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Arjun Ahirwar
vs.
State of M.P

02/02/2017

Shri Raghuvveer Singh, counsel for the appellant.

Shri R.D.Agarwal, Panel Lawyer for the respondent/State.

This appeal has been filed under Section 374 of CrPC against the judgment dated 25/07/2014 passed by Additional Sessions Judge, Chachaura, District-Guna in Special Sessions Trial No.05/2014 by which the appellant has been convicted under Sections 363,366,376(2) of IPC and under Section 6 r/w Section 5(l) of Protection of Children from Sexual Offences Act, 2012.

The allegations against the appellant are that on 23/06/2013 at about 06-07:00AM, the appellant kidnapped the prosecutrix aged about 15 to 16 years. The prosecutrix remained in the company of the appellant from 23/06/2013 till 29/12/2013 and during this period, the appellant had frequent physical intercourse with her. It is also undisputed fact that the appellant and the prosecutrix were known to each other and the appellant took the prosecutrix to Kota and Jakota and at the time of recovery, she was having a pregnancy of 22-24 weeks.

The prosecution story in short is that a missing person report was lodged by Suraj Lal (PW/2) on 25/06/2013 in Police Station-Kumbhraj to the effect that his daughter is missing from 23/06/2013. Crime No.188/2013 for offences punishable under Sections 363,366 of IPC was registered and on 29/12/2013, when

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the prosecutrix was recovered, a recovery memo (Exhibit P/1) was prepared. The statement of the prosecutrix was recorded. The prosecutrix was handed over to the custody of her parents and *punchnama* was prepared. The consent of the prosecutrix was obtained for medical examination and Dr. Reshma Pathan medically examined the prosecutrix. In order to ascertain the age and the fetus of the prosecutrix, she was referred to Guna Hospital. Sonography was done in Guuna Hospital and the report was given. The appellant was arrested and he was got medically examined. The school certificate of the prosecutrix was obtained in order to prove her age. The cloths vaginal swap of the prosecutrix as well as undergarment of the appellant were sent to the FSL. Accordingly, a charge-sheet was filed against the appellant for offences punishable under Sections 363,366,376 and 342 of IPC and under Section 6 of Protection of Children from Sexual Offences Act, 2012.

By order dated 13/01/2014, charges under Sections 363,366,376(2)(N) of IPC and under Section 6 r/w Section 5(l) of Protection of Children from Sexual Offences Act, 2012 were framed.

The appellant abjured his guilt and pleaded not guilty.

The prosecution, in order to prove its case, examined the prosecutrix (PW/1), Suraj Lal (PW/2), Rachhna Bai (PW/3), Kalyan (PW/4), Dr. Reshma Pathan (PW/5), Jagdish Kumar Uikey (PW/6), Amar Lal (PW/7), Brijmohan (PW/8), Vijay Singh (PW/9), Dr. Sitaram

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Raghuvanshi (PW/10) and Ravinder Singh (PW/11).

The appellant did not examine any witness in his defence.

The first question for determination is that what was the age of the prosecutrix on the date when she was alleged to have been kidnapped.

Jagdish Prasad Uikey (PW/6) has stated that he was working on the post of Headmaster in Government Primary School, Bahukheedi. He had stated that on 03/01/2014, some police personnel from the police station, Kumbhraj had come in order to get the certificate pertaining to the date of birth of the prosecutrix. A certificate (Exhibit-P/8) was issued by him on the basis of the entry available in the school record and as per the school record, the date of birth of the prosecutrix is 02/05/1998, The original admission register of the school was also brought by this witness and on the basis of the date of birth mentioned in the admission register, certificate was issued.

In the cross-examination, this witness has admitted that the said certificate was issued by him without there being any written request. No application was given by the concerning police personnel. This witness has also stated that he is not having any document at present to show that he was posted as head-master on the school. But he denied that he was not posted on the post of head master of Government Primary School, Bahukhedi.

Except the school certificate, no other document has been filed by the prosecution to prove the age of the

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prosecutrix.

In the case of **Jarnail Singh v. State of Haryana** reported in **(2013) 7 SCC 263**, the Supreme Court has held as under:-

"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

"12. Procedure to be followed in determination of age: - (1) in every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or

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a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub- rule (3) of this rule

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the

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Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VWPW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then

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no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

As per Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007, the following documents are required for determination of age:-

(a)(i) Matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) and (iii) of clause a above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

Thus, the date of birth certificate of the school can be taken into consideration for ascertaining the age of the prosecutrix.

Furthermore, Kalyan (PW/4) is the brother of the prosecutrix. In examination in chief, he has stated that the age of the prosecutrix is 14 years. In the cross-examination, a question was put to this witness about

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the age of Vinod, younger brother of this witness. This witness, in cross-examination, has specifically stated that his younger brother Vinod is aged about 17 years and the prosecutrix is younger to Vinod. Even the prosecutrix has stated that she is 14 to 15 years of age in her evidence.

Thus, if the age of Vinod is 17 years, then the age of the prosecutrix would be certainly either 16 years or less than 16 years.

The evidence of this witness was recorded in the year 2014. If the age of the prosecutrix is ascertained in the light of the school certificate as well as the statement of this witness, then it would be clear that the prosecutrix was 16 years of age on 11/03/2014 when Kalyan was examined. The contention of Kalyan that his younger brother is aged about 17 years and the prosecutrix is younger to his younger brother Vinod, then it would be clear that the prosecutrix was aged about 16 years on 11/03/2014, the date on which the evidence of Kalyan was recorded.

According to the prosecution case, the prosecutrix was kidnapped on 23/06/2013. Thus, undisputedly the prosecutrix was aged about 15 years and she was minor.

Now the next question is that whether the appellant is guilty of kidnapping and rape.

Referring to the statement of the prosecutrix, the counsel for the appellant submitted that the prosecutrix had gone alongwith the appellant without any coercion or pressure and had remained with the appellant for near

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about six months and she was carrying the pregnancy also and she was moving to different places alongwith the appellant. Thus, it would be clear that she was a consenting party.

Prosecutrix (PW/1), in her Court evidence, has stated that after convincing her, the appellant took her to Kota where they resided in a rented room for three months and, thereafter, they resided at Jakota for three months. It was stated by the prosecutrix that in spite of her objections, the appellant used to have physical intercourse with her and she is carrying the pregnancy and her age is 14 to 15 years. In Jakota, the police had recovered her and from where they were brought to Kumbhraj. Her statement was recorded by the police and she was got medically examined at Binaganj and the sonography was got done at Guna Hospital. She further stated that recovery *punchnama* (Exhibit-P/1) bears her signature and custody *punchnama* (Exhibit-P/2) also bears her signature.

In the cross-examination, the prosecutrix admitted that the appellant is not of her caste. She further admitted that the house of the prosecutrix and the appellant are situated in front of each other. She further stated that by the side of the house of the prosecutrix as well as appellant, houses of various persons are situated and the road, between the house of the prosecutrix and the appellant, is a public road. She further admitted that the prosecutrix never made any complaint to anybody that the appellant used to make indecent gestures and

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he also used to say that he would take her to a metropolitan city. She further admitted that she never disclosed this fact to her parents that the appellant was saying that he would take her, however, she denied the suggestion that she was on visiting terms with the appellant. However, she admitted that the appellant had taken her at about 7:00AM in the morning and at that time her parents were not in the house. She admitted that when the appellant took her alongwith him, her brother, her *bhabhi* and her uncle, all were in the house and there were almost all the persons in the colony. She also admitted that in the villages, people usually get up at 5:00AM in the morning. However, she denied that while the appellant was taking her, she was seen by her brother, *bhabhi* and uncle. She further admitted that she did not raise any hue and cry while she was being taken by the appellant. She further admitted that she never made any complaint or raised any alarm either at Jakota or Kota. She further admitted that there were other tenants in the building in which they had taken a room on rent in Kota and Jakota. However, she denied this suggestion that on her own will, she had gone alongwith the appellant.

It is contended by the counsel for the appellant that from the plain reading of the entire evidence of the prosecutrix, it would be clear that she stayed with the appellant for near about six months at two different places but neither on the way or at Kota or Jakota, the prosecutrix raised any alarm and, thus, it is clear that

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she was a consenting party.

Suraj Lal (PW/2) has stated that prosecutrix is his daughter and at about 6-7:00 in the morning, by inducing her daughter, appellant took away with him. When, inspite of intense search made by them, they could not discover the whereabouts of the prosecutrix, then a missing person report Exhibit-P/3 was lodged. After about six months, the police had brought the prosecutrix and the appellant from Jakota (Baroda). This witness was called in Kumbhraj from where the prosecutrix was taken to Binaganj for medical examination. Consent letter Exhibit-P/4 bears his signature. The sonography of the prosecutrix was done at Guna where it was reported that she is carrying the pregnancy. After coming back from Guna, the custody of the girl was handed over to him. The recovery *punchnama Exhibit-P/1* and custody *punchnama Exhibit-P/2* bear his signatures. The spot map of the house of this witness is Exhibit P/5. The arrest memo of the appellant is Exhibit-P/6 which bears his signatures. It was further stated by him that he was told by his daughter that by misrepresenting, the appellant had taken her away and had sexual intercourse with her.

In the cross-examination, he admitted that he had lodged the missing person report after two days. He further admitted that the house of the appellant is situated in front of the house of this witness and he used to visit his house and he used to talk to the prosecutrix. He further admitted that the appellant used to sit in front

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of the house on every morning. However, he never objected to it. This witness further stated on his own that he did not know about the intentions of the appellant.

Rachna Bai (PW/3) is the *bhabhi* of the prosecutrix. She has also stated that in the morning they noticed that the prosecutrix was missing and inspite of intense search, when the whereabouts of the prosecutrix could not be known, then a missing person report was lodged. She also admitted that the house of the appellant is situated in front of the house of this witness. There is a public way in between both the houses. She never disclosed to the neighbors that the prosecutrix is missing, however, she admitted that the appellant used to talk to the prosecutrix. The statement of Kalyan (PW/4) is also in the same line.

The contention of the counsel for the appellant is that as the prosecutrix was a consenting party, therefore, no offence punishable under Section 376 of IPC is made out.

As this Court has already come to a conclusion in the previous paragraphs that the prosecutrix was aged about 15 years on the date when she was kidnapped, then whether she was a consenting party or not, it is immaterial. Once the prosecution has succeeded in proving the fact that the prosecutrix was minor on the date when she was kidnapped, then the appellant cannot submit that no offence is made out because of the fact that the prosecutrix was a consenting party.

Dr. Reshma Pathan (PW/5) is the doctor who had

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medically examined the prosecutrix. At the time of the medical examination, it was found that she was carrying pregnancy of 22-24 weeks.

Undisputedly, the prosecutrix was in the company of the appellant, therefore, it is proved beyond reasonable doubt that the prosecutrix was subjected to physical intercourse.

Under the facts and circumstances of the case, this Court has come to a conclusion that the prosecutrix was aged about 15 years on the day when she was abducted, then whether she was a consenting party or not, is immaterial. As the prosecutrix was also carrying the pregnancy of 22-24 weeks, therefore, it is clear that she was subjected to physical intercourse by the appellant.

Thus, the prosecution has succeeded in proving the fact that prosecutrix was kidnapped from the legal guardianship of her parents without their knowledge and consent and she was subjected to physical intercourse and thus, the appellant is held guilty of committing offences punishable under Sections 363,366,376(2)(N) of IPC and under Section 6 r/w Section 5(I) of Protection of Children from Sexual Offences Act, 2012. The judgment passed by the Trial Court, convicting the appellant, is hereby affirmed.

Now the question arises that what should be the sentence.

The Trial Court has awarded a sentence of rigorous imprisonment of 10 years.

For offence punishable under Section 376(2)(N),

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the minimum sentence provided is 10 years. Thus, the Trial Court, by providing minimum sentence, has not committed any mistake.

The conviction of the appellant under Sections 363, 366,376(2)(N) of IPC and Section 6 r/w Section 5(I) of Protection of Children from Sexual Offences Act, 2012 and sentence are maintained.

Accordingly, this appeal fails and is hereby dismissed.

(G.S.Ahluwalia)

Judge

AKS