by the appellants and shown to PW 7 during cross-examination, I find that the material available on record shows that this certificate does not pertain to the birth of the prosecutrix. Though the name of the father of the child has been shown as Prabhu Dass the name of her mother has been shown as Devi Rani in this document. A perusal of the FIR would show that the name of the mother of the prosecutrix is 'Devki' and not 'Devi Rani'. During the course of the trial, the process issued by the court to Shri Prabhu Dass, father of the prosecutrix was received by his wife a number of times. The summon of Prabhu Das for 8 th November, 1994 received by one Devki and the report of the process server shows that she was the wife of Prabhu Das. The summon of Prabhu Das for 12 October, 1995 was received by Devki and as per the report of the process server she was the wife of Prabhu Das. When the Crl.Appeals 311-312/1999 Page 9 of 33 summon of Prabhu Das was issued for 7th May, 1996, it was Devki who met the process server and informed him that Prabhu Das had died and she also handed over a copy of the Death Certificate to the process server. Thus, there can be no doubt that the name of the mother of the prosecutrix was Devki and not Devi Rani. Therefore, certificate Ex.PW7/DA cannot be in respect of the birth of the prosecutrix. A perusal of the FIR shows that late Shri Prabhu Das, father of the prosecutrix, had two children including the prosecutrix. The certificate Ex.PW 7/A filed by the prosecution shows that the woman who gave birth to the child to which the certificate pertains had two living children on the date of registration of birth. On the other hand, the certificate Ex.PW7/DA filed by the appellants does not contain any entry regarding the number of living children. This is yet another circumstance which shows that the certificate Ex.PW7/DA does not pertain to the prosecutrix.

12. There is no corroborative evidence which would assure the court that Ex.PW7/DA pertains to the prosecutrix. On the other hand, there is ample corroborative documentary evidence in the form of Ex.PW9/A and PW 15/B which gives complete assurance to the court that Ex.PW 7/A is the certificate pertaining

to the birth of the prosecutrix. Therefore, no reliance can be placed upon the Birth Certificate produced by the appellants. Crl.Appeals 311-312/1999 Page 10 of 33

13. It was contended by the learned counsel for the appellants that in his cross-examination the Investigating Officer stated that the Birth Certificate produced by the father of the prosecutrix did not relate to the prosecutrix. In my view the arguments is based upon a complete misreading of the deposition of the Investigating Officer. The sentence relied upon by the learned counsel for the appellants has been picked up by him out of the context and a careful examination of the entire statement of the Investigating Officer would show that in his examination-in-chief he has specifically stated that the certificate Ex.PW7/A giving the date of birth of the prosecutrix as 2nd September, 1974 was verified by him from Safdarjung Hospital vide Ex.PW15/B. His deposition in the cross-examination to the effect that the Birth Certificate of the prosecution did not relate to her and that he did not verify about the Birth Certificate from NDMC, obviously refers to PW7/DA which the appellants claim to be the Birth Certificate of the prosecutrix. In his cross-examination the Investigating Officer also stated that he had submitted before the court, at the time of hearing of the bail application, that the Birth Certificate was genuine but did not relate to the prosecutrix. Obviously, he would not be saying so in respect of the Birth Certificate which he himself filed with the charge sheet and authenticity of which he himself had verified from Safdargjung Hospital vide Crl.Appeals 311-312/1999 Page 11 of 33 Ex.PW15/B. It appears that during arguments on the bail application the appellants relied upon Ex.PW7/DA, and it was in respect of this document that the Investigating Officer submitted before the court that though the document was genuine, it did not relate to the prosecutrix. Hence, I am satisfied that Ex.PW7/DA does not pertain to the birth of the prosecutrix and Ex.PW7/A is her genuine Birth Certificate issued by NDMC. As per the Birth Certificate Ex.PW7/A the prosecutrix was born on 2nd September, 1974. Therefore, on 25th November, 1989, she was less than 16 years old.

14. As per the report of the CW1 Dr. U.C. Garg Ex.CW1/A, the age of the prosecutrix was between 16-17 years. Relying upon his opinion it was contended by the learned counsel for the appellants that the prosecutrix was more than 16

years of age on the date she is alleged to have been kidnapped and that since there could be variation of up to 2 years in the age determined by Ossification Test, she could be more than 18 years old on the relevant date.

15. In my view it is not appropriate for the court to give preference to the medical opinion in the form of Ossification Test over unimpeachable and authentic documents are available in the form of Birth Certificate of the NDMC produced by the prosecution which also finds corroboration from the record of Crl.Appeals 311-312/1999 Page 12 of 33 the hospital Ex.PW15/B and Birth Register of NDMC Ex.PW9/A. In the case of Madan Gopal Kakkad vs. Naval Dubey & Anr. (1992) 3 SCC 204 the Hon'ble Supreme Court, inter alia, observed as under:

"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."

16. In Vishnu vs. State of Maharashtra AIR 2006 SC 508, the Birth Certificate of Municipal Corporation and register of the hospital where the prosecutrix was born showed that she was less than 16 years of age. On the other hand as per the Ossification Test her age was 18-19 years with error of margin of six months on either side. It was contended before the Hon'ble Supreme Court that determination of the age of the prosecutrix having been scientifically proved by conducting Ossification Crl.Appeals 311-312/1999 Page 13 of 33 Test, should be accepted. Rejecting the contention, the Hon'ble Supreme Court, inter alia, held as under:-

24. In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother - PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.64, which is supported by the unimpeachable documents, as referred to above in all

material particulars. These are the statements of facts. If the statements of facts are pitted against the so called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness effects tendered by PW-1 and PW-13, supported by unimpeachable documents.

17. The judgment in the case of Vishnu (supra) was followed by the Hon'ble Supreme Court in Arjun Singh vs. State of H.P. AIR 2009 SC 1568. In view of the above referred authoritative pronouncements of the Hon'ble Supreme Court, no reliance can be placed upon the report of Ossification Test in the face of the unimpeachable documentary evidence produced by the prosecution.

18. I am, however, in full agreement with the learned counsel for the appellant that the facts and circumstances of the case CrI.Appeals 311-312/1999 Page 14 of 33 rule out any reasonable possibility of the prosecutrix having been forcibly kidnapped or raped against her consent as claimed by her. According to the prosecutrix after reaching Pragati Maidan on 25.11.1989 she looked for her cousin at gate No.1 as he had asked her to meet him there. On the other hand, the father of the prosecutrix alleged in the FIR that the prosecutrix had asked her cousin to meet him at Ahmed Food Stall. If the prosecutrix was to meet with her cousin at Ahmed Food Stall, there was no occasion to her to go first to gate No.1 of Pragati Maidan. According to the prosecutrix, she was brought by the appellant to gate No.3 of the Pragati Maidan and was forced to board a Three Wheeler Scooter, with two knives having been kept on her person by the appellants. She has further stated that the direction of the auto rikshaw was towards ITO and not towards Zoo. If that be so, the prosecutrix must have crossed Mathura Road in order to reach the side where the auto rikshaw was parked because Pragati Maidan is on that side of the Mathura Road which goes towards Zoo whereas the auto rikshaw was parked on that side of the Mathura Road which goes towards ITO. The Prosecutrix has admitted that there were lot of people in Pragati Maidan as Trade Fair was

going on at that time. As a matter of fact, Pragati Maidan and its surrounding areas are extremely overcrowded during trade fair which is held every year between 14th November to 27th November. It is not possible to accept that no one noticed the prosecutrix going all the way from gate no. 3 of Pragati Maidan up to other side of the Mathura Road with two knives having been put on her side. Had that been the case a number of persons would have noticed it and would have immediately called the police.

19. Had the appellants put knives on the person of the prosecutrix at a crowded place like Pragati Maidan in day time, she would definitely have raised alarm because on account of presence of a large number of persons, she would not be intimidated even if knives are put on her person, confident as she would be that on alarm being raised by her the appellants would be caught by the persons who are present there and would be handed over to the police. This is more so when the appellants were not stranger to her, they being previously known to her.

20. According to the prosecutrix she travelled in an auto rikshaw from Pragati Maidan to ISBT and both the appellants were sitting on her side with knives on her person during the course of the journey. Had that been the case, it could not have escaped the attention of the auto rikshaw driver and he would have caught the appellants and handed over them to the police instead of taking the prosecutrix and the appellants to the ISBT. Crl.Appeals 311-312/1999 Page 16 of 33

21. According to the prosecutrix they boarded a bus for Merrut from ISBT. A large number of persons including the police officers always remain present at ISBT. It is difficult to accept that knives had been put on the person of the prosecutrix when she remained at ISBT and boarded the bus from there but that was not noticed by any person present at the Bus Terminus. If a young girl is being escorted by two boys who have kept one knife each on both her sides, that would immediately draw the attention of some or the other person present at a busy place like a Bus Terminus and the persons wilding knives would immediately be caught and handed over to the police. According to the prosecutrix she travelled in a bus from Delhi to Merrut and other passengers were also present in the bus. She has stated that knives were kept on her person even during the bus journey.

Had that been the case, the prosecutrix would definitely have raised alarm because she knew that on account of presence of a large number of passengers in the bus, it would not be possible for the appellants to harm her and since the bus was moving they also will not be able to escape. In any case, had the appellants kept knives on the person of the prosecutrix during bus journey they could not have escaped the attention of their fellow passengers.

22. The prosecutrix has stated that in Merrut she was brought to hotel. She must have got down at a Bus Terminus at Merrut Crl. Appeals 311-312/1999 Page 17 of 33 and must have taken some means of transport for going from Bus Terminus to the hotel. No alarm was raised by the prosecutrix either at Bus Terminus in Merrut or during journey from Bus Terminus to the hotel. Had she been under threat, should would definitely have raised alarm and the appellants would have been caught by the persons present at the Bus Terminus or the persons present on the road while they were travelling from Bus Terminus to the hotel.

23. In the hotel also the prosecutrix did not raise any alarm. She did not complain either to the receptionist or any waiter. Had she not been a consenting party she would have never have gone towards the room and would have told the receptionist that she was being coerced to go into the room.

24. The prosecutrix has stated that from hotel she was taken to the house of the sister of the appellants. Again she did not raise any alarm when she came down from the room or when she was being taken to the house of the sister of the appellants. She did not make any complaint to the family of the sister of the appellants that she had been subjected to rape and had been brought under intimidation. The prosecutrix came to Delhi from Merrut. For that purpose she must have travelled in a bus or a train from Merrut to Delhi and would have got down either at ISBT or a railway station in Delhi. Had she not been a willing Crl. Appeals 311-312/1999 Page 18 of 33 and consenting party, she would have raised alarm at any of these places. Her failure to do so despite having repeated opportunities that she had accompanied the appellants on her own and that she was not under any kind of threat or intimidation when she accompanied the appellants to Merrut and was subjected to sexual intercourse firstly in a hotel and then in a house in

Delhi.

25. As regards charge under Section 363 and 366 of IPC, in order to prove kidnapping the prosecution was required to prove that the appellants had taken or enticed the prosecutrix out of the keeping of her lawful guardian. The object behind Section 361 of Indian Penal Code, which defines kidnapping, is to protect the minor children from being seduced for improper purposes and to protect the rights and privileges of guardians having lawful charge or custody of their minor wards. What is necessary is either taking or enticement, of the minor. Taking would include causing to go or getting into possession whereas enticement involves an idea of inducement, by igniting hopes or desire in the other. One does not entice other, unless the latter attempts to do a thing which he or she would not otherwise have done. In order to bring home conviction for kidnapping, there must be proof of the accused having done something which led to the girl going out of the keeping of her guardian. The words 'takes' and 'entices' as used in Section 361 of Indian Penal Code CrI.Appeals 311-312/1999 Page 19 of 33 need to be read together so as to take colour and content from each other.

26. If the minor leaves her parental home without any promise, offer or inducement from the accused, it cannot be said that an offence of kidnapping is made out. Of course, if the accused lays a foundation by inducement, allurements etc. and that influences the minor or weighs with her in leaving her guardian's custody and keeping and going with the accused then it is difficult to accept that the minor had voluntarily come to the accused.

27. In the present case, there is no evidence of either of the appellants having extended any promise or allurements to the prosecutrix. This is not the case of the prosecution that either of the appellants had promised to marry the prosecutrix or held out any other promise to her. The case of the prosecution is that the appellants had threatened the prosecutrix by putting knives on her person and being afraid of them she accompanied them to Merrut. That part of the deposition of the prosecutrix where she claimed that she had been threatened and two knives had been put on her person when she was taken from Delhi to Merrut cannot be believed and is obviously false. The truth appears to be that since the prosecutrix

was previously known to the appellants, and had become friendly to one of them, she of her Crl.Appeals 311-312/1999 Page 20 of 33 own abandoned the guardianship of her parents and eloped with the appellants. Though the prosecutrix has been found to be less than 16 years old, it cannot be said that she was not capable of knowing what she was doing. She was not of such an age so as to be unable to decide what was good and what was bad for her. Had the prosecutrix been about 10 months older, even the offence of rape would not have been made out against the appellants in the facts and circumstances of the case. In my view the facts and circumstances brought on record clearly show that the prosecutrix willingly accompanied the appellants and stayed with them till they were caught by the police. The prosecutrix knew and had the capacity to know the full import what she was doing. It is, therefore, difficult to say that the offence of kidnapping has been made out against the appellants in the facts and circumstances of this case.

28. In order to succeed in a charge under section 366 of IPC, the prosecution was required to prove that the kidnapping of the prosecutrix was:

(a) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or

Crl.Appeals 311-312/1999 Page 21 of 33 (b) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

29. In the present case there is no evidence of either of the appellants having even made an attempt to compel the prosecutrix to marry him. The deposition of the prosecutrix to the effect that she was subjected to intercourse under intimidation cannot be belied in the facts and circumstances of this case. Therefore, it cannot be said that the appellants took the prosecutrix with them so as to force or seduce her to illicit intercourse. The facts and circumstances of the case indicate that she was a consenting person to have sexual intercourse with the appellants.

30. In Shyam and Another versus State of Maharashtra , 1995 Criminal Law General 3974, the prosecutrix had put blame on the appellants and had deposed

that she was threatened right from the beginning while being kidnapped and was kept till police recovered her. It was found by the Hon'ble Supreme Court that she was not truthful as regards the manner of the so- called taking. The prosecutrix in that case was a grown up girl, though she had not touched 18 years of age but was still in the age of discretion. She was found going on the bicycle of the appellant. The Hon'ble Supreme Court noted that it was not CrI.Appeals 311-312/1999 Page 22 of 33 unknown to her with whom she was going and therefore, it was expected of her then to jump down from the bicycle or put up the struggle and in any case raise an alarm to protect herself. As no such steps were taken by her, the Hon'ble Supreme Court felt that she was a willing party to go with the appellants of her own and, therefore, there was no taking out of the guardianship. The appellants were acquitted of the charge under Section 366 of IPC.

31. In State of Karnataka vs. Sureshbabu, 1994 CrI.L.J.1216(1), it was found that the girl went with the accused voluntarily. It was held by the Hon'ble Supreme Court that the requirement of Section 366 of IPC is that taking or enticing away a minor out of the keeping of the lawful guardianship was an essential ingredient of the offence of kidnapping. It was held that in such a case, it is difficult to held that the accused had taken her away from the keeping of her lawful guardian and something more has to be shown in a case of this nature, like inducement.

32. In Mahabir vs. State 55(1994)DLT 428, the appellant and the prosecutrix were known to each other. The appellant took the prosecutrix to a place outside Delhi where they stayed for about fifteen days and had sexual intercourse with each other. The appellant was convicted under Sections 366 and 376 CrI.Appeals 311-312/1999 Page 23 of 33 of I.P.C. A learned Single Judge of this Court noticed that she had gone to Railway Station, had stood there with the appellant who also went to purchase tickets and then she had travelled with him in a compartment shared by other persons. She had then gone to a house in a tonga and yet she did not lodge any protest and made no attempt to flee despite having ample time and opportunity. The learned Single Judge noted that on the day of reckoning, she surely had crossed mark of sixteen years and since she was all along a willing party, the appellant was acquitted of both the charges against him. Thus, despite the prosecutrix being less than eighteen years of age, the appellant was acquitted

not only of charge under Section 376 but also of the charge under Section 366 of I.P.C.

33. In *Piara Singh vs. State of Punjab*, 1998(3) Crimes 570, the High Court found that the prosecutrix was more than sixteen years of age at the time of this incident, though, the case of the prosecution was that she was fourteen years of old at that time. Since the High Court came into conclusion that no force was used in having sexual intercourse with him, the appellant was acquitted not only of charge under Section 376 but also of charge under Section 366 and 366-A of Indian Penal Code. In this case also, the prosecutrix was not found to be more than eighteen years of age.

Crl.Appeals 311-312/1999 Page 24 of 33

34. In *Bala Saheb vs. State of Maharashtra*, 1994 Criminal Law General 3044, it was found that the prosecutrix accompanied the appellant/accused from her village and stayed with him for two to three days. It was held that these circumstances clearly show that offence under Section 363 or 366 of I.P.C. was not made out.

35. In *Chida Ram vs. State*, 1992 Criminal Law General 4073, the prosecutrix went to the P.S. and lodged report that she had gone with the petitioner/accused, of her own accord. However, during trial, she deposed that she was forced by the accused/petitioner to go to the police station. She had also given statement before a Magistrate after lodging report with the police and in that statement she did not say that she was forced by the accused/petitioner to go to the Police Post and lodged the report. A learned Single Judge of this Court observed that she had ample opportunity to say before the Magistrate, before whom she was produced at the first instance, that she was forced by the accused to go to the Police Station and lodged report. The story set up by her during trial was considered to be an afterthought and was not believed. It was found that she was a consenting party in eloping from her house with the accused/petitioner. It was held that it could not also be called a case of kidnapping.

Crl.Appeals 311-312/1999 Page 25 of 33

36. However, as far as charge under section 376 of IPC is concerned, the appellants are guilty even if they had sexual intercourse with the prosecutrix with her consent as the prosecutrix was less than 16 years old at the time when she was subject to sexual intercourse.

37. I see no reason to disbelieve the testimony of the prosecutrix as regards the sexual intercourse with her. It is extremely unlikely that a young unmarried girl will falsely allege sexual intercourse with her, since she knows that by making such an accusation, she would be sacrificing what is most dear to her. In a tradition bound non-permissive society like ours, a young girl would be reluctant even to admit an incident of sexual intercourse with her, conscious as she would be of being criticized not only by the society but also by her own family members, relatives and neighbors who may somehow or the other hold her at least partly responsible for the incident which happened with her. Even the parents of an unmarried girl would not report such an incident to the police unless they are absolutely sure of its truthfulness. The parents of an unmarried girl would always be aware of the risk that comes to be associated with the marriage of an unmarried girl who is subjected to sexual intercourse and that too by two young boys professing an altogether different religion. They know that if such an incident becomes public it would be difficult for them to find a suitable match for their daughter from a respectable family. Their natural inclination would be to avoid giving publicity to such an incident lest their family name and family honour is brought under disrepute on account of an adverse publicity. Therefore, I find no good ground to reject the testimony of the prosecutrix to the effect that she was subjected to sexual intercourse by both the appellants.

38. In his statement under section 313 of Cr.PC the appellant Mohd. Imran claimed that his co-accused Jamal Ahmed used to visit his place and had introduced him to the family of the prosecutrix. On the other hand, the appellant Jamal Ahmed stated that it was Mohd. Imran who had introduced him to the family of the prosecutrix. Thus, both of them are contradicting each other as to who introduced whom to the prosecutrix.

39. When Mohd. Imran came in the witness box as DW5, he stated that he had become friendly with the prosecutrix and they had been meeting each other. He also claimed that the prosecutrix had come to his stall on 22nd November as well as 25th November and she had told him that she had been turned by her mother out of her home. He further stated that he along with the prosecutrix and Jamal Ahmed went to Merrut to consult Shri Mustafa Alam, Advocate. According to him it was Jamal Ahmed who took the prosecutrix to the house of the advocate Crl.Appeals 311-312/1999 Page 27 of 33 and he himself went to Bahadurgarh to bring the brother of the advocate but could not reach Bahadurgarh. However, the appellant Jamal Ahmed has not taken the same stand and has altogether denied having accompanied the prosecutrix to Merrut. According to the appellant Mohd. Imran he had no contact with the prosecutrix or Jamal Ahmed thereafter and was arrested by the police from his restaurant. On the other hand testimony of the police officials shows that both the appellants were arrested from a flat in G.B. Pant Hospital and that time the prosecutrix was in their company. In fact, the appellant Mohd. Imran, in his statement under section 313 of Cr.PC denied having taken the prosecutrix to Merrut and did not claim that he, along with Jamal Ahmed, had accompanied her to Merrut, he had come back from there for going to Bahadurgarh to bring the brother of Shri Mustafa Alam, advocate. Even otherwise it is difficult to accept that if the appellant Mohd. Imran was having relationship with the prosecutrix he would leave her in the company of Jamal Ahmed and come back from Merrut. His claim that he wanted to go to Bahadurgarh but could not reach there because the bus had stopped on the way and he did not know the address of the lawyer and, therefore, he came to Delhi is totally unbelievable. If one bus had gone out of order, he would have boarded another bus. His claim that he came back to Delhi as he did not know the address of the lawyer is ex- Crl.Appeals 311-312/1999 Page 28 of 33 facie false, as he himself stated that Jamal Ahmed had taken them to the lawyer at Merrut. If he had gone up to the place of the lawyer along with Jamal Ahmed, there could be no question of his not knowing the address of the lawyer and not being able to reach there. Since the appellant Mohd. Imran Khan was having an affair with the prosecutrix, in normal course of human conduct he must have remained with her throughout till they were apprehended by the police.

40. In his statement under section 313 of Cr.PC, Jamal Ahmed does not say that he along with Mohd. Imran Khan had accompanied the prosecutrix to Merrut and that in Merrut he along had taken the prosecutrix to the place of the advocate whereas Mohd. Imran Khan had gone to Bahadurgarh to bring the brother of the advocate. He does not say that he had accompanied the prosecutrix to hotel and had stayed there in the night with her. He does not say that he alone had brought the prosecutrix from Merrut to Delhi. During cross-examination of the prosecutrix it was suggested to her that in the hotel she and Jamal Ahmed had introduced themselves as brother and sister. Such a defence is inherently improbable and cannot be believed. Assuming that Jamal Ahmed alone had taken the prosecutrix to the hotel and stayed with her in the night, when a young boy goes to a hotel and takes a room on rent for staying overnight he would not introduce the girl accompanying him as Crl.Appeals 311-312/1999 Page 29 of 33 his sister because that would immediately create suspicion in the mind of the hotel staff because a young boy is not likely to stay with his young sister in a hotel in the night. The appellant Jamal Ahmed having been identified by PW12 Data Ram as Manoj, it cannot be accepted that he had not gone to the hotel with the prosecutrix and had not stayed there in the night with her. If the names of both the appellants were not got recorded in the record of the hotel that by itself would not show that they had not stayed in the room with the prosecutrix. It is quite likely that the names of them the boys were not entered in the hotel register because that would have created suspicion on account of two boys staying with a young girl in one room. Nothing prevented the appellants from taking the room for one couple and then both of them staying in the same room during night. There is yet another possibility that the hotel staff was persuaded to give room to all the three but the names of only one male and one female were entered in the register in order to show, on record, that a couple had stayed in the room.

41. Whatever be the circumstances in which all the three came to stay in the same room, it is difficult to believe that the appellant Mohd. Imran Khan who was carrying an affair with the prosecutrix would have allowed his co-accused Jamal Ahmed a young man to stay alone with the prosecutrix in a hotel in the night. Once it is shown that both the appellants had stayed in Crl.Appeals 311-312/1999 Page 30 of 33 the same room with the prosecutrix, it is difficult to accept that only one of

them had sex with her. If either of them did not want to have sex with the prosecutrix, he would not have stayed in that room during the night. In any case, had the prosecutrix been subjected to sexual intercourse only by the appellant Jamal, she would not have implicated Imran, with whom she was friendly.

42. It was pointed out by learned counsel for the appellants that there was delay in lodging the FIR as the prosecutrix went missing on 25th November, 1989 but her father lodged missing report only on 27th November, 1989. It was noted by the Hon'ble Supreme Court in Ravinder Kumar vs. State 2001(VII) AD(SC) 209 that the law has not fixed any time limit for lodging FIR and delayed FIR is not illegal. If there is a delay the court has to look for the reasons which could be many, but the FIR is not vitiated on account of delay alone. As regards reporting of cases of elopement of a girl that too with boys of a different religion one cannot be oblivious to the fact that since in such cases honour of the family is involved, a lot of thought must have gone into, before it was decided to lodge FIR. The prosecutrix being a young girl aged about 15 years at the time she accompanied the appellants, it is understandable that her father must have taken time to decide what course of action he should take. *Crl.Appeals 311-312/1999 Page 31 of 33* adopt. Therefore, lodging of FIR in the facts and circumstances of this case cannot be said to be fatal to the prosecution.

43. For the reasons given in the preceding paragraphs, both the appellants are acquitted of the charge under section 366/34 of IPC. Their conviction under section 376 of IPC is, however, maintained. As regards sentence though the minimum prescribed punishment is imprisonment for 7 years coupled with fine, the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than 7 years. The incident in this case took place in the year 1989. More than 20 years have passed since then. These appeals are pending for last more than 10 years. The evidence that has come on record shows that the prosecutrix had willingly accompanied the appellants to Merrut and had willingly stayed with them in the hotel where she was subjected to rape. She was more than 15 years old when she eloped with the appellants. The appellants were young boys when this incident took place. The main circumstance which persuades me to take a lenient view in the matter of

sentence and awarding less than the minimum prescribed sentence is the consent on the part of the prosecutrix to accompany them which is more than evident from the facts and circumstances of the case.

Crl.Appeals 311-312/1999 Page 32 of 33

44. Keeping in view the facts and circumstances as discussed in the preceding paragraphs, the appellants are sentenced to undergo RI for 5 years each and to pay fine of Rs.10,000/- each or to undergo SI for 3 months in default under section 376 of IPC.

45. The appellants are directed to surrender forthwith before the trial court to undergo the remaining portion of the sentence imposed upon them.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com