

Judgment reserved on: April 22, 2009

Judgment pronounced on: May 01, 2009

+ Crl. Appeal No. 215 of 2000

Versus

State (Govt. of NCT of Delhi) ... Respondent
Through: Mr. Amit Sharma, Additional Public
Prosecutor for State

Hon'ble Mr. Justice Sunil Gaur

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

SUNIL GAUR, J.

1. About a decade ago, a minor girl was kidnapped and raped. Appellant was tried for committing this offence and the trial ended in conviction of the appellant, which is under challenge in this appeal.
2. Appellant- Dilshad, son of Chhote Khan, is aggrieved of the trial court judgment/ order of 17th March, 1999, vide which he has been held guilty for committing offence under Sections 363/366 and 376 of the Indian Penal Code and vide impugned order, the appellant has been sentenced to undergo rigorous imprisonment for

two years and to pay a fine of Rupees two hundred and in default of payment of fine, to undergo RI for one month for committing offence under Section 363 of the IPC and to a further RI of **three years** and fine of Rupees five hundred for committing offence under Section 366 of the IPC and in default thereof, to undergo RI for two months. Besides, appellant has also been ordered to undergo RI for **four years** and to pay a fine of Rupees five hundred for committing offence under Section 376 of the IPC, and in default of payment of fine, he has been directed to undergo RI for two months.

3. Concisely put, the background facts emerging from the record of this case are as follows:-

On 28th August, 1997, prosecutrix (PW-1), a minor, went to T.B. Hospital, *Fatehpuri*, Delhi, alongwith her younger sister, for buying some medicine and on the pretext of going for nature's call, went to meet appellant/accused – Dilshad, who was acquainted to her. Appellant took the prosecutrix to Pahar Ganj, then to ISBT, Kashmiri Gate, Delhi, and thereafter boarded a bus for *Muradabad*. Ultimately, they both reached *Salempur*, i.e. to the house of appellant's sister and stayed there for one day, where appellant committed rape upon the prosecutrix. Thereafter, the prosecutrix was first taken to *Salone* and then to Village *Pritampur* where she was again raped by the appellant/accused. Missing Report vide DD No. 91- B was entered, wireless message of a missing minor girl was flashed, FIR was registered, investigation was carried out and appellant/accused was apprehended from Police Station *Gajrela*. Prosecutrix was taken into custody, her statement under Section 164 of the Code for Criminal Procedure was got recorded and *Charge-sheet* was filed in the court for the offence of kidnapping and rape.

4. The trial court framed charges under Sections 363/366 and 376 of the IPC against appellant/accused- Dilshad, whereas his co-accused- Gajraj, was charged for committing offence under Section

376 of the IPC and they both were put to trial, as they had pleaded not guilty to the charges framed against them under the aforesaid provisions of law.

5. At trial, prosecution had got examined sixteen witnesses in support of its case. Prosecutrix (PW-1) has asserted in her deposition that she was aged less than fifteen years on the day of this incident. Chanderpal Singh (PW-2) is father of the prosecutrix who has stated on oath of his daughter was a minor, Doctor Gopesh (PW-4) has proved Ossification Report (EX. PW-4/A) and opined the age of prosecutrix between 14 to 16 years. Doctor Saroj Sarin (PW-6) is the Principal of the school, who has proved date of birth of the prosecutrix as per school records and Constable Shiv Kant (PW-12) had arrested the appellant/accused- Dilshad and got his medical examination done. ASI Shiv Dutt Sharma (PW-11) and Head Constable Sunil Kumar (PW-14) had carried out investigation of this case.

6. At the stage of recording of statement of appellant/accused, and his co-accused, trial court found that there was no incriminating evidence against co-accused Gajraj and therefore, on 2nd February, 1999, the trial court acquitted co-accused Gajraj by observing as under:-

“There is nothing against accused Gajraj which may be put to him under Section 313 Cr.P.C.. Hence he is acquitted of the charge vide my separate judgment of the date. Final arguments are heard in respect of the case of accused- Dilshad”.

7. Appellant/accused in his statement under section 313 Cr. P.C., denied the prosecution case set up against him and pleaded that he was innocent and was falsely implicated in this case. However, appellant/accused had not led any evidence in his defence before the trial court.

8. After the trial, appellant/accused stood convicted and sentenced as noticed above.

9. Both the sides have been heard at length and with their assistance, the evidence on record has been perused.

10. It is asserted on behalf of the appellant that the Prosecutrix PW-1 was a consenting party and was major in age and the trial court has illegally ignored the Bone Age Report of the Prosecutrix which clearly shows that she was aged between fifteen to sixteen years and while giving benefit of two years, the age of the prosecutrix comes to more than seventeen years. Learned Counsel for the appellant contends that there is no basis of the age of the Prosecutrix, as recorded in the school leaving certificate and so the trial court has erred in relying upon it. Learned counsel points out that Ramphool (PW-2), Uncle of the prosecutrix, has not denied that the Prosecutrix was aged above eighteen years on the day of the incident. Lastly, it is contended on behalf of the appellant that when two views are possible, then view in favour of the accused ought to be preferred. Reliance has been placed upon a decision of the Apex Court reported in **(2001) 5 Supreme Court Cases 714**, wherein, it has been observed as under:-

“The source of age recorded in the original school is not known to us in order to ascertain whether the information furnished at the time of the first admission in the school was correct or not and in this respect, no evidence has been adduced. Furthermore, if the admission of the father in his cross-examination regarding the age of the accused is accepted, entries in the school certificate cannot be said to be correct particulars of the age of the accused.”

11. Another decision relied upon on behalf of the appellant is of **(2000) 9 SCC 204** to contend that for adequate and special reasons, less than the minimum sentence was awarded in a case of rape and the sentence was reduced to the period already undergone, even though Prosecutrix was found to be *“not more than sixteen years of age”* and was a consenting party. Thus, it is submitted in the alternative that appellant has already remained behind bars in this case, for about four months and therefore, sentence of four years deserves to be reduced to the period already undergone by him as the appellant was aged about twenty years at the time of this incident and now he is married and has minor children to support and because he has already faced the agony of trial and appeal proceedings for the last about twelve years. Nothing else has been urged on behalf of the appellant.

12. Learned Additional Public Prosecutor for the State has relied upon the two recent decisions of the Apex Court reported in **2008 (3) JCC 1781 & 2138** to contend that the school certificate has to be given preference over the determination of the bone age and especially so, in the cases like the present one. It is pointed out that as per the School Leaving Certificate of the Prosecutrix, her date of birth is 15th May, 1982 and on the day of this incident i.e. on 28th

August, 1997, she was aged fifteen years and three months, i.e. less than sixteen years and so her consent has been held to be immaterial by the trial court and there is no illegality in the impugned judgment.

13. After having heard both the sides and upon perusal of the evidence on record and decisions cited, I find that the bone of contention in this case is the age of the Prosecutrix. As per the school leaving certificate (EX. PW6/A) of the Prosecutrix (PW-1), her date of birth recorded therein is 15th May, 1982 and as per the deposition of Dr. Saroj (PW-6), School Principal, the said date of birth has been recorded on the basis of the school admission register. Prosecutrix (PW-1) in her evidence has given her age as fifteen years, meaning thereby, she was aged fourteen years at the time of this incident. From the evidence of Chander Pal (PW-3) father of the Prosecutrix, it emerges that age of the Prosecutrix on the day of the incident was fourteen years. No doubt that the evidence of father of the Prosecutrix regarding the age of the Prosecutrix is based upon oral testimony only and similar is the position in the case of Ramphool (PW-2) Uncle of the Prosecutrix. Infact, Prosecutrix in her evidence has stated that she was born in the year 1983. However, she has denied the suggestion of the defence that she was aged above sixteen years on the day of the incident.

14. Now the question which arises for consideration is as to whether the age of the Prosecutrix as given in the school leaving

certificate duly proved, ought to be relied upon or her age as per the Ossification Test Report (EX. PW-4/A) giving her age as between fourteen to sixteen years, with margin of two years, can be the basis to give any benefit to the appellant/accused.

15. The view of the Apex Court in the year 2001 in the case of juveniles in a murder case stands reflected in its decision in **(2001) 5 SCC 714**, as noted above. The aforesaid view of the Apex Court has undergone a sea change. In the two recent verdicts of the Apex Court reported in **2008 (3) JCC 1787 & 2138**, it has been declared that the age of the Prosecutrix as reflected in the duly proved school record, has to be preferred, over and above, the Bone Age Report. The relevant observations made by the Apex Court in its decision reported in **2008 (3) JCC 1781**, reads as under:-

“On the basis of the evidence of the Headmaster and the original school leaving certificate and the school register which were produced the High Court came to abrupt conclusion that normally for various reasons the guardians to understate the age of their children at the time of admission in the school. There was not material or basis for coming to this conclusion. The High Court in the absence of any evidence to the contrary should not have come to hold that the date of birth of the prosecutrix was not established and the school leaving certificate and the school register are not conclusive.

There is no requirement that at the time of admission, documents are to be produced as regards the age of the student. Practically, there was no analysis of the evidence on record and abrupt conclusions, mostly based on surmises, were arrived at. The inevitable conclusion is that the judgment of the High Court is unsustainable, deserves to be set aside which we direct.”

16. In the case of *State of Karnanataka v. Bantara Sudhakara @ Sudha & Another* **2008 (3) JCC 2138**, Apex Court has expressed its

view about the evidentiary value of the Bone Age Report, by observing as under:-

“Additionally, merely because the doctor’s evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years age has to be added to the upper age limit is without any foundation. There was no basis for coming to such a conclusion.”

17. In the case of *Sukhvinder Singh v. State of Punjab* (2000) 9 SCC 204, relied upon by the appellant, the sentence for the offence of rape was reduced to less than the minimum provided as the accused had married the Prosecutrix. It is not so in the instant case.

18. The bone age report of the Prosecutrix (EX. PW4/A) reveals that on the day of this incident, she was aged between fourteen to sixteen years, whereas the School Leaving Certificate (EX PW6/A) gives the date of birth of the prosecutrix as 15th May, 1982 which clearly shows that the Prosecutrix was aged below sixteen years on the day of the incident. Nothing worthwhile has been brought out by the defence in cross-examination of the school Principal or the father of prosecutrix (PW-1) or the prosecutrix (PW-1) to show that date of birth, as given in school record, is incorrect or there is any conflict in age of prosecutrix (PW-1) to show that she was aged above sixteen years on the day of this incident.

19. In view of the aforesaid latest pronouncements of the Apex Court, I proceed to rely upon the School Leaving Certificate of the Prosecutrix (PW-1), which given her age as below sixteen years. Otherwise also, the School Leaving Certificate of the prosecutrix, indicating her date of birth, can be safely relied upon, because, it could not have been anticipated about one and a half decade ago

that such a unfortunate incident would take place and therefore, there is no possibility of lesser age of the Prosecutrix being recorded in the school records. The possibility of understating the age of the children by the parents at the time of the admission in the school, has been discounted by the Apex Court in its recent verdict in **2008 (3) JCC 1781** (supra).

20. In view of the foregoing narration, I do not find any illegality or infirmity in the impugned judgment, calling for any interference by this court in this appeal. This appeal is devoid of merit and is accordingly dismissed. Appellant is on bail. His bail bonds are cancelled and he is directed to surrender forthwith, failing which, trial court shall ensure that he is put behind bars to serve out the remainder of the sentence, as awarded to him. Trial court be apprised of this order, to ensure its compliance.

21. This appeal is accordingly disposed of with directions as aforesaid.

Sunil Gaur, J.

May 01, 2009
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