

TEAM CODE- TJIR114

BEFORE THE HIGH COURT OF HIMACHAL PRADESH

IN THE CASE OF

WASIM AKRAM

V

MR. RAJ ANAND KAPOOR

CASE NO- 1741 OF 2017

CRIMINAL APPEAL NO. 182 OF 2017

DATE- 21ST MARCH 2018

CRIMINAL APPEAL UNDER SECTION 374

Appeals from convictions: under section 374 of Criminal Procedure Code, 1973.

The Appellant has filed an appeal to this Hon'ble High Court of Himachal Pradesh to review the judgment passed by the Trial court. The Hon'ble High Court has the jurisdiction to hear the matter under Section 374 (2) of the Criminal Procedure Code, 1973.

Section 374(2):

“Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial, may appeal to the High Court”

Reference to precedent and other sources

Code of Criminal Procedure, 1973 (Cr.P.C) - Section 374(2) - Section 325, Indian Penal Code (IPC) - Section 363, Indian Penal Code (IPC) - Section 376, Indian Penal Code (IPC)-Section 2, Protection of Children from Sexual Offences Act, 2012-Section 3, Protection of Children from Sexual Offences Act, 2012 - Section 4, Protection of Children from Sexual Offences Act, 2012-Section 27, Protection of Children from Sexual Offences Act, 2012-Section 2,

Prohibition of Child Marriage Act, 2006-Section 3, Prohibition of Child Marriage Act, 2006 - Section 3(1), Prohibition of Child Marriage Act, 2006 - Section 3(2), Prohibition of Child Marriage Act, 2006-Section 9, Prohibition of Child Marriage Act, 2006- Section 12, Prohibition of Child Marriage Act, 2006

History and Procedural History of the appeal

Criminal - rape - Sections 325, 363 and 376 of Indian Penal Code, 1860 - appeal for the acquittal within the limitation period - age of victim was about 17years and eleven months- victim mentioned in her testimony that appelland had -sexual intercourse with her without her consent and she has married to him under compulsion – medical examination and complainant fully corroborates version and testimony of victim - Trial Court convict appelland under Section 325, 363 and 376 of Indian Penal Code and a fine of Rs. 50,000/- High Court - held, appelland rightly convicted under Sections 325, 363 and 376.

Issues and points for determination

- ISSUE I: Whether WA is liable under section 325 of Indian Penal Code?

Point of determination: Medical report and circumstantial evidence

- ISSUE II: Whether WA is liable under section 363 of Indian Penal Code?

Point of determination: As per the section 363 of Indian Penal Code,“taking the minor out of her lawful guardianship amount to kidnapping”

- ISSUE III: Whether WA is liable under section 376 of Indian Penal Code?

Point of determination: minor girl never consented for the inter-course hence the intercourse amount to rape

JUDGMENT

1. An Appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 against the judgment dated December 24, 2017, passed by the trial court, by which the appellant is convicted of the offences punishable under Sections 325, 363 & 376 of the Indian Penal Code and sentenced to suffer imprisonment for 7 years and fine of Rs.50, 000/- in default.
2. This is a case under Section 376 and, therefore, in view of the decision in the case of *State of Punjab v. Ram Dev, 2003*¹, this Court has refrained from mentioning the name of the victim.
3. The prosecution case briefly runs as under:

The age of the victim is 17 years and 11 months. Both the accused and victim met in a party and developed their friendship from the party and was witnessed many a time goofing around at certain public places of Shimla. On 26th July 2017, victim was seen coming out of residence of accused . Both were in jolly mood, accused was in his bath robe while he came out of his residence to see off victim. Father of accused (named Aslam Khan) gave marriage proposal but victim's father rejected the proposal on the ground of their religion differences and his girl is underage 17 years and 2 months and told them to get out of his house. On 26th August, 2017 victim was seen missing from her house and later on somebody told to victim's father that she was seen in the Court of Marriage Registrar along with the accused. Accused father filed a complaint with the police at the local police station that his minor daughter has been kidnapped by the accused. On 27th August, 2017 police officials along with victim's father visited at accused residence and they witnessed that both were living as husband & wife and the victim told to the police officials that she married to accused with her consent and there was no compulsion on her. Then later on 5th November 2017, victim's father again visited at the residence of accused. Girl's father witnessed that both were fighting with each other and he also witnessed certain bruises on victim's body and victim's arm was also fractured and her clothes were also torn up and at that time she told to his father that accused has had sexual intercourse with her without her consent and she has married to

¹A.I.R. SCW 6947

him under compulsion. On the same day victim's father registered a complaint against accused of Grievous Hurt, Kidnapping and Rape.

4. The learned Judge to whom the case was made over for trial framed charge against the appellant based on the contentions put forth by both the parties and weighing also on the result of the ossification test declared the age of victim to be seventeen (17) years and eleven (11) months. Hence, convicting the accused as per the following charges under Indian Penal Code 1860:

- Section 325 Grievous Hurt caused to victim by him, for four (4) years;
- Section 363 kidnapping of victim for two (2) years;
- Section 376 rape of a minor girl, for seven (7) years.

Along with a total fine of Rs. 50,000/- (Rupees Fifty Thousand). The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried.

5. After appreciating the evidence adduced by the prosecution and hearing the learned counsels of the parties, the learned Judge held that the case of the prosecution against the appellant of the offences punishable under Sections 325, 363 & 376 of I.P.C. was proved beyond reasonable doubt. In view of this conclusion, the learned Judge has convicted the appellant of the offences punishable under Sections 325, 363 & 376 of I.P.C. and imposed sentences referred to hereinabove by judgment dated December 24, 2017, giving rise to this appeal.

6. The learned counsel of the appellant, submitted that the appellant had not committed grievous hurt on the victim she got grievously hurt as she slipped during doing the household work and false allegations have been imposed on him just to take revenge due to some personal grudges arises between them. But the counsel could not establish their fact by the help any evidence or any proof.

7. The learned counsel further submitted that the appellant had not kidnapped victim as she has gone with him and left the house of her father with her own free consent and she was able to understand the consequences of leaving her parent's home. All the charges framed against him are false and made with malafide intention. The learned

counsel also draw our attention to the Judgement delivered by the Hon'ble Supreme Court in the case of *S Varadarajanv. State of Madras* ² where the Hon'ble Court has laid down that *when a girl below eighteen rings up his lover and at the appointed place meets him and goes to Marriage Registrar's office and there is no evidence of any inducement made by lover, there is no taking or enticing.*

8. The counsel also raised an objection on the validity of Ossification test, where they draw our attention on various cases determined by the Hon'ble Apex Court as well as other High Courts. In the case of *Chalthuv. Govindan* AIR 1958 Ker 121³ where the Hon'ble Court has held that *owing to the variation in climatic, dietic, hereditary and other factors affecting the people of different states of India uniform standard for determination of age by Ossification test cannot be formulated.* Also the Gauhati High Court in the case of *Taimus Ali v. State of Assam* ⁴ held that *Non-ossification on one end of a bone may be due to various factors including want of food and calcium deficiency.*
9. The learned counsel, lastly, submitted that the appellant has not committed rape on victim as both indulged in the sexual intercourse with free consent and both of them were aware of the consequences of their act and the allegations are made with a malafide intention.
10. The learned counsel prays that there being no merit in this application, the same be rejected and the appellant should be acquitted.
10. The learned counsel of the victim, submitted that the accused was grievously hurt, when she denied for having sexual intercourse with him, he started to beat her and all the injuries have inflicted due to him. In addition to this the medical examination report clearly stated that the injuries sustained state that quarrel has held between the parties only then this kind of injuries can be sustained. The learned counsel further submitted that the accused had taken her from her parent's house by instigating her and she was not aware of the fact that he will not let her go back to her parent's house again. Therefore, he is liable for kidnapping her.

² AIR 1998 SC 942

³ AIR 1998 SC 942

⁴ 1977 CrLJ (NOC) 243 (Gau)

11. In the instant case when the father of the victim visited the house of the accused on 5th November 2017 he witnessed certain bruises on victim's body, her arm was fractured and her clothes were also torn up. According to the counsel these all amounts to circumstantial evidences that the victim was beaten up badly. The counsel also draw our attention to the case *Ramkaran Mohton v. State*⁵ where the patna High Court held that "*The offence of grievous hurt is not caused unless the offender has intention or himself knows that such act is likely to causes grievous hurt to the person*". The party also very prominently established this before us. Also in the Case of *Loknath Beherav. State*⁶ where the court held that "*When appellant would certainly expect the natural consequence of his act to be the fracture of a rib or such injury it is said that he had voluntarily cause grievous hurt. Therefore, it could be held that the accused was liable to be convicted for voluntarily causing grievous hurt and punishable under section 325 of Code of Criminal Procedure*"
12. The learned counsel, also, submitted that the accused has committed her rape and even she did not consent for the sexual intercourse with him and she came to know after marriage that even he married with her just to fulfill his physical lust from her.
13. The learned counsel, lastly, submitted that accused has committed the kidnapping of the minor girl. Since, the age of girl was 17 year 11 months. The counsel also draws our attention to the Ossification test which shows the dilemma of +/- 3 months. In this case there is doubt between three documents. The Ossification test instead of giving clarity, created more ambiguity and in this case Counsel draw our attention towards the case of *Vishnu v. State of Maharashtra*⁷. In this case the girl was below 16 years of age and to support this fact the birth register of Municipal Corporation and Register of Hospital where she was born was submitted, but in school register she was shown above the age of 16. In such circumstances consent of victim was considered immaterial. The accused had induced the girl to a hotel by creating an impression that his wife was admitted in the hospital and by threatening her had forcibly ravished her sexually. The entire evidence of victim was considered reliable and natural and conviction was upheld.

⁵ AIR 1958 Pat 452

⁶ 1984 CrLJ 833

⁷ AIR 200 SC 508

14. The learned counsel also draws the court's attention on the judgement delivered by Hon'ble Supreme Court i.e. *Kuldeep K. Mahatov. State of Bihar*⁸ where the court has held the person guilty even in the case where the victim girl's age was contentious and was between 17-18 years.
15. The learned counsel therefore prays that the accused shall not be acquitted instead the sentence of life imprisonment should be enhanced.
16. Based on the argument presented by the both the learned counsel the court finally found that the finding of Trial Court was correct and valid. accused is guilty of grievous hurt. The accused here contended that the victim got hurt because she slipped during some household work. But, they could not establish it before the court. Also, they could not show any mala-fide intention of the victim which could support their arguments. Further, the learned counsel without any reasonable doubt have proved that the accused has caused the grievous hurt to the victim. Furthermore, the appellants also could not defend themselves against the circumstantial evidences.
17. Also, as the objection raised about the Ossification test we agreed to the argument raised by the Counsel of accused. We agree to the fact that bone density may depend on the various factors and hence, subject to error. But, to determine the age of the victim we are obliged to follow the verdict given the Hon'ble Apex Court in the case of *Vishnu v. State of Maharashtra*⁹, where in the case of ambiguity in documents of age, the apex court gives the validity to the age contended by the victim. Hence, following the same principle herein in the instant case, the age of the victim will be assumed 17 years and 11 months or below the 18 years of age as contended by her.
18. The accused is also found to be guilty of kidnapping. The accused here contended that the victim gone with him and left the house of her father with her full consent. But as the objection raised by the Victim's counsel that as per the section taking the minor out of her lawful guardianship amount to kidnapping. The section nowhere talks about the consent of minor. Hence, the accused is guilty of Kidnapping.
19. Also, in the case of rape keeping the circumstantial evidences in mind and listening arguments of both the parties we came to the conclusion that the accused is liable of Rape. As the argument given by accused that she was seen by many people coming

⁸(1998) 6 SCC 420

⁹AIR 200 SC 508

out of his house many times and the allegation are made with a mala-fide intention. But the party could not show that they have sexual intercourse prior to marriage. Even though there are witness testifying her presence in his house but this does not proof that they had a sexual intercourse. On the other hand the counsel for the victim tell us that they never had any sexual intercourse before the marriage. Further he argued that since she was a minor and also she never gave consent for any sexual intercourse. Hence, this amounts to the Rape of Minor Girl.

20. Since, the court found the accused guilty of such offence and upheld the punishment given by the trial court which is as 4-year imprisonment for grievous hurt caused to victim, 2-Year imprisonment for Kidnapping and 7-year imprisonment for Rape. The court also upheld the fine imposed by the trial court of Rupees 50,000/-.

21. Appeal Dismissed.