

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Reserved on: 10.09.2024

Pronounced on: 26.09.2024

CrlA(S) No.07/2023

BILAL AHMAD MIR

...APPELLANT(S)

Through: - Mr. T. A. Lone, Advocate.

Vs.

UT OF J&K & ANR.

...RESPONDENT(S)

Through: - Mr. Satinder Singh Kala, AAG, with
Ms. Raheela Khan, Assisting Counsel.
Mr. Wani Manzoor, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The appellant has challenged the impugned judgment of conviction dated 17.07.2023 and order of sentence dated 22.07.2023 passed by learned 1st Additional Sessions Judge, Baramulla, whereby he has been convicted for offences under Section 363 and 376 of RPC. In proof of offence under Section 363 RPC, the appellant has been sentenced to undergo rigorous imprisonment for a period of two years and in proof of offence under Section 376 RPC, he has been sentenced to undergo rigorous imprisonment for a period of five years. The appellant has also been sentenced to a fine of Rs.2,000/ and in default of payment of fine, he has been ordered to undergo further imprisonment of three months.

2) Briefly stated, case of the prosecution is that on 27.07.2004, complainant Manzoor Ahmad Gooru submitted a written report with Police Station, Sopore, alleging therein that on 23.07.2004, his cousin

sister (hereinafter referred to as “the prosecutrix”), who is a minor, has been kidnapped by the appellant herein with a view to commit sexual intercourse with her. It was further alleged in the report that the appellant is a married person having three children and despite launching a search, the prosecutrix could not be traced. On the basis of this written report, FIR No.250/2004 for offences under Section 363 RPC came to be registered and investigation of the case was entrusted to PW-11, Sub Inspector Wali Mohammad Hakeem. During investigation of the case, the prosecutrix was recovered from the custody of the appellant at Bypass Tarzoo Road. She was subjected to medical examination. After recording statements of the witnesses under Section 161 of Cr. P.C and completing investigation of the case, offences under Section 363 and 376 RPC were found established against the appellant and, accordingly, charge sheet was laid before the trial court.

3) In her statement recorded under Section 161 of Cr. P.C, the prosecutrix narrated that on 23.07.2004, she was enticed by the appellant to go with her, whereafter he kidnapped her. She further stated that while she remained with the appellant, for the first two days he did not commit any sexual intercourse with her but on 25.07.2004, she was taken by him to a room at unknown place and subjected to forcible sexual intercourse. She further stated that she is a minor and that the appellant is related to her and that he is married to her cousin sister having three children. It is pertinent to mention here that during investigation of the case, date of birth of the prosecutrix was ascertained from her school and in this regard certificate, Ext-NG, was obtained from Government Boys Middle School,

Hatishah Sopore, according to which the date of birth of the prosecutrix is 15.01.1989, which shows that she was less than 16 years of age at the time of the occurrence.

4) The learned trial court, in terms of order dated 24.11.2005, framed charges for offences under Section 363 and 376 RPC against the appellant who denied the charges and claimed to be tried. Accordingly, the prosecution, in order to prove its case, examined as many as 11 witnesses, whereafter the statement of the appellant/accused under Section 342 of J&K Cr. P. C was recorded. The appellant entered his defence and examined three witnesses in defence.

5) It appears that the prosecution made an application under Section 540 of J&K Cr. P. C for summoning Headmaster Government Boys Middle School, Hatishah, Sopore, so as to prove the certificate, Ext-NG. The said application was allowed and the statement of the headmaster was recorded after the trial of the case had been completed.

6) The learned trial court, after hearing the parties and after appreciating the evidence on record, came to the conclusion that the prosecution has been able to bring home the guilt of the accused beyond reasonable doubt and, accordingly, the appellant/accused has been convicted of the offences under Section 363 and 376 RPC in terms of the impugned judgment.

7) The appellant has challenged the impugned judgment of conviction on the grounds that the trial court has failed to appreciate that there was no sufficient evidence on record to prove the charges against the appellant.

It has been further contended that there are contradictions in the statements of the prosecution witnesses *inter se*, which have not been taken note of by the learned trial court. It has been further contended that the statement of the prosecutrix does not inspire confidence, as such, the same is not trustworthy. It has been also contended that the prosecution has miserably failed to prove that the prosecutrix was below 16 years of age at the time of alleged occurrence but the learned trial court has failed to take note of this aspect of the matter. Finally, it has been contended that the learned trial court has not appreciated the evidence on record in its proper perspective.

8) I have heard learned counsel for the parties and perused the impugned judgment, the grounds of challenge and the evidence available on the trial court record.

9) As already noted, the charge against the appellant is that he has kidnapped the prosecutrix and thereafter subjected her to sexual intercourse. As per prosecution case, the prosecutrix was less than 16 years of age at the relevant time. The first question that is required to be determined in this case is as to whether the prosecutrix was minor at the time of the occurrence because the age of the prosecutrix in a case like the present one becomes significant for determination as to whether or not the sexual intercourse committed by the accused upon the victim would come within the definition of 'rape'. If it is found that the prosecutrix was minor at the relevant time, her conduct as to whether she was a consenting party to the alleged act would become immaterial.

10) As per the prosecution case, the age of the prosecutrix at the relevant time was 15 years. It is to be noted that Section 375 RPC, which defines 'rape' as it stood in the year 2004 when the occurrence is alleged to have taken place, laid down the age of consent as 16 years. As per this provision, a man is said to have committed rape if he has sexual course with a woman, inter alia, with or without her consent if she is less than 16 years of age.

11) It is a settled law that burden lies upon the prosecution to show that the victim at the time of the occurrence of rape was minor. In the instant case, the prosecution, in order to prove the age of the prosecutrix, has relied upon the certificate (Ext-NG) issued by the Headmaster, Govt. Boys Middle School, Hatishah Sopore. In the said certificate, it is recorded that the date of birth of the prosecutrix is 15.01.1989, meaning thereby that as on the date of the occurrence, i.e. in July, 2004, she was less than 16 years of age. In order to prove this certificate, the prosecution has examined Smt. Neelofar Gul, Headmaster Govt. Boys Middle School, Hatishah, Sopore. She, on the basis of the record which she had brought before the Court, has deposed that the prosecutrix has remained a student of the said school and as per the record, her date of birth shown in the certificate, Ext-NG, is correct. She has stated that in the year 2004, when the certificate was issued, Niyaz Ahmad Bhat was headmaster of the school. In her cross-examination, she has stated that she cannot identify signature of the headmaster on the certificate, Ext-NG. However, she has stated that she has compared the particulars mentioned in the certificate with the admission register of the school and found it correct. She has gone on to

state that discharge certificate requires counter signature of the Zonal Education Officer but in the instant case there is no counter signature of the Zonal Education Officer. She has also stated that the prosecutrix was admitted to the school on the basis of the discharge certificate. She has also stated that at the relevant time, the date of birth was recorded on the basis of the application from the parents.

12) Learned counsel appearing for the appellant has vehemently argued that the particulars of date of birth recorded in Ext-NG cannot be relied upon in the instant case because the headmaster, who has issued the said certificate, has not been examined as witness by the prosecution. He has further contended that the record, on the basis of which date of birth of the prosecutrix has been entered in the admission register of the school, has not been produced nor is it proved as to on what basis the date of birth of the prosecutrix has been recorded in the admission register of the school. While relying upon the ratio laid down by the Supreme Court in the case of **Alamelu & anr. vs. State represented by Inspector of Police**, (2011) 2 SCC 385, the learned counsel for the appellant has contended that merely because date of birth certificate of the prosecutrix has been exhibited during the trial of the case does not mean that its contents have been proved. It has been contended that the date of birth mentioned in the certificate does not have evidentiary value unless the person who has made entry or who gave the date of birth is examined. In this regard, the learned counsel has also placed reliance upon the ratio laid down by the Supreme Court in **Narbada Devi Gupta vs. Birendra Kumar Jaiswal & anr.** (2003) 8 SCC745, **Mobarik Ali Ahmed vs. The State of Bombay**,

AIR 1957 SC 857, and the judgment of the Bombay High Court in the case of **Om Prakash Berlia and another vs. Unit Trust of India and others**, AIR1983 (Bom) 1.

13) There is no doubt to the fact that the author of the certificate, EXT-NG, has not been examined by the prosecution and it is also a fact that PW Smt. Neelofar Gul has not identified the signatures of the author of the certificate while making her statement but she has testified to the correctness of the particulars mentioned in the said certificate by comparing the same with the admission register of the school which she had brought to the court at the time of recording her statement. So, it has been established that the particulars mentioned in the said certificate correspond to the particulars of the prosecutrix mentioned in the admission register. The school registers are authentic documents being maintained in the official course and these registers are entitled to credence of much weight unless proved otherwise. Section 35 of the Evidence Act makes an entry in any public or other official book, register stating a fact in issue or relevant fact made by a public servant in discharge of his official duty admissible in evidence. Thus, an entry made in the admission register of the school by the school authorities can be read in evidence in proof of the contents of the said entry. In my aforesaid view, I am supported by the ratio laid down by the Supreme Court in **State of Madhya Pradesh vs. Preetam**, (2018) 17 SCC 658.

14) It is true that the persons, on the basis of whose statement the school authorities have recorded the birth particulars of the prosecutrix, have

neither been named nor examined in the present case but when the father of the prosecutrix was questioned on the aspect of age of the prosecutrix, he has stated that he does not remember the date of birth of his daughter but he has also stated that he got married in the year 1985 and after two years of his marriage, his first issue was born and after about two years thereafter, the prosecutrix was born. Thus, according to father the of prosecutrix, she was born somewhere in the year 1989. This corresponds to the date of birth mentioned in the certificate, Ext-NG. The prosecutrix while making her statement during the trial of the case in the year 2008, when questioned about her age, stated that she is 19 years old and that she had left her school about four years back, which means that in the year 2004, when the alleged occurrence took place, she was about 15 years of age. The brother of the prosecutrix, PW Ishtiyaq Ahmad Guroo, has also stated that at the relevant time age of the prosecutrix was about 14 years.

15) When the aforesaid oral evidence led during the trial of the case is read in conjunction with the date of birth mentioned in the certificate, Ext-NG, it is conclusively proved that the prosecutrix was aged around 15 years at the time of the alleged occurrence. The learned trial court has dealt with this aspect of the matter extensively and in an elaborate manner in the impugned judgment, whereafter it has rightly come to a conclusion that the prosecutrix at the relevant time was aged less than 16 years. This finding of the learned trial court does not call for any interference.

16) Having held that the prosecutrix was less than 16 years of age, meaning thereby she had not attained the age of consent at the time of

occurrence, let us now proceed to analyze the evidence on record as regards the alleged the occurrence.

17) The prosecutrix has stated that as per her desire, her engagement for marriage was settled with her cousin brother but the appellant, who is related to her, conveyed that her fiancée is not a good person as he is already having a child, thereby instilling hatred in her mind for the said person. She stated that she conveyed to her family that she is not going to marry her fiancée Jan Mohammad but her decision was not accepted by her parents. She narrated this thing to the appellant who assured her that he will extend help to her. She went on to state that on Friday, the appellant brought her out of her house. She was taken to the house of a boy where she stayed for a night. On next day, she along with the appellant went to a park, whereafter the appellant hired a room at Safapora wherein they stayed for three nights. She further stated that on the first night at Safapora, the appellant committed sexual intercourse with her against her will. She further stated that on other nights, the appellant did not commit any sexual intercourse with her. She also stated that she was recovered from the custody of the appellant by the police.

18) In her cross-examination, she stated that on the first night when she stayed in the house of the boy who had met the appellant, she spent the night with another girl as a guest. It was on next day that she along with the appellant went to Mansbal park and spent whole day with the appellant. On the said day, the appellant hired a room at Safapora where they reached in the evening. She reiterated in her cross-examination that

on the first night which she spent with the appellant in the hired room at Safapora, he had forcible sexual intercourse with her.

19) From the aforesaid statement of the prosecutrix, it is clear that appellant did subject her to sexual intercourse during the first night which they spent in a hired room at Safapora. This has been clearly stated by the prosecutrix in her examination-in-chief and repeated in her cross-examination. There is no contradiction in her statement to this extent.

20) Learned counsel for the appellant has tried to project that there was previous enmity between the family of the prosecutrix and the family of the appellant which has prompted the prosecutrix to depose falsehood against him. In this regard reference has been made to the statements of defence witnesses. The defence of the appellant that there was previous enmity between the two families is not proved from the evidence on record at all. None of the defence witnesses has been able to depose as to regarding which land there was a dispute between the two families. They have only made general assertions with regard to the alleged dispute between the two families without giving specific details about the same. In fact, it has been admitted by the defence witnesses that there is no case going on in any court between the families of the complainant and the accused. A feeble attempt has been made by the appellant to set up this defence while cross-examining the prosecution witnesses but all of them have denied existence of any such dispute between the two families. In this view of the matter, it cannot be stated that the prosecutrix has roped in the appellant with a view to take revenge upon him.

21) As already stated, the statement of the prosecutrix as regards commission of sexual intercourse upon her is consistent and does not admit of any contradiction. She has clearly stated that the appellant instilled hatred in her mind against her fiancée which drove her to run away from her house with the appellant. In fact, there is no cross-examination of the prosecutrix from the appellant on this aspect of the case. It is also proved from the evidence on record that the prosecutrix was recovered by the police from the custody of the appellant while they were together at Bypass Tarzoo Road. All the witnesses to the recovery memo, EXPW-1/1, namely, Manzo Ahmad Guroo, Farooq Ahamd Guroo, Ishtiyaq Ahmad Guroo and the Investigating Officer, Wali Mohammad Hakeem (SI), have testified to this fact. Thus, the prosecution has been successful in proving that the prosecutrix, who was a minor at the relevant time, was induced and influenced to leave her guardian's custody and to go with the appellant, thereby establishing the charge of kidnapping against him.

22) It has been contended by learned counsel for the appellant that the medical evidence does not prove sexual intercourse as the report of the doctor shows that there was no presence of sperms and there were no marks of violence on any part of the body of the prosecutrix. It has been contended that in the absence of corroboration to the statement of the prosecutrix by the medical evidence on record, the same cannot be relied upon.

23) The aforesaid argument raised by learned counsel for the appellant is without any merit for the reason that the medical examination of the prosecutrix was conducted after $\frac{3}{4}$ days of the sexual intercourse. She was kidnapped on 23rd July, 2004 and as per her statement, sexual intercourse took place during the intervening night of 24th/25th July, 2004. She was examined by the doctor on 28th July, 2004. After $\frac{3}{4}$ days of the sexual intercourse, presence of sperms was not possible as by that time the same must have been washed away. Absence of marks of violence on the body of the prosecutrix does not rule out the possibility of sexual intercourse. It is to be noted that the prosecutrix was aged only 15 years and the appellant was a grownup person aged about 28 years. Therefore, it would not have been possible for the prosecutrix to resist the sexual assault of the appellant. The absence of marks of violence can be attributed to the fact that the prosecutrix was a little girl and when pitted against a grownup man, it was impossible for her to put up any resistance.

24) Even otherwise, the prosecutrix, as already stated, was less than 16 years of age at the relevant time, therefore, even if it is assumed she had consented to the sexual intercourse, still then her consent is immaterial. The same would not make any difference to the case of the appellant. All these aspects of the matter have been specifically dealt with by the learned trial court while recording the judgment of conviction and there is no ground to take a view different from the one taken by the learned trial court in the impugned judgment on these aspects of the matter.

25) For what has been discussed hereinabove, I do not find any ground to interfere with the judgment of conviction recorded by the learned trial court. However, so far as the question of sentence is concerned, it has to be taken into account that the occurrence has taken place about 20 years back and the appellant has suffered trial for about 19 years and the present appeal is also pending for the last more than one year. The appellant at present must be a middle-aged man with his family and children to support. Keeping these special circumstances in view, the sentence imposed upon the appellant by the learned trial court deserves to be reduced.

26) Accordingly, while upholding the conviction of the appellant for offences under Section 363, 376 RPC, the sentence of imprisonment imposed upon the appellant in proof of offence under Section 376 RPC is reduced from five years rigorous imprisonment to three years rigorous imprisonment whereas fine imposed upon him in proof of said offence is increased from Rs.2,000/ to Rs.5,000/. The sentence imposed upon the appellant in proof of offence under Section 363 RPC is upheld.

27) The appeal stands disposed of accordingly.

(Sanjay Dhar)
Judge

Srinagar
26.09.2024
"Bhat Altaf-Secy"

Whether the order is reportable: Yes/No