

# Avdesh Son Of Sh. Suraj Pal Singh vs The State Of Haryana on 27 July, 2010

Criminal Appeal No. 564-SB of 2000

1

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH

Criminal Appeal No.564-SB of 2000  
Date of Decision: 27.07.2010

Avdesh son of Sh. Suraj Pal Singh, resident of village  
Dhirola, P.S. Kalyan, Tehsil Jalalabad, District  
Shahjahanpur (U.P.).

... Appellant

Versus

The State of Haryana.

...Respondent

CORAM: HON'BLE MR. JUSTICE SHAM SUNDER

Present: Mr. Rahul Vats, Advocate,  
for the appellant.

Mr. Kulvir Narwal, Additional Advocate General ,  
Haryana, for the respondent - State.

SHAM SUNDER, J.

This appeal is directed against the judgment of conviction dated 18.05.2000, and, the order of sentence, dated 19.05.2000, rendered by the Court of Additional Sessions Judge, Faridabad, vide which, it convicted the accused (now appellant), and sentenced him, as under:-

Name of the accused (now appellant)	Offence for which convicted	Sentence awarded
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Avdesh

Under Section 363 of To undergo rigorous the Indian Penal Code. imprisonment, for a period of two years, and, to pay a fine of Rs. 500/-, and, in default of payment thereof, to further undergo rigorous imprisonment for a period of one year.

Under Section 366 of To undergo rigorous the Indian Penal Code. imprisonment, for a period of five years, and, to pay a fine of Rs. 1,000/-, and, in default of payment thereof, to further undergo rigorous imprisonment for a period of one year.

Under Section 376 of To undergo rigorous the Indian Penal Code. imprisonment, for a period of seven years, and, to pay a fine of Rs. 1,000/-, and, in default of payment thereof, to further undergo rigorous imprisonment for a period of one year.

All the substantive sentences were ordered to run concurrently.

2. The facts, in brief, are that Siri Chand, father of the prosecutrix (name not being disclosed, in view of the judgement of the Apex Court, in case titled as, 'State of Punjab Vs. Gurmeet Singh and others, AIR 1996 (SC), 1393), made a statement dated 02.04.99, before the Police, which formed the basis of first information report, containing the allegations that, on 30.03.99, Avdesh, accused, kidnapped his daughter, aged about 14 years, from her lawful guardianship.

3. During the course of investigation, the prosecutrix and the accused, were recovered on 02.04.99, from Bus Stand, Delhi. The accused was arrested. Thereafter, the prosecutrix and the accused, were got medico-legally examined. The statement of the prosecutrix, under Section 161 Cr.P.C., was recorded, to the effect, that she was kidnapped, by the accused, from her lawful guardianship, and,

was raped. The undergarments and swabs of the prosecutrix, were also sent to the Forensic Science Laboratory, for examination. Report PL of the Forensic Science Laboratory was received. Rough site plan PM was also prepared. The statements of the witnesses were recorded. After the completion of investigation, he was challaned.

4. On his appearance, in the Court of the Committing Magistrate, the accused was supplied the copies of documents, relied upon by the prosecution.

5. After the case was received by commitment, in the Court of Sessions, charge under Sections 363, 366 and 376 of the Indian Penal Code, was framed against the accused, which was read-over and explained to him, to which, he pleaded not guilty, and claimed judicial trial.

6. The prosecution, in support of its case, examined Dr. Mrs. Beena Sharma, Medical Officer (PW1), Dr. S.P. Jayant, Medical Officer, Radiologist (PW2), Constable Manoj Kumar, Draftsman (PW3), Jagdish Chand, Constable (PW4), Dr. A.K. Lohan, Medical Officer (PW5), Prem Narain, Sub Inspector (PW6), Kartar Singh, Head Constable (PW7), the prosecutrix (PW8), Prem Narain (PW9), Sat Narain, Sub Inspector (PW10), the Investigating Officer, and, Siri Chand, complainant, father of the prosecutrix (PW11). Thereafter, the Public Prosecutor for the State, closed the prosecution evidence.

7. The statement of the accused, under Section 313 of the Code of Criminal Procedure, was recorded. He was put all the incriminating circumstances, appearing against him, in the prosecution evidence. He pleaded false implication. He, however, did not lead any evidence, in defence, and closed the same.

8. After hearing Counsel for the parties and, on going through the evidence, on record, the trial Court convicted and sentenced the accused, as stated above.

9. Feeling aggrieved, the instant appeal, has been filed by the appellant.

10. I have heard the Counsel for the parties, and have gone through the evidence and record of the case, carefully.

11. The Counsel for the appellant, submitted that, the age of the prosecutrix, at the time of the alleged occurrence, was more than 18 ½ years, as held by the trial Court, and, as such, she was not minor. He further submitted that, the prosecutrix, accompanied the accused of her own accord, without any threat, inducement or allurement, having been made, to her, by him. He further submitted that, the prosecutrix, accompanied the accused and stayed with him, at different places, for a period of about four days, but, did not raise any alarm, nor, did she tell anybody, that sexual intercourse, had been committed with her forcibly, by putting her under fear by the accused. He further submitted that, even no injury, on the body of the prosecutrix or her private parts was found. He further submitted that, even no injury, on the person of the accused, was found, during the course of medical examination. He further submitted that, all these circumstances, clearly showed, that the prosecutrix, was a consenting party, and, the accused, did not commit any offence,

punishable under Section 376 of the Indian Penal Code. He further submitted that, since the prosecutrix, was not induced, by the accused, nor was threatened, to accompany him, no offences, under Sections 363 and 366 of the Indian Penal Code, were also committed by him. He further submitted that, the Court below, without appreciation of evidence, in its proper perspective, wrongly convicted the accused. He further submitted that the judgement of conviction and the order of sentence, rendered by the Court below, being illegal, are liable to be set aside.

12. On the other hand, the Counsel for the respondent, no doubt, submitted that, the age of the prosecutrix, was held to be more than 18 years, by the Court below, on the basis of ossification test, as no other cogent and convincing evidence, could be produced, by the prosecution, to prove her age to the contrary. He further submitted that, since the prosecutrix, was threatened, by the accused, it could not be said, that she was a consenting party to the sexual intercourse, with him. He further submitted that, the mere fact that, the prosecutrix, did not raise any alarm, nor, did she tell the passengers, in the bus or the persons, at the places, where, both of them stayed together that she was raped, did not mean, that she was a consenting party. He further submitted that the judgement of conviction and the order of sentence, rendered by the Court below, being legal and valid, are liable to be upheld.

13. After giving my thoughtful consideration, to the rival contentions, raised by the Counsel for the parties, in my considered opinion, the appeal, is liable to be accepted, for the reasons to be recorded, hereinafter. First coming to the age of the prosecutrix, it may be stated here, that no documentary evidence, was produced, by the prosecutrix, to prove, that she was below 16 years of age, at the time of alleged occurrence. It was, under these circumstances, that the ossification test of the prosecutrix, was conducted, by the doctor, and, he found that, the age of the prosecutrix, was 16 ½ years, but, during the course of cross-examination, it was stated by him, that the possibility of age variation, on either side of two years, in the ossification test, could not be ruled out. It is settled principle of law, that if two views, are possible, from the evidence, produced by the prosecution, then the view, which is favourable, to the accused, is required, to be taken. Similar principle of law, was laid down, in Rakesh Vs. State of Haryana, 2006(4), RCR (Criminal), 505. So, keeping in view the report of the ossification test, submitted by Dr. S.P. Jayant, Medical Officer, B.K. Hospital, Faridabad (PW2), it could be said that, at the time of the alleged occurrence, the age of the prosecutrix was about 18 ½ years. It means that, the prosecutrix, was major, at that time. The Court below, was right, in holding so. The findings of the Court below, in this regard, being based on the correct reading and due appreciation of evidence, as also law, on the point, do not warrant any interference, and, on the other hand, are affirmed.

14. The next question, that arises for consideration, is, as to whether, the prosecutrix, was kidnapped or abducted with an intent, to subject her, to sexual intercourse, by the accused. As stated above, the age of the prosecutrix, was 18 ½ years, at the time of the alleged occurrence. The prosecutrix, when appeared, as PW8, in her examination-in-chief, stated that, when she went, to ease herself, the accused, met her, threatened her and committed rape with her, in an open space. She further stated that, thereafter, she was taken to different places, where, she stayed with the accused. She further stated that there also, he committed rape with her. The prosecutrix, being 18 ½ years of age, at the time of the alleged occurrence, could distinguish, between her good and bad. There is nothing, on

the record, that the accused, was having any weapon, in his hand, and, he threatened her with the same. The statement of the prosecutrix, that the accused, threatened her, and, made her, to accompany him, is not at all reliable. In case, she had been threatened orally, by the accused, she could raise alarm. She could refuse, to accompany him, and, could also run away, to escape, from the place, where, the accused, met her, but, she did not do so. The mere fact, that the prosecutrix, stayed with the accused, for a period of four days, at various places, and, also travelled, in buses alongwith him, and, did not tell anybody about the alleged occurrence, clearly showed that, she was not threatened or induced, by the accused, so as to make her to accompany him. From the evidence, it is established, that she accompanied the accused of her own accord. The ingredients, required for constituting the offence under Section 366 of the Indian Penal Code, were not fulfilled, in the instant case. The prosecutrix, being major, the question of commission of offence by he accused, under Section 363 of the Indian Penal Code, did not at all arise. The trial Court, was, thus, wrong in coming to the conclusion, that the accused committed the offences, punishable under Sections 363 and 366 of the Indian Penal Code. It is held that the accused, did not commit the offences, punishable under Sections 363 and 366 of the Indian Penal Code. The findings of the trial Court, to the contrary, being incorrect are reversed.

15. Now coming to the question, as to whether, the prosecutrix, was a consenting party, to the sexual intercourse, with the accused, it may be stated here, that this fact, is proved, beyond doubt, from the evidence, on record, as would be discussed, hereinafter. The statement, made by the prosecutrix, that she was threatened, by the accused, and, he made her to accompany him, has been held, to be unreliable and discarded. She stated that the accused, took her to Sonapat, by bus, and, kept her there, for two days. She further stated that, no weapon, was shown, to her, by the accused, while threatening her. She further stated that, she travelled alongwith the accused, in a bus, in which, about 15 passengers, were also travelling. She further stated that, she could not disclose to any passenger, as the accused, had already threatened her. She further stated that, she was kept, at a place, at Sonapat, by the accused. She further stated that, other persons, were also residing nearby the said place. She further stated that, two boys, were already staying, in the house, where, she was kept, by the accused, and, sexual intercourse, was committed with her. She further stated that, she did not tell those boys, that she was threatened by the accused. She further stated that, from Sonapat to Delhi, they went in an auto- rickshaw. From the statement of the prosecutrix, it is evident, that she was not under threat of the accused. She had many occasions, to raise alarm/hue and cry, had she been kidnapped/abducted, by the accused, and rape had been committed with her. She, however, kept mum. A girl aged about 18 ½ years, who could distinguish, between her good and bad, if stayed with the accused, for a period of four days, and allowed him to have sexual intercourse with her without any demur, it could certainly be said that, she voluntarily consented to the same. Not only this, no mark of external injury, was found, on the person of the prosecutrix. No mark of injury, on her private parts, was also found. Even, no mark of injury, was found, on the person of the accused. Had the prosecutrix, been subjected to sexual intercourse forcibly, by the accused, she would have certainly resisted the said act, resulting into struggle marks, on her body, as also injuries, on the body of the accused. Even no semen, was found, on the swabs of the prosecutrix, sent to the Forensic Science Laboratory. All these factors, clearly showed, that the prosecutrix, was a consenting party. When she was recovered alongwith the accused, by the Police, in the presence of her father, with a view, to save the honour of the family, the first information report, was got

registered. In Pratap Misra Vs. State of Orissa, AIR, 1977 (SC), 1307, it was held, that absence of injuries, on the prosecutrix, or the accused, clearly showed, that she was a consenting party. In Tameezuddin @ Tammu Vs. State of (NCT) of Delhi, 2009(4), RCR (Criminal), 345 (SC), the medical evidence, showed that, it was not a rape case. Vaginal swabs and salwar, had semen stains. Under these circumstances, it was held, that it would, at best be the case of sexual intercourse, but not of rape. No evidence, was produced, to prove, that semen was of the accused. Even no other evidence, was available, to support the prosecution case. There was no injury found, on the person of the prosecutrix. Under these circumstances, it was held, that the statement of the prosecutrix, was improbable and belies the logic. Ultimately, the appellant, was acquitted. In Tukaram Vs. State of Maharashtra, AIR 1979 (SC), 185, it was held, that if a consent, is given, by the prosecutrix, for the commission of sexual intercourse with her, and, she was major, at that time, and the circumstances negated the existence of fear, consent given, could be held to be passive submission, and, the conviction, was liable to be set aside. The Court below, was, thus, completely wrong, in holding, that the accused, committed rape with the prosecutrix, and, she was not a consenting party. The findings of the trial Court, in this regard, being not based on the correct reading and due appreciation of evidence, are liable to be set aside.

16. No other point, was urged, by the Counsel for the parties.

17. In view of the above discussion, it is held that, the judgement of conviction and the order of sentence, rendered by the trial Court, are not based on the correct appreciation of evidence, and law on the point. The same warrant interference, and are liable to be set-aside.

18. For the reasons recorded above, the appeal is accepted. The judgement of conviction and the order of sentence, rendered by the trial Court, are set-aside. The appellant, shall stand acquitted of the charge, framed against him. If the appellant, is on bail, he shall stand discharged of his bail bonds. If he is in custody, he shall be set at liberty, at once, if not required, in any other case.

19. The Chief Judicial Magistrate, is directed to comply with the judgement promptly, in accordance with the provisions of law, on receipt of a copy thereof.

27.07.2010  
Amodh

(SHAM SUNDER)  
JUDGE