

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.App. 156/2007**

Date of Reserve : 09.11.2009

Date of Decision: 02.12.2009

MAAN SINGH

..... Appellant

Through: Ms. Ritu Gauba, advocate

Versus

STATE

..... Respondent

Through: Mr. Navin Sharma, APP for state

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG,J

1. The present appeal has been filed under Section 374 Cr.P.C. against the judgment dated 23.03.2006 and the order on sentence dated 30.03.2006 passed by the Ld. ASJ in Sessions Case no. 18/2005 arising out of FIR No. 264/2005 under Section 363/366/376/34 IPC registered at Police Station Khajuri Khas. By the impugned judgment the Addl. Sessions Judge held the appellant guilty under Section 376 IPC and sentenced him to undergo R.I. for a period of 10 years besides directing him to pay a fine of Rs. 2,000/- and in default of payment of fine, to further undergo S.I. for 6 months.

2. The factual matrix of this case are that a general diary entry no. 7A was recorded at P.S. Khajuri Khas, on the statement made by the complainant, Prem Pal

(father of the prosecutrix) alleging, that on 11.06.2005 he went for his job and returned late in the evening. On returning back, his wife told him that during the day hours she had gone to market and on return found Rashmi, their daughter (hereinafter referred to as “the prosecutrix”) aged about 10 years missing. It is stated by him that on being searched he could not find her daughter. He then went to the house of Durgesh, his neighbour, who used to come to his home very frequently and found him missing too. On being enquired his brother told him that Rashmi had gone for a feast in the marriage along with Durgesh. He further searched for Rashmi up to 20.06.2005. Thereafter, he lodged a missing report at P.S. Khajuri Khas on 06.07.2005, which is the basis of the present FIR. Thereafter, investigation was undertaken by the police. A police party was constituted by police and they along with Prem Pal, father of the prosecutrix, left for village Pal, from where they recovered the prosecutrix from the house of accused Maan Singh. Maan Singh was arrested and produced before a local Court & later brought to Delhi along with Rashmi. They were then medically examined at GTB Hospital, Delhi.

3. Statement of prosecutrix was got recorded under Section 164 Cr.P.C. wherein she made allegations that she was taken away by Durgesh to join a feast in marriage in a village at Amba. There she was married to Maan Singh forcibly. She also stated that Maan Singh had sex with her against her will. The police after completing investigation filed a challan against the present appellant for the offence punishable under Section 376 IPC. After charges were framed, he pleaded not guilty and claimed trial.

4. The prosecution examined 12 witnesses to prove their case, including the prosecutrix. Statement of accused was then recorded under Section 313 Cr.P.C., where he claimed innocence. According to him he has been falsely implicated in the

present case because he had to return a sum of Rs. 50,000/- to Prem Pal which amount was borrowed by him and when he failed to pay the said amount, Prem Pal had framed him in this case.

5. He also alleged that prosecutrix has left the home in the company of Durgesh not forcibly and there was no independent witness who can support the prosecution story in this regard and that she had gone out of her own will. It is also submitted by him that learned Trial Court has not examined Durgesh with whom the prosecutrix had gone for a feast in the marriage before preparing the charge-sheet and there is no explanation whatsoever given by the prosecution as to why the said Durgesh was not cited as a witness, who in fact is a co-accused and a conspirator to the present appellant. It is also his case that in her statement under Section 164 Cr.P.C. she stated that she was taken away by Durgesh to join a marriage feast and then married to appellant/convict and there was no allegation of rape as such. It is also submitted that there are material contradictions in the statements of the father of the prosecutrix and the other witnesses and the prosecution has failed to explain as to how the prosecutrix has been forcibly married with Maan Singh against her will by not interrogating any other member of the family or any villager or relative who can support their case.

6. Learned ASJ has taken note of all the contentions raised before that Court and has dealt with the evidence which has come on record.

a. On the issue of testimony of Prem Pal, the Ld. ASJ has observed that:

8. When testimony of Prem Pal was perused, it came to light that this witness details inconsistent facts on the count as to when FIR was lodged by him. In one breath, he deposes that FIR was lodged on 20.06.2005, but in subsequent breath, he deposed that FIR was lodged by him on 09.07.2005. He further details inconsistent facts on the count as to when police partly left for village Pal. Question for consideration comes as to

whether Prem Pal can be termed as unworthy of credit, on account of discrepancy highlighted above. As is evident out of the record, Prem Pal is a hawker by profession. He is a man of average intelligence, who strives hard to meet two ends. His focus is on the aspect as to how livelihood for his family is to be earned. Persons like Prem Pal are not serious about dates and events. Even otherwise, Prem Pal was under going a trauma, since his daughter was missing and police was not taking any action in the matter. He makes it clear that Rashmi went missing on 11.06.05. He searched for her till 20.06.05 and thereafter went to PS Khajuri and lodged a report there. Tejawati ASI give re-affirmation to the facts testified by Prem Pal. She deposed that FIR was registered on 06.07.05. However, she clarified that prior to that date, a missing report was lodged by Prem Pal, detailing therein that his daughter was missing from his house. Therefore, these facts that Pem Pal went to PS on 20.06.05 and lodged a report there are true. Discrepancies to this effect as to when FIR was lodged cannot be termed as a material fact. Prem Pal further clarified as to what efforts were made by him to get a case registered. He explains that two activists of shiv Sena were associated by him for getting his daughter traced. This situation brings it over the record that police of PS Khajuri Khas took steps in the matter when political activists were joined by Prem Pal. In such a situation, the contention of the defence that Fir was lodged belatedly has no substance. Even otherwise Pem Pal explains that he was searching for his daughter till 20.06.05 and thereafter he went to PS to lodge a report. Explanation offered by Prem Pal is sufficient and satisfactory. Delay in lodging FIR nowhere shrouds the case with doubt and distracts. When testimony of Prem Pal was closely perused, it emerged that factum of rAshmi going missing from house on 11.06.05 is an event which is not at all a matter of dispute. Rashmi was recovered from village Pal, where police reached along with Prem Pal. This fact has been brought over the record through depositions of Prem Pal, Rajinder Singh ASI and Rashmi. Consequently, the case projected by Prem Pal is found to be true in main. Apex Court in Anil Singh (AIR 1988 SC 1998) has ruled that invariably a witness adds embroidery to the prosecution story perhaps for the fear of being disbelieved. But that is no ground to throw a case over board, if true in main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witness. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that an innocent man is punished. A judge also preside to see that a guilt does not escape. One is as important as the other. Both are the duties of a judge to perform. When evidence of Prem Pal was assessed on the above standards, it came to light that his testimony is true in main. Factum of Rashmi going missing and her recovery from house of accused Maan Singh have been established beyond doubt. Therefore, discrepancies on minor matters of details are not such which may persuade the court to discard version of Prem Pal. Hence, it is held that evidence of

Prem Pal can be considered in adjudicating the accountability of the accused.

- b. On the issue that prosecutrix being a minor and her testimony may not be believed, the learned ASJ observed as under:

9. Much has been said that Rashmi may not be believed, since she was tutored by her parents to depose in a particular manner. When testimony of Rashmi was perused, it came to light that defence has completely failed to impeach her credit by showing that she was not a person of veracity and detailed facts, on being tutored by her parents. Her demeanour was noted down by the Court. The Court remained alive to the situation that tone of her voice, readiness with which she gave answers to the questions, her look, her self possess, her courage and pitch of her voice were such factor which would have persuaded an ordinary prudent man to conclude that she was detailing events by her memory and not on account of being tutored by her parents. Question for consideration comes as to whether this child witness is competent to testify facts. It is a settled proposition of law that no precise rule can be laid down respecting degree of intelligence and knowledge, which will render a child a competent witness. In practice, it is not unusual to receive the testimony of children aged between 8 and 9 years when they appear to possess sufficient understanding. As a matter of prudence, the Court are generally chary in putting absolute reliance on the evidence of a solitary witness and look for corroboration of the same from other circumstances of the case. But when evidence is found reliable the courts accepts it. The Apex Court accepted evidence of a child of five years in Suresh (AIR 1981 SC 1122), who was sole witness to murder by a domestic servant. When testimony of Rashmi was considered she was found competent to testify since she appeared to be intelligent for her age and gave her testimony frankly and without any hesitation. A village girl of 13-14 years managing household chores was held not to be a child witness in Devi Nandan (1987 CrL.J. 1016). In Tarlal Singh (AIR 10979 SC 1374), a child witness was found to be competent to testify. In S.D. Mohite (AIR 1975 SC 55) only witness examined by the prosecution to prove facts was a teenager, who was found to be truthful. Therefore, it is apparent that a child witness may be competent to testify, if he or she appears to be intelligent for his or her age. Here in the case, Rashmi appeared before the Court with beaming eyes, confidence over her face, with candour of self possession. She narrated facts with full confidence, coherently and clearly. She fared well in cross-examination. Therefore, it is apparent that she is reliable and worthy of credence. Her testimony can safely be considered for adjudicating accountability of the accused.

- c. Regarding the commission of rape on the prosecutrix, Ld. ASJ has

observed:

10. Rashmi unfolds that Durgesh was her neighbour. About 6-7 months ago, Durgesh invited her for a feast in marriage, which was being celebrated nearby. Durgesh took her to a village and she was kept there. Durgesh called Mann Singh and settled her marriage with him. Maan Singh was not known to her prior that day. She objected to her marriage being performed with Maan Singh, but she was forcibly married with Maan Singh in a temple. Maan Singh took her to a village where he had forcible coitus with her. Maan Singh had forcible sex with her five times. Facts narrated by Rashmi get reaffirmation through deposition of Prem Pal, her father. He tells that on 11.06.05 Rashmi went missing. He searched for her. Brother of Durgesh told that Rashmi was taken to a feast in marriage by Durgesh. He accompanied police party to village Pal. There Rashmi was recovered from the house of accused Maan Singh. Maan Singh was also arrested from there. Rajinder Singh ASI also confirms the facts in that regard. He deposed that on 07.07.05, he went to village Pal, PS Amba, Distt. Morena (MP) along with Jagbir Singh, Constable and Prem Pal. Rashmi was recovered from the house of accused Maan Singh. Maan Singh was also arrested there.

11. Rajinder Singh, ASI, explains that Rashmi and Maan Singh were produced before a local Magistrate and transit remand was obtained. Thereafter, he went to village Bashoni to arrest Durgesh, who was not available there. Next day, prosecutrix and Maan Singh were brought to Delhi. Prosecutrix was sent for medical examination. Facts testified by Rajinder Singh, ASI, bring it over the record that after arrest of Maan Singh, he was produced before local Court and was obtained on transit remand. These events make it clear that prosecution could establish that Maan Singh was arrested in village Pal and Rashmi was recovered from his possession.

d. On the issue that Rashmi was legally wedded wife of Durgesh, Ld.

ASJ has observed as under:

15. Much has been said that Maan Singh was husband of the prosecutrix. He relied testimony of Rashmi for a finding in that regard. Rashmi deposed that she was taken to a temple and married to Maan Singh there. She nowhere deposed as to what

ceremonies were performed in her marriage. Sub-section (1) of Section 7 of the Hindu Marriage Act, 1955 contemplates that a Hindu Marriage may be solemnized in accordance with customary rites and ceremonies of either parties there. Neither Rashmi was questioned nor any evidence was adduced by the accused to show that his marriage with Rashmi was performed in accordance with customary rites and ceremonies of either the bride or bridegroom. It has further not been shown that Saptpadi took place before the sacred fire, when marriage between him and Rashmi was solemnized. Therefore, it nowhere comes over the record that Rashmi was married to Maan Singh according to customary rites and ceremonies of the parties. Mere this fact that she was taken to a temple and married with Maan Singh nowhere brings her marriage within the ambit of Hindu Marriage. I am constrained to conclude that there is nothing over the record to find facts in favour of the accused to this effect that Rashmi is his legally wedded wife.

7. It is also observed that Dr. Richa Aggarwal, who appeared as PW-9, had deposed that on 08.07.2005 Rashmi was brought in the hospital for medical examination and on medical examination she found that her hymen was torn. Her MLC is Ex.PW9/A. The contents of MLC supported the story projected by the prosecutrix. Therefore, the testimony of the prosecutrix Ex.PW1/A also gets support from the statement of Dr. Richa Aggarwal.

8. Dr. Sujan Singh who appeared as PW5 before Ld. ASJ had examined Maan Singh on 08.07.2005 and has deposed:

PW-5 Dr. Sujan Singh, ACOMO, GTB Hospital, Shahdara, Delhi

On SA:-

On 08.07.05, Maan Singh was produced before me by Ct. Phool Singh of PS Khajuri Khas, Delhi. I examined him and noted that secondary sexual characters were well developed. No external injuries were noted on his body. There is nothing suggestive of the fact that he was incompetent to sexual intercourse. I prepared MLC Ex.PW5/A which is in my hand and bears my signature is correct.

9. Having gone through the record of the case, it is clear that the contentions raised on behalf of the appellant does not support his case and even the defence raised by him that the father of the prosecutrix, Prem Pal (PW-2) has advanced him a loan

on the basis of which he has been falsely implicated in this case has not been even put up to Prem Pal during his cross-examination and, therefore, there is no other defence evidence adduced by the appellant. The testimony of the prosecutrix in the present case is consistent and over-board. Her testimony was not abnormal and the events unfolded by the girl satisfy the standards of ordinary human behavior, which seems to be natural course of events happened with her. The conviction of appellant does not suffer from any illegality or infirmity and, therefore, needs to be confirmed.

10. Hence, taking into consideration all the facts and circumstances of this case, it is apparent that the marriage between Rashmi and Maan Singh was not a legal marriage and therefore, claim of Maan Singh that Rashmi was his legally wedded wife and he had sex with his wife and thus, it was not against her consent even though the age of Rashmi was of 11 years at that time cannot be sustained. Taking all these factors into consideration, I uphold the conviction of the appellant and do not find any reason to interfere in the order of sentence awarded to the appellant in view of the age of the prosecutrix. Accordingly, the appeal is dismissed.

11. Copy of the order be sent to the appellant through Jail Superintendent and to the Trial Court along with the TCR.

MOOL CHAND GARG, J.

December 02, 2009
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