

HIGH COURT OF MADHYA PRADESH**BENCH AT GWALIOR****SINGLE BENCH****PRESENT:****HON'BLE MR. JUSTICE G.S. AHLUWALIA****Criminal Appeal No. 435 OF 2010****Iqbal****-Vs-****State of M.P.**

Shri Anoop Nigam, counsel for the appellant.

Shri B.P.S. Chauhan, Public Prosecutor for the respondent/State.

J U D G M E N T
(09/03/2017)

This appeal under Section 374 of Cr.P.C. has been filed against the judgment dated 7.4.2010 passed by 14th Additional Sessions Judge, Gwalior in S.T.No. 406/2009 by which the appellant has been convicted under Sections 376, 366 of IPC and has been sentenced to undergo the rigorous imprisonment of 10 years and a fine of Rs. 5,000/- with default imprisonment and rigorous imprisonment of five years and a fine of Rs. 1,000/- with default imprisonment. Both the offences have been directed to run concurrently.

This appeal has been filed by the appellant from jail. None had appeared on behalf of the appellant to argue the case. Shri Anoop Nigam, Advocate was present in the Court and is in the list of Legal Aid Advocates and he has a vast experience of arguing the criminal matters, therefore, he was requested by the Court to go through the file and argue the matter. Shri Anoop Nigam gracefully accepted the request made by the Court and went through the record of the case

for about 1 ½ hours and then argued the matter at length.

The prosecution case in short is that on 20.2.2009 the complainant Saleem informed the police that his daughter is missing. After about 3-4 months, the prosecutrix returned back and informed that the appellant had persuaded her to go along with him and had forcibly committed rape on her. Accordingly, offence under Sections 363, 366, 376 of IPC was registered. The police after recording the statements of the witnesses and getting the prosecutrix medically examined, prepared the spot map, obtained the school register of the prosecutrix to prove her age, filed the charge sheet after completing the investigation.

The Trial Court by order dated 11.1.2010 framed the charges under Sections 366, 376 of IPC.

The appellant abjured his guilt and pleaded not guilty.

The prosecution in order to prove its case examined prosecutrix (PW-1), Sanno (PW-2), Saleem (PW-3), Dr. Sonal Kulshreshtha (PW-4), Dr. S. Rajesh (PW-5), Ramesh Ghanghoriya (PW-6), Maharaj Singh (PW-7), Sevaram (PW-8), Indrakumar Batham (PW-9), R.N.S. Gaur (PW-10), Dr. S.S. Jadon (PW-11) and Naresh Singh Parihar (PW-12).

The appellant examined himself under Section 315 of Cr.P.C. and also examined Khairo Nisha (DW-2) in his defence.

The Trial Court in paragraph 22 of the judgment came to a conclusion that the prosecutrix was not less than 18 years of age on the date of the incident. As the findings given by the Trial Court has not been called in question by the State counsel, therefore, it is held that the prosecutrix was more than aged about 18 years on the date of incident.

Now the next question for determination would be that whether the prosecution has succeeded in establishing the guilt of the appellant for offence under Sections 366, 376 of IPC or not.

The undisputed fact is that appellant is the husband of aunt (मौसी) of the prosecutrix.

The prosecutrix (PW-1) has stated that about 10 to 11 months back the appellant came to her house and informed that the health of her aunt (मौसी) is not good, therefore, she should accompany him to look after her aunt (मौसी). Thereafter the prosecutrix was sent by her mother along with the appellant. Her mother also enquired from the appellant that whether he has taken permission from the father of the prosecutrix or not then he replied that he has already taken permission. Thereafter, the appellant instead of taking her to Agra took her to some other place. When she enquired that why he is going to another place then he stated that he is taking to a place where her aunt (मौसी) is admitted in hospital. After taking the prosecutrix to some other place the appellant informed that now he has taken revenge from her father as her father had not given adequate dowry in marriage and also slapped her. The appellant had kept the prosecutrix in Mathura where he developed physical relations without her consent. The appellant used to beat her and whenever she insisted that she should be taken back to her house he always replied that he would defame her father. After four months the appellant brought her back from Mathura and left at Gudagudi Chowk, Gwalior along with a boy. The boy brought her to the house of her maternal grandmother. Where she was beaten by her maternal grandmother and the police was called. She was medically examined. Because of the physical relations developed by the appellant she got pregnant and has now given birth to a girl child. In her cross-examination, she stated that the police had never recorded her statement and she is giving her statement for the first time in the Court. The name of her aunt (मौसी) is Sanu who is the wife of the appellant. She further denied that when the appellant had come to her house,

her father was also there. This witness on her own stated that her father had gone to work. She further denied that the appellant had taken her with the consent of her father. She admitted that her mother had sent her along with the appellant but clarified that as the appellant had informed that he has already taken permission from her father, therefore, she was sent. She further admitted that she had seen the house of her maternal grandmother in Agra. She further stated that they had deboarded the train at Mathura station and since she was not aware that it was not Agra Railway Station, therefore, she did not raise any alarm. The appellant took her to the house of his friend in Mathura. She was not beaten on the way. The prosecutrix had informed the friend of the appellant that the appellant has brought her forcibly. She was kept in Mathura for three to four months and during these three to four months, the appellant used to go outside for earning and during that period she used to be all alone in the house but never made an attempt to leave the house. She further clarified that as she was not knowing anybody and had not seen the police station, therefore, she did not make any attempt to leave the house. She further stated that she was not talking to anybody, therefore, she could not enquire about the location of the police station. The appellant used to have sexual relations with her after gagging her mouth, therefore, she never raised any alarm. She never informed anybody in the neighborhood as the appellant used to extend the threat that in case if she tells anybody then she will be killed. She further stated that she had informed the police in her case diary statement that the appellant had told her that as her father has given less dowry, therefore, he would take the revenge but if such statement does not find place in her case diary statement then she could not tell the reasons. She denied that the appellant had never committed sexual

intercourse with her without her consent.

Sanno (PW-2) is the mother of the prosecutrix. She has stated that at about 8 to 10 months back the appellant came to her house and informed that the physical health of her sister is deteriorating, therefore, he has come to take the prosecutrix with him. When she asked that whether he has taken permission from the father of the prosecutrix or not then he said that he has permitted. When her husband came back in the evening, he enquired about the whereabouts of the prosecutrix, then she informed that the appellant has taken her with him by misrepresenting that he has taken permission from the husband of this witness. On the next day, her husband tried to find out the prosecutrix in the houses of all the relatives and also went to Agra but she could not be found. Thereafter they lodged a Gum Insan Report. After 4 to 5 months they came to know about the whereabouts of the prosecutrix. The appellant had come to know that her father is on death bed, therefore, he left the prosecutrix in the market and ran away. When the prosecutrix came back she informed that the appellant had taken her to Mathura where he had committed rape on her. The prosecutrix had also become pregnant and the baby girl who is now aged about 1 ½ years is that of the appellant. In cross-examination, this witness has stated that after the prosecutrix came back she has been married and the name of her son-in-law is Raheesh. However, she denied that the baby is that of Raheesh. She further admitted that she had sent her daughter voluntarily as the appellant had informed her that the physical condition of her sister is deteriorating.

Saleem (PW-3) has also stated that in his absence the appellant came to his house and informed his wife that he has taken permission from this witness and, therefore, she should send the prosecutrix along with him to Agra. When in the

evening he came back and enquired about the whereabouts of the prosecutrix then he was informed by his wife that she has sent her to Agra along with the appellant. Thereafter he went to Agra to find out the prosecutrix but neither the prosecutrix nor the appellant were found there. After coming back, he lodged the Gum Insan Report which is Ex.P/1. Near about 3 to 4 months after the Gum Insan Report was lodged, the prosecutrix came back to the police station and he also went to the police station where vide Ex.P/2 the prosecutrix was given to his custody. After coming back the prosecutrix informed that the appellant took her to Mathura where she was raped by him. She further informed that because of the physical relations developed by the appellant she is carrying the pregnancy of about four months. In cross-examination, this witness has stated that after the prosecutrix came back he got her daughter married with Raheesh @ Pappi. He was not knowing Raheesh @ Pappi prior to the marriage but he was knowing his father. He further denied that Raheesh was visiting his house prior to the incident and the baby girl is that of Raheesh. This witness has specifically stated that in fact the girl child is of the appellant.

Dr. Sonal Kulshreshtha (PW-4) has medically examined the prosecutrix and has stated that she was pregnant. For the determination of the age of the prosecutrix and for ascertaining the pregnancy as well as other factors she had advised ultra sonic test. She further stated that she did not give any specific report about the rape. The MLC report is Ex.P/3. This witness in cross-examination has stated that at the time of the medical examination, the mother of the victim was present and the age which was disclosed by the victim has been mentioned by her.

Dr. S. Rajesh (PW-5) has stated that in ultrasound, the prosecutrix was found pregnant. As the prosecutrix was

pregnant and ionizing radiation could have been hazardous for the fetus, therefore, he had advised that x-ray may be got done after delivery.

Ramesh Ghanghoriya (PW-6) has stated that on 20.2.2009 he was posted as T.I. Police Station Madhoganj. On the said date, the Gum Insan Report was received. The Gum Insan Enquiry was done by ASI Gaur and during enquiry he had found that the appellant has taken the prosecutrix with him by misrepresentation and had forcibly developed physical relations with her and accordingly FIR Ex.P/5 for offences under Sections 363, 366, 376 of IPC was registered. In cross-examination, this witness admitted that before registration of FIR he had enquired from the complainant and she had informed him that the appellant had taken his daughter with him. He had also informed that the prosecutrix did not reach the destination for which she had left her house. The complainant had also informed him that the appellant has taken his daughter by misrepresentation. He admitted that in Gum Insan Report this fact is not mentioned that the appellant has taken the prosecutrix.

Maharaj Singh (PW-7) had recorded the Gum Insan Report which is Ex.P/1. He further stated that on 15.6.2009 Sanjay Singh of Police Station Madhoganj had brought underwear of the appellant in sealed condition. A packet containing hair, slide of the appellant in sealed condition and the specimen of the seal were seized vide seizure memo Ex.P/6. In cross-examination, this witness admitted that the Gum Insan report is in his handwriting and the complainant Saleem had not informed at that time that the appellant has taken his daughter to Agra by misrepresentation.

Sevaram (PW-8) had seized the clothes of the prosecutrix which were received in a sealed condition from G.R.M.C. Hospital, Gwalior. One sealed packet containing swab

and pubic hairs, one sealed packet containing slide and one specimen of seal were seized vide seizure memo Ex.P/7.

Indrakumar Batham (PW-9) has stated that he had conducted the ultrasound of the prosecutrix and found that she was carrying the pregnancy of 17 weeks and four days. The ultrasound report is Ex.P/8 and the ultrasound film is Article A-1. In cross-examination, this witness admitted that the prosecutrix has been wrongly shown as wife of Saleem whereas she is the daughter of Saleem. He further clarified that on the film which is Article A-1, the prosecutrix has been shown as daughter of Saleem.

R.N.S. Gaur (PW-10) had investigated the matter. He recorded the statements of the witnesses, prepared the spot map, arrested the appellant on 7.6.2009 vide arrest memo Ex.P/11. In cross-examination, this witness admitted that he got the diary for investigation on 6.6.2009 and prior thereto he did not conduct any investigation/enquiry in the matter. He did not went to Agra and did not record the statements of any witnesses and did not prepare the spot map.

Dr.S.S.Jadon (PW-11) had medically examined the appellant.

Naresh Singh Parihar (PW-12) had proved the admission register of the prosecutrix in which her date of birth is mentioned as 20.7.1998.

Thus, from the appreciation of the evidence of the witnesses it is clear that the appellant misrepresented to the mother of the prosecutrix that the physical condition of her sister is deteriorating, therefore, he want to take the prosecutrix with him to Agra. He also misrepresented that he has already taken permission from the father of the prosecutrix.

It is submitted by the counsel for the appellant that the prosecutrix has admitted in her evidence that during her stay

with the appellant in Mathura she did not raise any hue and cry and the appellant was also going outside the house for earning money, leaving her in the house all alone. The appellant also did not use to lock the house from outside and inspite of that she did not inform anybody that she has been forcibly brought by the appellant and the appellant has committed rape on her. It is submitted that the silence on the part of the prosecutrix during her stay in Mathura clearly shows that she was a consenting party. It was further stated that even according to the prosecutrix whenever the appellant committed rape on her she did not resist and the explanation given by her that the appellant used to gag her mouth cannot be accepted. It was further submitted by the counsel for the appellant that from the photograph of the prosecutrix affixed on Gum Insan Report it is clear that the Maang of the prosecutrix was filled with Sindur and, therefore, it is clear that even prior to leaving the house, the prosecutrix was already married.

Per contra, it is submitted by the counsel for the State that when the girl is residing all alone in an unknown place and was not talking to anybody, then the reaction of each and every person would be different. A uniform reaction of raising hue and cry or shouting cannot be accepted from each and every person. Everyone would react in a different manner in a given circumstance. In the present case, the prosecutrix has specifically stated that as she was staying in a completely unknown place and was not talking to anybody and under the threat of the appellant she did not inform anybody that she has been kept forcibly. It is submitted that it cannot be said that the prosecutrix was a consenting party. It is further submitted that according to the prosecution case the appellant was the husband of the aunt (मौसी) of the prosecutrix and when the prosecutrix is so closely related to the prosecutrix and the

status of the prosecutrix was just like that of a child of the appellant then it was not expected of the appellant that he would commit such an offence with the prosecutrix. It was further stated that the appellant has not only committed rape on the prosecutrix but had violated the pious relationship with the prosecutrix. The appellant has also not taken any defence that why the prosecutrix or her mother are stating false against him.

Heard the learned counsel for the parties.

So far as the age of the prosecutrix is concerned, as it has already been held by this Court that the Trial Court has come to a conclusion that age of the prosecutrix was not less than 18 years on the date of incident, therefore, the question would be that whether the prosecutrix was a consenting party or not and whether she was abducted with an intention to compel her to marry or she may be forced or seduced to illicit relationship.

If the facts and circumstances of the case are considered in proper perspective then it would be clear that the appellant came to the house of the prosecutrix and misrepresented to the mother of the prosecutrix that the physical health of her sister is deteriorating and, therefore, she should send the prosecutrix along with him to Agra. On enquiry he also misrepresented that he has already taken permission from the father of the prosecutrix. In the present case the appellant is the maternal uncle of the prosecutrix. If a person who is so closely related to the family of the prosecutrix comes and informs that his wife is seriously ill, therefore, the prosecutrix may be sent along with him for taking care of his wife then it was not unnatural on the part of the mother of the prosecutrix for sending the prosecutrix along with the appellant. From the evidence it is also clear that the mother of the prosecutrix before sending her along with the appellant, had taken care by

asking him that whether he has taken permission from the father of the prosecutrix or not. Thus, under these circumstances, it is clear that the appellant had taken permission/consent of the mother of the prosecutrix by misrepresentation.

Section 90 of IPC reads as under:-

“90. Consent known to be given under fear or misconception: A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
Consent of insane person- If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
Consent of child- unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

Thus, it is clear that in the present case the consent of the prosecutrix as well as her mother was taken by the appellant by misrepresentation and, therefore, the consent given by the mother of the prosecutrix or the prosecutrix for accompanying the appellant to Agra cannot be said to be a free consent within the meaning of Section 90 of IPC. Thus, it cannot be said that the appellant had taken away the prosecutrix along with him either with the consent of the mother of the prosecutrix or with the consent of the prosecutrix.

Abduction has been defined under Section 362 of IPC which reads as under:-

“362. Abduction- Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.”

Thus, it is clear that if somebody by deceitful means

induces any person to go from any place then he is said to have been abducted that person. As this Court had already come to a conclusion that the age of the prosecutrix was not less than 18 years on the date of the incident, therefore, it cannot be said that she was kidnapped. As she was above the age of 18 years, therefore, the appellant had committed offence of abducting the prosecutrix by adopting the deceitful means.

As kidnapping, abducting, or inducing woman to compel her marriage etc. is punishable under Section 366 of IPC and the charge under Section 366 of IPC was also framed against the appellant, therefore, no difference it will make that whether the prosecutrix was minor for the purposes of kidnapping or she was above 18 years of age for the purpose of abduction.

It is submitted by the counsel for the appellant that in the Gum Insan Report, it is nowhere mentioned that the appellant had taken away the prosecutrix with him and, therefore, the evidence of Sanno (PW-2) and Saleem (PW-3) cannot be accepted to the effect that the appellant by misrepresentation had taken away the the prosecutrix with her.

Considered the submissions made by the counsel for the appellant.

Merely because the father of the prosecutrix did not mention that the appellant has taken away the prosecutrix with him will not make the evidence of prosecutrix (PW-1) unreliable. Even if we ignore the evidence of Saleem (PW-3) on the ground that he did not mention the fact of taking away of the prosecutrix by the appellant in his Gum Insan Report, there is nothing on record to discard or disbelieve the evidence of Sanno (Pw-2) and the prosecutrix (PW-1). After Gum Insan Report was lodged, no action was taken by the police.

R.N.S. Gaur (PW-10) has specifically stated that he got the diary for investigation purposes on 6.6.2009 and prior to that he did not conduct any enquiry in the matter.

Ramesh Ghanghoriya (PW-6) who was working as T.I. Police Station Madhoganj has stated that after the Gum Insan Report was lodged, the enquiry was handed over to R.N.S. Gaur (PW-10).

Thus, it is clear that the police even did not care to record the statements of the parents of the prosecutrix. When the investigation was faulty, then the evidence of the prosecution witnesses cannot be disbelieved because of the negligence on the part of the Investigating Officer. Even otherwise, it is clear from the facts of the case that the prosecutrix was not recovered because of any efforts made by the police but in fact she was left by the appellant at Gudiguda Square, Gwalior from where she went to police station.

Thus, if some fact is not mentioned in the Gum Insan Report then the evidence of the prosecutrix (PW-1) and her mother Sanno (PW-2) cannot be disbelieved because of the negligence of the police officer who even did not care to make any enquiry on the Gum Insan Report. Thus, the non-mentioning of the fact that the appellant had taken away the prosecutrix with him in the Gum Insan Report would not make much difference to the credibility of the evidence of the prosecutrix (PW-1).

The prosecutrix (PW-1) has specifically stated that by misrepresentation the appellant took her to Mathura instead of Agra. Merely because she stayed there for 3 to 4 months along with the appellant by itself would not mean that she was a consenting party as she has explained that as to why she did not raise any hue and cry while her stay at Mathura. The appellant has also not come forward with a case as to why the prosecution witnesses are lying against him specifically when

he is close relative of the prosecutrix and her mother. The counsel for the appellant also could not point out anything from the statements of the witnesses to show the probability of the false implication of the appellant. No reasons were suggested to the witnesses for the false implication of the appellant. Under these circumstances it is clear that the appellant had abducted the prosecutrix by misrepresenting that the aunt (मौसी) of the prosecutrix is not well and, therefore, she is required at Agra for looking after her.

Khairunisha (DW-2) has stated that the appellant is her son-in-law and Sanno (PW-2) is her daughter. In other words Khairunisha (DW-2) is the maternal grandmother of the prosecutrix. She has stated that the prosecutrix was of loose character and she had fallen in love with some boy and because of that she got pregnant. When Saleem (PW-3) came to know about this fact he came to her and suggested that the prosecutrix may be left at Agra for the purposes of abortion. It was expected by Saleem (PW-3) that the appellant would get her aborted but the appellant did not get the abortion done. Thereafter leaving the prosecutrix at Agra, Saleem (PW-3) came back and as the matter was subsequently compromised with the boy, therefore, Saleem (PW-3) informed the appellant to bring the prosecutrix back and when the appellant demanded an amount of Rs. 5,000/- which he had spent on the treatment of the prosecutrix then Saleem (PW-3) lodged the false report against the appellant.

The appellant (DW-1) in his statement under Section 315 of Cr.P.C. has also stated that as the prosecutrix had developed illicit relations with a boy and had got pregnant, therefore, Saleem (PW-3) had left her in his house and after the matter was compromised with the boy he brought the prosecutrix back and when he demanded his money which he had spent, a false case has been lodged against him. In cross-

examination, the appellant could not say that on what date Saleem (PW-3) had left the prosecutrix with him. He could not tell the name of the doctor from whom he had got the prosecutrix treated. He also could not produce any prescription of treatment. He also could not disclose the name of the doctor to whom he had taken the prosecutrix for abortion. He further admitted that he is being prosecuted in Agra under Gangster Act. He further denied that he is biological father of the baby child of the prosecutrix.

If the evidence of these two witnesses are considered in the light of medical evidence and the ultrasound report Ex.P/8, then it would be clear that on 8.6.2009 the prosecutrix was carrying the pregnancy of 17 weeks and 4 days.

According to the prosecution case, the Gum Insan Report was lodged on 20.2.2009 informing that the prosecutrix is missing from 10.2.2009 and the prosecutrix came back on 6.6.2009. Thus, the period of missing and the age of the fetus is more or less the same. In absence of evidence to show that the appellant had ever taken the prosecutrix to any doctor for abortion purposes, the defence taken by the appellant cannot said to be reliable.

Thus, it is clear that the appellant abducted the prosecutrix by misrepresenting and took her to Mathura where he kept her for about four months and committed rape on her.

Accordingly, it is held that the appellant is guilty of committing offence under Sections 366, 376 of IPC and, therefore, the judgment of conviction passed by the Trial Court is hereby affirmed.

So far as the question of sentence is concerned, it is clear from the record that the appellant was never released on bail during the trial. In the present appeal also, this Court by order dated 11.3.2015 granted bail to the appellant but it appears that he did not furnish the bail and he was produced

before the Court by production warrant and he was sent back to jail for serving out the jail sentence. Under these circumstances, after including the period of remission, it appears that the appellant must have undergone the entire jail sentence. Even otherwise, if the facts of the present case are considered then it would be clear that the appellant who is the maternal uncle of the prosecutrix had violated the pious relationship between himself and the prosecutrix who was like his daughter. The mother of the prosecutrix and the prosecutrix had relied on the statement of the appellant that he has already taken permission from the father of the prosecutrix for taking her to Agra as the physical condition of the aunt (मौसी) of the prosecutrix is deteriorating. Under these circumstances, the appellant had not only violated the pious relationship between himself and the prosecutrix but he had also violated the relationship of trust and belief between himself and the parents of the prosecutrix.

Under these circumstances, this Court is of the view that the jail sentence of rigorous imprisonment of 10 years awarded by the Trial Court for offence under Section 376 of IPC is proper and does not call for any interference.

Accordingly, this appeal fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
Judge

(alok)