2026:AHC:157015

AFR
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HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 2174 of 1987

Ganga Ram

…..Appellant(s)

Versus

State of U.P.

…..Respondent(s)

Counsel for Appellant(s)	:	D.s. Tiwari, Suhel Ahmad Azmi
Counsel for Respondent(s)	:	A.G.A.

Court No. - 93

HON'BLE SANTOSH RAI, J.

1. Heard Shri Nityanand Srivastava, Advocate holding brief of Shri Suhel Ahmad Azmi, learned counsel for the appellant and Shri Purshottam Maurya, learned AGA for the State.

2. This criminal appeal under Section 374(2) of the Code of Criminal Procedure has been preferred by the appellant Ganga Ram against the judgment and order dated 20.08.1987 passed by the 4th Additional Sessions Judge, Mathura, in S.T. No. 393 of 1986 (State Vs. Devi Singh and others), by which the appellant was convicted for the offence punishable under Section 366 IPC and sentenced to seven years' rigorous imprisonment, and further convicted for the offence punishable under Section 376 IPC and sentenced to seven

years' rigorous imprisonment, both the sentences directed to run concurrently. By the very same judgment, the co-accused Devi Singh and Tilak Raj alias Gopal, who had been charged respectively under Sections 363/366 IPC and 368 IPC, were acquitted and given the benefit of doubt.

3. The prosecution case, briefly stated, is that the complainant Mawasi lodged a first information report on 18.05.1986 at Police Station Vrindaban alleging that his niece Kela, who was residing with him, had gone to fetch water from a hand-pump on 12.05.1986 at about 6.00 p.m. and was kidnapped by the appellant Ganga Ram. It transpired during investigation and trial that the appellant took the prosecutrix from Vrindaban to Chatikara, thence to Kosi, Faridabad and Jagadri, and thereafter confined her at his house in Palwal, where she was ultimately recovered by the police on 17/18.05.1986.

4. The prosecution examined Mawasi (complainant) as PW-1, witness Ram Chand as PW-2, witness Kalua as PW-3, Dr. Nirupma Srivastava as PW-4, the prosecutrix Kela as PW-5, father of the prosecutrix Girdhar as PW-6, SI Pradeep Kumar Gautam as PW-7, SI Veer Pal Singh as PW-8 and Head Constable Girraj Singh as PW-9.

5. The prosecutrix, examined as PW-5, deposed on oath that the appellant committed rape upon her at Jagadri at the house of his

brother's wife, at the point of a knife, and thereafter kept her confined at Palwal.

6. The accused-appellant stated in his statement recorded under Section 313 Cr.P.C. that he has been falsely implicated in this case and the prosecution allegations against him are wrong. He further stated that he has never kidnapped and victim and has not committed rape upon her.

7. The grounds of the appeal in brief are that the conviction of the appellant is against the weight of evidence on record and is bad in law. Furthermore, the sentence awarded to the appellant is too severe.

8. Learned counsel for the appellant assailed the conviction on the following grounds: (i) that the radiological opinion placed the age of the prosecutrix at about sixteen years, with a variation of a year on either side, and there was no other reliable material, such as a birth certificate or school record, to conclusively establish that she was below eighteen years of age; (ii) that the vaginal-sperm report was negative and no definite medical opinion regarding rape could be given; (iii) that the first information report was lodged six days after the alleged occurrence, casting doubt on the prosecution version; (iv) that the conduct of the prosecutrix, in not raising an alarm and not disclosing the incident to anyone despite several opportunities, was consistent only with her being a consenting

party; and (v) that there was a discrepancy between the description of the colour/print of the salwar in the fard and the salwar produced in court.

9. Learned AGA, per contra, supported the impugned judgment and submitted that the trial court, after a threadbare and balanced appraisal of the evidence, has clearly and specifically attributed a distinct role to the appellant alone, namely, that of having induced, kidnapped and confined the prosecutrix and having committed rape upon her, as distinguished from the co-accused Devi Singh and Tilak Raj, against whom no specific act or role was attributed either by the prosecutrix or by any other witness, and who were consequently, and rightly, extended the benefit of doubt. It was submitted that the conviction of the appellant rests on the cogent, consistent and creditworthy testimony of the prosecutrix (PW-5), duly corroborated by the statement of her father (PW-6, Girdhar), the recovery of the prosecutrix from the appellant's own house at Palwal, the site plan, the seizure of her salwar bearing human blood, and the radiological opinion, and that the minor discrepancies pointed out by the defence do not go to the root of the prosecution case.

10. This Court has given its anxious consideration to the rival submissions and to the evidence on record.

11. So far as the plea of consent is concerned, it is well settled that the consent of a minor prosecutrix is wholly immaterial and affords no defence to a charge under Sections 366 and 376 IPC. In **Anversinh @ Kiransinh Fatesinh Zala Vs. State of Gujarat, (2021) 3 SCC 12**, the Hon'ble Supreme Court reiterated that even where the prosecutrix may have accompanied the accused willingly, such consent, being the consent of a minor, is not a consent known to law and does not absolve the accused of the offence of kidnapping from lawful guardianship or the consequences flowing therefrom. Para 12 and 13 of the judgement in *Anverish @ Kiransinh Fatesinh Zala (supra)* are as under:

> *"12. Having given our thoughtful consideration to the rival submissions, it appears to us that although worded succinctly, the impugned judgment does not err in appreciating the law on kidnapping. It would be beneficial to extract the relevant parts of Sections 361 and 366 IPC which define "kidnapping from lawful guardianship" and consequential punishment. These provisions read as follows:*
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> > *"361. Kidnapping from lawful guardianship. Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*
> >
> > *366. Kidnapping, abducting or inducing woman to compel her marriage, etc. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit*

intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

13. A perusal of Section 361 IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such "enticement" need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. However, mere recovery of a missing minor from the custody of a stranger would not ipso facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in King Emperor v. Gokaran and Emperor v. Abdur Rahmans, 1916 SCC OnLine All 63.

(emphasis supplied)

The trial court has, on facts, correctly found that the prosecutrix, being of tender age and belonging to an unlettered, backward background, could neither be expected to raise an alarm at every stage nor could her silence, born out of fear and threat at the point of a knife, be equated with consent and furthermore, she was enticed and removed from legal guardianship on the basis of false information given by the accused-appellant that her mother is not well.

12. As regards the sufficiency of the sole testimony of the prosecutrix, it is equally well settled that the evidence of a prosecutrix in a case of rape or kidnapping stands on a footing different from that of an ordinary witness and, if found to be truthful, natural and inspiring confidence, does not require corroboration as a matter of rule.

13. In **Bharwada Bhoginbhal Hirjibhai v. State of Gujarat, (1983) 3 SCC 217**, Honble Supreme Court held in para 11 as under:-

> *"11..... We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the "probabilities factor" is found to be out of tune."*

14. In **State of Punjab v. Gurmit Singh, (1996) 2 SCC 384,** Honble Apex Court held in para 21 as under:-

> *"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape*

is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

Thus, the Supreme Court held that the testimony of the prosecutrix, if found reliable, is by itself sufficient to found a conviction, and courts must be wary of insisting on corroboration as a condition for judicial reliance on such testimony. The trial court, applying this very standard, has recorded a clear finding that the statement of the prosecutrix (PW-5), read as a whole and tested in cross-examination, inspires confidence and stands corroborated in material particulars by the medical, radiological and recovery evidence.

15. On the question of age, this Court is further fortified by the consistent line of authority including **Independent Thought Vs. Union of India, (2017) 10 SCC 800,** recognizing that the age of

consent under the extant criminal law is eighteen years, and that sexual intercourse with, or the taking away of, a girl below that age cannot be validated by any purported consent on her part. The trial court's approach in giving the appellant the benefit of the marginally lower end of the radiological estimate (holding the age to be 'not more than seventeen years' rather than exactly sixteen) and yet convicting him, discloses a careful and appellant-favourable, rather than a perverse, appreciation of the ossification evidence.

16. The contentions regarding delay in lodging the first information report, the discrepancy in the description of the salwar, and the negative vaginal-sperm report have all been specifically dealt with by the trial court. The delay of six days stands satisfactorily explained by the fact that it was the maternal uncle of the prosecutrix who, upon her disappearance, first engaged in a search for her rather than rushing to lodge a report, and by the fact that a further report was made by the father (PW-6) upon her recovery. Trivial and natural discrepancies of the kind pointed out do not, without more, warrant rejection of an otherwise credible and corroborated prosecution case.

17. What weighs with this Court, in particular, is that the trial court's judgment demonstrates a specific and individuated assessment of the role of each accused. Whereas no evidence was

found to connect either Devi Singh or Tilak Raj alias Gopal with any overt act of kidnapping or confinement, the sole allegation against Devi Singh being that he was casually met at Kosi, and against Tilak Raj that his house was, without more, named as a place of brief stay, the role attributed to the appellant Ganga Ram is direct, specific and consistently spoken to by the prosecutrix at every stage, from the inducement at the water-pump to his confining and committing rape upon her at Jagadri and Palwal. This distinction, resulting in the acquittal of the co-accused and the conviction of the appellant alone, itself demonstrates that the trial court did not proceed on generalised or assumed culpability but on a specific finding of individual role and responsibility qua the appellant.

18. Prior to substitution by Act 13 of 2013, Section 376(1) IPC provides that "whoever, except in the cases provided for by sub section (2), commits rape **shall be** punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years, and *shall also be liable to fine……".* Furthermore the same provision regarding mandatory part of imposition fine is provided under section 363 and 366 of IPC. Thus, where the IPC provision prescribes punishment in the form: *"…shall be punished with imprisonment … and shall also be liable to fine", or "…with*

imprisonment and fine", the trial court is expected to impose fine also. Failure to impose fine amounts to a material legal error in sentencing. It is true that the learned trial court has committed an error in not imposing the fine though the penal provision contemplates punishment of imprisonment coupled with fine. Nevertheless, the present appeal has been preferred only by the convicted accused. Neither the State nor the victim has preferred any appeal seeking enhancement of sentence, nor has any revisional jurisdiction for enhancement been invoked after due notice. Since imposition of fine would undoubtedly amount to enhancement of the sentence already awarded, this Court, while deciding the appeal preferred by the accused alone, cannot place him in a more disadvantageous position. The omission of the trial court, though legally erroneous, cannot therefore be rectified in the present appellate proceedings.

19. Para 21 of the judgement of Apex Court in *Anversinh @ Kiransinh Fatesinh Zala (supra)* is extracted below:

> *"21. Having held so, we feel that there are many factors which may not be relevant to determine the guilt but must be seen with a humane approach at the stage of sentencing. The opinion of this Court in State of M.P. v. Surendra Singh, (2015) 1 SCC 222 on the need for proportionality during sentencing must be re-emphasised. This Court viewed that: (SCC p. 227, para 13)*

> *"13. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider ull relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society."* *(emphasis supplied)*

20. It is true that the learned trial court has committed an error in not imposing the fine though the penal provision contemplates punishment of imprisonment coupled with fine. Nevertheless, the present appeal has been preferred only by the convicted accused. Neither the State nor the victim has preferred any appeal seeking enhancement of sentence, nor has any revisional jurisdiction for enhancement been invoked after due notice. Since imposition of fine would undoubtedly amount to enhancement of the sentence already awarded, this Court, while deciding the appeal preferred by the accused alone, cannot place him in a more disadvantageous position. The omission of the trial court, though legally erroneous, cannot therefore be rectified in the present appellate proceedings.

21. For the reasons aforesaid, this Court finds no infirmity, illegality or perversity in the findings recorded by the 4th Additional Sessions Judge, Mathura. The prosecution has proved beyond reasonable doubt that the appellant kidnapped the prosecutrix and thereafter committed rape upon her, and the conviction of the appellant under Sections 366 and 376 IPC, and the sentence of seven years' rigorous imprisonment on each count (to run concurrently), call for no interference.

22. The judgment and order dated 20.08.1987 passed by the 4th Additional Sessions Judge, Mathura, in S.T. No. 393 of 1986, convicting the appellant Ganga Ram under Sections 366 and 376 IPC and sentencing him to rigorous imprisonment for seven years on each count, to run concurrently, is hereby affirmed.

23. The appeal is **dismissed**.

24. The appellant, if on bail, shall surrender within *a period of two weeks from today* to serve out the remainder of the sentence. The bail bonds are cancelled and sureties, if any, are discharged from their liabilities.

25. If the appellant fails to surrender within stipulated period as above, learned trial court is directed to take immediate legal steps adopting coercive measures including issuance of non-bailable warrant to take the appellant into custody for execution of sentence in accordance with law.

26. Let a copy of this judgment be transmitted forthwith to the trial court concerned along with trial court record for information and compliance.

27. The trial court is directed to submit its compliance report within two months from the date of receipt of this order. Further more, the registry is also directed to place the compliance report on record.

28. The Registrar (Compliance) is also directed to serve a copy of this order within 48 hours by FAX/e-mail to the concerned court through District & Sessions Judge, Mathura for compliance.

29. Before parting with this judgment, this Court records its appreciation for the sincere assistance rendered by the Research Associates, Mr. Shivansh Pandey and Mr. Sandeep Kumar Singh and law intern Ms. Ishika Rai in researching the legal issues involved and assisting in the preparation of this judgment. Their efforts are gratefully acknowledged.

(Santosh Rai,J.)

July 29, 2026
Ankit.

Digitally signed by :-
ANKIT VISHWAKARMA
High Court of Judicature at Allahabad