

Before S. P. Bangarh, J.
MANOJ SON OF HANS RAJ—Appellant
versus
STATE OF HARYANA—Respondent
CRA NO. S-765-SB OF 2009
 September 26, 2012

Indian Penal Code - Ss.363, 366-A, 376 & 120-B - Appeal against conviction-appellant with the help of accomplices, eloped with the prosecutrix and had sexual intercourse with her - Intercourse proved to be consensual - According to the school certificate, the girl was below 16 yrs of age - Contended that ossification test was required to ascertain the correct age of the prosecutrix - Held, onus of proof is on appellants to prove she was above 16 yrs of age at the time of occurrence - School certificate shall be repelled only if some contrary certificate is produced by the appellants - Appellant is a young man who has not previously been convicted - His sentence is reduced to five years - Appeal partly allowed.

Held, that keeping in view the plea taken by the appellant, adverse inference cannot be drawn against the respondent due non performance of ossification test upon the prosecutrix for determining her age, as this would have been relevant only, if the appellant had not taken the plea of consensual sex with the prosecutrix.

(Para 23)

Further held, that even, no suggestion was made to PW-2 Dr. Archana Yadav during cross-examination that the prosecutrix was above the age of 18 years at the time of occurrence or that her date of birth was not 05.12.1992. By not putting such type of questions to PW-2 Dr. Archana Yadav, the appellant remained complacent with the age, disclosed by the prosecutrix before PW-2 Dr. Archana Yadav.

(Para 24)

Further held, that the certificate Ex.PE could be repelled only, if, some contrary certificate, thereto, would have been produced by the appellant regarding the age proof of the prosecutrix.

(Para 25)

Further held, that learned trial Court, thus, rightly concluded that the prosecutrix was less than 16 years of age at the time of occurrence and, therefore, the consensual sex with her by the appellant attracted commission of offence punishable under Section 376 IPC. The appellant also kidnapped the prosecutrix from the lawful guardianship and induced her for seduction to illicit intercourse with him.

(Para 26)

Further held, that the learned trial Court, thus, rightly convicted the appellant for commission of offences punishable under Sections 363 and 366-A IPC vide impugned judgment of conviction, which must be upheld and affirmed.

(Para 27)

Arun Yadav, Advocate, *for the appellant*.

G.S. Sandhu, AAG, Haryana *for the respondent*.

S.P. BANGARH, J

(1) Challenge in the appeal is to the legality and propriety of judgment of conviction and order of sentence dated 27.02.2009 passed by Learned Additional Sessions Judge, Rewari, in Sessions case No. RI/35 of 2008/2007, emanating from FIR No. 157 dated 12.07.2007, under Sections 363, 366-A, 376 and 120-B of the Indian Penal Code (for short-IPC) registered at Police Station Khol, whereby, the appellant was convicted and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.500/- or in default of payment of fine to further undergo rigorous imprisonment for one month for commission of offence punishable under Section 363 IPC; to undergo rigorous imprisonment for five years and to pay a fine of Rs.500/- or in default of payment of fine to further undergo rigorous imprisonment for one month for commission of offence punishable under Section 366-A IPC and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.500/- or in default of payment of fine to further undergo rigorous imprisonment for one month for commission of offence punishable under Section 376 IPC. All the substantive sentences were ordered to run concurrently and the period of detention already undergone by the appellant during investigation/inquiry/trial of the instant case was ordered to set off from the substantive sentences.

(2) Brief facts of the case are that on 10.07.2007 at about 5.00 p.m., appellant entered into the house of Satnarayan (complainant) father of the prosecutrix with a bad intention and when he reached the house after

providing fodder to the cattle, he (appellant) fled away from their house by jumping from the roof of the house. Two ladies of their village, who had come there to collect firewood, heard the noise of jumping. The matter was reported to village Panchayat, as also, to the uncles of the appellant, thereupon, accomplice of the appellant namely Nirmala (mother of the appellant) said that now her son had only entered their house and in future, he would elope with their daughter. On the next day i.e. on 11.07.2007, prosecutrix whose date of birth was 05.12.1992 and was studying in 10th standard in Government Senior Secondary School, Jainabad had gone to the school in school dress. Thereafter, Sarita daughter of Subhash, who is the cousin of appellant took prosecutrix to her house under a pre-planned scheme. Appellant and Krishna wife of Subhash were already present there and, thereafter, appellant took prosecutrix to an unknown place by alluring her under a pre-planned scheme. She was searched, but could not be found.

(3) Satnarayan (complainant) on 12.07.2007 at about 12.50 p.m. met the police party headed by Harpal Singh ASI at bus stand, Dahina and moved an application Ex.PD containing aforementioned allegations, whereon, Harpal Singh ASI made endorsement Ex.PD/3 and sent the same to the police station, where formal FIR Ex.PD/1 was recorded. He moved an application Ex.PK to the Principal Government High School, Jainabad and latter made endorsement regarding the date of birth of the prosecutrix Ex.PK/1. Harpal Singh ASI arrested the appellant. He visited the spot and prepared rough site plan Ex.PL. He also got the appellant medico legally examined from Civil Hospital. On 13.07.2007 after medical examination of the appellant, he made parcel of his (appellant's) underwear, which was seized vide memo Ex.PN and that parcel was sent to Chemical Examiner, Madhuban. On the same day, he had obtained parcel after medical examination of the prosecutrix and seized that parcel vide memo Ex.PG. On 14.07.2007, he moved an application Ex.PJ for getting recorded statement of prosecutrix under Section 164 Cr.P.C.

(4) After completion of investigation, Station House Officer of Police Station Khol, instituted police report under Section 173 Cr.P.C., before the learned Illaqa Magistrate to the effect that it appears that the appellant has committed offences punishable under Sections 363, 366-A and 376 IPC. On presentation of police report, copies of documents, as required under Section 207 Cr.P.C. were furnished to the appellant and the case was later committed to the Court of Session for trial, where, charge under Sections 363, 366-A and 376 IPC was framed against the appellant.

whereto, the latter pleaded not guilty and claimed trial. Consequently, prosecution evidence was summoned. On 19.03.2008, prosecutrix was examined as PW-1 before the learned trial Court and after her examination, an application under Section 319 Cr.P.C was filed for summoning of Sarita and Nirmla as additional accused and accordingly, both were ordered to be summoned vide order dated 28.03.2008 passed by the learned trial Court and after their appearance, charge under Sections 363, 366-A, 376 read with 120-B IPC was framed against Sarita and Nirmla, whereto, they pleaded not guilty and claimed trial.

(7) During the pendency of the trial, Sarita accused was referred to the Juvenile Justice Board for trial.

(8) At the trial, prosecution examined prosecutrix as PW-1, Dr. Archana Yadav as PW-2, Dr. Vijay Pal as PW-3, Satnarayan complainant as PW-4, Santra as PW-5, Kanwar Singh as PW-6, Sri Krishna Inspector as PW-7, Dharam Pal as PW-8, Bhagirath HC as PW-9, Dhan Raj as PW-10, Desh Raj as PW-11, Sukhram Pal as PW-12, Ravi Kumar Constable as PW-13, Harpal Singh ASI as PW-14, Uday Bhan ASI as PW-15 and closed evidence later after tendering in evidence PSI report Ex.PX.

(9) After the close of prosecution evidence, appellant and his accomplice were examined under Section 313 Cr.P.C, wherein, they denied the allegations of the prosecution, pleaded innocence and false implication in this case. They also examined Dr. Vijay Rustogi, Handwriting and Finger print expert as DW-1 and closed defence evidence, later.

(10) After hearing both the sides, learned trial Court convicted and sentenced the appellant, as described in the first paragraph of this judgment, while acquitted Nirmla accomplice of the appellant. Aggrieved, thereagainst, the appellant, who was accused before the learned trial Court, has come up in this appeal with a prayer for acceptance, thereof, and for his acquittal of the charge framed against him.

(11) Learned counsel for the appellant and learned Assistant Advocate General, Haryana for the respondent have been heard and the record of the learned trial Court perused with their assistance.

(12) First of all it is to be seen, as to what the PWs deposed in this case.

(13) Prosecutrix appeared as PW-1 and testified that on 11.07.2007, she went to her school where Sarita sister of the appellant

requested her to accompany her to her house and accordingly, she accompanied her to her house, where she found Nemo mother and Krishna maternal uncle of the appellant and the latter, himself. She, further testified that Nemo (mother of the appellant) told the appellant to take her in a room and accordingly, she was taken by the appellant to his room and he bolted the door from inside and committed rape with her and she cried when rape was being committed with her and the appellant gave a threat to kill her, as also, her brother and sister. She, further, testified that Nemo (mother of the appellant) then gave money to the appellant and instructed him to take her away to some other place and then appellant took her on a tractor to Siha and on the same day, he took her to Rewari in a bus and from there, to some other place and kept her at his paternal uncle's house for one day, where also, the appellant committed rape on her at night time and on 13.07.2007, he brought her to village Siha and her father and police came there in search of her and her father saw her and she came to her father who brought her back. She, further testified that on 10.07.2007 at about 5.00 p.m., her uncle Sher Singh went to the house of the appellant and requested his mother to dissuade the appellant from such type of conduct and mother of the appellant in place of dissuading the appellant said that today he (appellant) had entered the house and now he would take her away. She, further testified that she was medico legally examined and police recorded her statement Ex.PA which bears her signature.

(14) Learned counsel for the appellant contended that latter, had consensual sex with the prosecutrix who was above the age of 16 years at the time of alleged commission of offence and, therefore, the appellant is entitled to be acquitted and the learned trial Court wrongly convicted and sentenced him for the alleged commission of offences punishable under Sections 363, 366-A and 376 IPC. He also contended that the school certificate Ex.PE was wrongly relied upon for determining the date of birth of the prosecutrix, which has been written as 05.12.1992, therein. He also contended that the ossification test was required to be conducted upon the prosecutrix for her age determination, which has not been got conducted and due to non-conducting of ossification test on the prosecutrix adverse inference was required to be drawn against her and by holding her age above 16 years, the learned trial Court should have acquitted the appellant.

(15) Learned counsel for the appellant also placed reliance upon *Makhan versus State of M.P (1)*, *Gurdeep Singh versus State of Haryana (2)*, *Arvinder Kaur versus State of Punjab (3)*, *Mohamad Imteaz Khan versus State of Haryana (4)*, *Bhup Singh versus State of Haryana (5)*, *Jaipal Singh versus State of Haryana (6)*, *Som Nath versus State of Punjab (7)*, *Rakesh versus State of Haryana (8)*, and *Ram Partap @ Makiya versus State of Rajasthan (9)*, passed by this Court and other Hon'ble High Courts. These judgments were delivered in those cases, where the prosecutrix was above the age of 16 years and in some judgments, the plea was not taken by the accused that he had consensual sex with the prosecutrix. So, these judgments are inconsequential to the appellant and no benefit can be derived by him, therefrom.

(16) It is, the admitted case of the appellant that he had love affair with the prosecutrix who had written him several letters. It is also the case of the appellant that prosecutrix was desperately after him (appellant) and at the time of occurrence, she was above the age of 18 years.

(17) Learned trial Court also held that though the prosecutrix has been proved to be a consenting party, yet in view of the fact that she was under the age of 16 years, charge against the appellant for commission of offences punishable under Sections 363, 366-A and 376 IPC has been proved beyond any reasonable doubt and he was, accordingly, convicted, thereunder.

(18) Learned counsel for the appellant has not assailed this finding of the learned trial Court who also contended that prosecutrix had consensual sex with the appellant and she was above the age of 18 years.

(19) Now, when once this plea has been taken by the appellant that he had consensual sex with the prosecutrix, onus heavily shifted upon him to show that at the relevant, prosecutrix had completed 16 years of age. Initially, the appellant flirted with the prosecutrix and this flirtation was

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- (1) 2003 (3) RCR (Criminal) 674
 - (2) 1996 (3) RCR (Criminal) 640
 - (3) 2007 (3) RCR (Criminal) 818
 - (4) 1994 (2) RCR 456
 - (5) 2005 (3) RCR (Criminal) 63
 - (6) 2003 (2) RCR (Criminal) 310
 - (7) 2008 (3) RCR (Criminal) 510
 - (8) 2006 (4) RCR (Criminal) 505
 - (9) 2007 (4) RCR (Criminal) 108

followed by the consensual sex. At the time of flirtation, as also, at the time of having consensual sex with the prosecutrix, it was his bounden duty to verify that the prosecutrix was above the age of 16 years.

(20) The appellant indubitably has not placed on the record any document to show that at the time of commission of consensual sex by him with the prosecutrix, she was according to that document had completed the age of 16 years. Respondent placed reliance upon school certificate Ex.PE. According to that certificate, the prosecutrix was born on 05.12.1992 and on the date of occurrence i.e. 11.07.2007, she was below the age of 16 years. One fails to understand, as to how this certificate regarding the proof of age of the prosecutrix can be repelled. If, this school certificate Ex.PE containing her date of birth as 05.12.1992 does not belong to her, then to whom it belongs. This evidence was required to be led by the appellant during trial that this certificate Ex.PE containing the date of birth of the prosecutrix as 05.12.1992, belongs to some other girl.

(21) So, in sum, it was for the appellant to show that the prosecutrix was above the age of 16 years, as on 11.07.2007.

(22) PW-2 Dr. Archana Yadav, Medical Officer, Government Hospital, Rewari, conducted the medico legal examination on the prosecutrix on 13.07.2007 and before her, prosecutrix had given her age as 15 years. As already held, in the middle standard certificate of the prosecutrix copy Ex.PE, which has been proved by PW-6 Kanwar Singh, Incharge/Principal, Government Girls Senior Secondary School, Jainabad, the date of birth of the prosecutrix has been written as 05.12.1992. In her statement dated 14.07.2007 under Section 164 Cr.P.C, made by her before learned Magistrate, she stated herself to be of 15 years of age.

(23) Keeping in view the plea taken by the appellant, adverse inference cannot be drawn against the respondent due non performance of ossification test upon the prosecutrix for determining her age, as this would have been relevant only, if the appellant had not taken the plea of consensual sex with the prosecutrix.

(24) Even, no suggestion was made to PW-2 Dr. Archana Yadav during cross-examination that the prosecutrix was above the age of 18 years at the time of occurrence or that her date of birth was not 05.12.1992. By not putting such type of questions to PW-2 Dr. Archana Yadav, the

appellant remained complacent with the age, disclosed by the prosecutrix before PW-2 Dr. Archana Yadav.

(25) The certificate Ex. PE could be repelled only, if, some contrary certificate, thereto, would have been produced by the appellant regarding the age proof of the prosecutrix.

(26) Learned trial Court, thus, rightly concluded that the prosecutrix was less than 16 years of age at the time of occurrence and, therefore, the consensual sex with her by the appellant attracted commission of offence punishable under Section 376 IPC. The appellant also kidnapped the prosecutrix from the lawful guardianship and induced her for seduction to illicit intercourse with him.

(27) The learned trial Court, thus, rightly convicted the appellant for commission of offences punishable under Sections 363 and 366-A IPC vide impugned judgment of conviction, which must be upheld and affirmed.

(28) Confronted, with this situation, learned counsel for the appellant contended that the latter, is not a previous convict, who has already suffered detention for a sufficient time; he has already faced the agony of this litigation and that would have brought tremendous mutation in his behaviour towards the woman folk and because of these special reasons, his sentence may be reduced from 7 years for commission of offence punishable under Section 376 IPC, in view of, the Court rightly.

(29) The appellant is not a previously convict. He is a young man who has already undergone agony of this litigation. He is also in jail since long. This Court in *Gurmeet Singh & Others versus State of Haryana (10)*, held that ends of justice would suffice, if the sentence of the appellant is reduced to four years under Section 376 IPC. In this judgment, it was held that the girl was 15 1/2 years of age, who was mature enough, though she was less than 16 years. Perhaps she wanted to enjoy sex with Gurmeet Singh and for the reason, she came out of her house.

(30) The benefit of this judgment must be accorded to the appellant Manoj and accordingly, his sentence for commission of offence punishable under Section 376 IPC is reduced to five years.

(31) Resultantly, except for the aforesaid modification in the order of sentence, appeal fails and, is, hereby, dismissed.

A. Aggarwal

(10) 1999 (2) AICLR 472