

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

+ **Crl.App. 36/2007**

% Date of reserve: 20.05.2009
Date of decision: 01.07.2009

JASWINDER SINGH ... APPELLANT
Through: Mr. M.L. Yadav, adv.

Versus

STATE ...RESPONDENT
Through: Mr. Navin Sharma, APP.

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. to set aside the impugned judgment dated 04.11.2006 and the order on sentence dated 10.11.2006 passed by the Learned ASJ in sessions case no. 44/04 in case FIR No. 276/2003 filed under Sections 363/506 (ii)/34/376 (2)(g) IPC registered at Police Station, Delhi Cantt.

2. The brief factual matrix of this case are, that a DD No. 18A was recorded at P.S. Delhi Cantt. on the statement made by the complainant, the father of the prosecutrix (hereinafter referred to as 'X') alleging that she had not come back from the school after she left her house on 11.08.2003. Just after three days, i.e., on 14.08.2003,

the complainant got recorded his supplementary statement and made specific allegations against the appellant/Shinda, resident of the same village where the complainant was residing, alleging that it was the appellant who had kidnapped his daughter (X) and that the kidnapper along with his daughter could be apprehended from their native village 'Khanna' in Punjab. Accordingly a police party was constituted by the police, after registering an FIR under Section 363 IPC by converting the missing report. The raiding party went to Khanna and recovered the prosecutrix as well as the present appellant from the said place. Father of the appellant was also found there. He was also arrested. Thereafter, the prosecutrix and the appellant were brought to Delhi. They were medically examined at Safdurjung Hospital. Statement of the prosecutrix under Section 161 Cr.P.C. was also recorded wherein she made allegations of rape against the present appellant. Accordingly, the police completed their investigation and filed a challan against the present appellant as well as his father under Section 363/506(2) IPC read with Section 376 of the IPC. Charges were framed against the appellant as well as his father on 17.03.2004 to which both of them pleaded not guilty. The prosecution examined 13 witnesses to prove their case. The prosecutrix was also one of the witnesses examined during the course of the trial. Statements of the accused persons were then recorded under Section 313 Cr.P.C. wherein they claimed that they were innocent.

3. According to the appellant, he had been falsely implicated because of a family litigation going on between his family and the family of the prosecutrix. He also alleged that there was no kidnap and that the prosecutrix had gone along with him out of her own will.

He also denied commission of rape as alleged. It was also his case that neither recovery of the prosecutrix from the possession of the appellant was proved by the prosecution nor they could lead any evidence to prove that the prosecutrix was subjected to sexual intercourse without her consent. It was also stated that the prosecutrix was major and that she used to discuss all these issues with one Nikki, her friend. However, except for examination of Gurvinder Singh no other defence witness was examined.

4. Learned Additional Sessions Judge who has tried this case has taken note of all the contentions raised before this Court by the appellant and has dealt with the evidence which has come on record very specifically. Some of the observations made by the learned ASJ which shows that the ASJ has categorically dealt with each and every contention raised by the appellant in the impugned judgment dated 04.11.2006 are reproduced hereunder:

a) On the issue of intimacy between the appellant and prosecutrix Learned ASJ has observed that

17. XIV....No evidence in defence was adduced by the accused to infer if there was love affairs between the prosecutrix and 'X', A-1(appellant) at any time or that the prosecutrix used to write love letters to him. Again there is nothing on record to show if Nikki, the alleged fast friend of the prosecutrix used to study in her class or that the prosecutrix used to discuss about A-1 with her. PW 13 Amardeep appeared from Guru Nanak Girls Senior Secondary School. No suggestion was put to this witness to falsify if any girl with the name of Nikki used to study in the class of the prosecutrix.

XV. A-1 has not explained how and when he developed so close intimacy with the prosecutrix which prompted her to take extreme step to run away with him from her school without informing her parents. No worthwhile evidence has come on record to infer if there was any close intimacy between the two at any time prior to the incident prompting the prosecutrix to accompany the accused persons from her school without taking into confidence her parents. Nothing has come

on record to show if both the accused persons and the prosecutrix had met each other for substantial duration to develop intimacy. It has come on record that the prosecutrix had visited the village of her father only for short duration during summer holidays. The accused persons have failed to prove that during visits of the prosecutrix to their village, love affairs had developed between the prosecutrix and A-1 or that they used to meet each other. A-1 has further failed to substantiate on record if any telephone calls were made by the prosecutrix to him on his mobile at any time. No such call record of the telephone allegedly made by the prosecutrix on the mobile of A-1 have been produced/proved on record. A-1 did not clarify the dates when allegedly the telephone calls were made by the prosecutrix to him. It is not pleaded by A-1 if the prosecutrix ever made telephone call to him on his mobile from Delhi and if so when and for what duration. Again the accused has failed to prove on record any letter allegedly written by the prosecutrix to him (A-1). The prosecutrix categorically denied letter mark PW8/DA to have been written by her. She further denied that she had written the words "143 SN" meaning "I love you" with her blood on the letter. Accused did not make any efforts to get compare the handwriting of the prosecutrix with the contents of the letter. A-1 did not clarify as to where and when this letter was written by the prosecutrix. He also did not specify as to how and by which mode, he received this letter. No date of receipt of letter was suggested by the accused. It has not been got clarified as to from where the prosecutrix had written and sent this letter to A-1. In her cross examination, the prosecutrix categorically denied if she and A-1 were having visiting terms at each others' residence in the village of the accused. No evidence to falsify the deposition of the prosecutrix in this regard has been adduced by the accused. Accused did not suggest as to when and where both of them had met each other prior to the incident or when they allegedly planned to run away. There is nothing on record to show if after taking the prosecutrix with them, the accused persons got introduced her to their family members or any other development regarding their relation took place. Rather it has come on record that when the prosecutrix was found in the possession of the accused persons, they were not living with their family. They were found at a secluded place in a "gher".

XVI. There is nothing on record whatsoever to infer love affairs between the prosecutrix and A-1 as vehemently argued by him. Even after the prosecutrix was taken to a remote village from Delhi, no efforts were made by the accused persons to intimate parents of the prosecutrix about their whereabouts. Had there been love affairs between the prosecutrix and A-1 they must have informed the parents of the prosecutrix regarding the well-being of the prosecutrix. Again there is nothing on record to show if the prosecutrix was having any strained relations with her parents forcing her to flee away with the accused without informing them. There is nothing on record to show if at any time any efforts were made by the accused persons to get any conversation made between the prosecutrix and her parents showing her willingness to accompany the accused persons.

Rather the prosecutrix supported her parents soon after her recovery from the possession of the accused persons. She categorically levelled allegations of kidnapping and rape against the accused persons in her statement recorded under Section 161 Cr.P.C. as well as 164 Cr.P.C. The accused persons have even failed to establish that the prosecutrix had accompanied them with her own free consent.

- b) On the issue of prosecutrix being major as alleged by the appellant, the Learned ASJ observed as under:

Age of the prosecutrix is also material in this regard. The prosecutrix was aged below 18 years on the date of incident. Her date of birth is stated to be 29.08.1987. On the date of incident i.e. 11.08.2003, she was below 18 years of age. The accused persons have disputed this date of birth of the prosecutrix. However, they have not given any logic for disbelieving this date of birth of the prosecutrix. PW 3 Mahender Singh, father of the prosecutrix has asserted the date of birth of the prosecutrix as 29.08.87 in his deposition. No other date of birth was suggested to the complainant in his cross-examination. The prosecution further examined PW 13 Amardeep, UDC from Guru Nanak Girls Senior Secondary School. The witness proved the photocopy of the admission register of the prosecutrix which is Ex.PW13/A. In the school record, her date of birth was recorded as 29.08.86. This date of birth was recorded on the basis of the school leaving certificate issued from Garrison Children High School, Khirki, Pune. The accused persons did not bother to summon any record from the said school to falsify the date of birth recorded in the school record. The incident had taken place on 11.08.03. The date of birth of the prosecutrix was got recorded in the school at Delhi on 02.07.03. At that time the prosecutrix and her family members were not expecting the present incident to happen to falsely get record date of birth of the prosecutrix there. The prosecutrix had taken admission in 9th class and date of birth collected by the prosecution is possible to the girls studying in the said class.

- c) Regarding the commission of rape of the prosecutrix, the Learned ASJ observed as under:

II. Again the testimony of the prosecutrix PW 8 "X" is vital on this aspect. In her deposition before the Court, prosecutrix proved the version given by her to the Police in her statement recorded under Section 161 Cr.P.C. and under Section 164 Cr.P.C. and categorically named A-1 to have committed rape on her person at night after both the accused persons consumed liquor. PW 8, the prosecutrix in so many words on oath stated that she was confined in the house of a relative. At night, A-1 and A-2 consumed liquor. A-2 caught hold her hands and A-1 committed rape on her person. On the next day, her father and police reached there and apprehended the accused persons.

III. This testimony of the prosecutrix in examination in chief categorically shows the commission of rape by A-1 with the prosecutrix. The prosecutrix, a minor girl is not imagined of fake incident of rape to defame herself in the eyes of her parents and public at large. She was not going to be benefited by levelling false allegations of rape against A-1. Fairly she did not level allegations of rape as such against A-2.

IV. In the cross-examination, the prosecutrix admitted that whenever A-1 met her in the village, he never committed wrong act with her and never attempted to kidnap her. She never disclosed to her relatives that A-1 was not having good character. She however reasserted that only once during her stay with the accused persons, she was raped only by A-1. She denied the suggestion to level false allegations at the instigation of her parents that she was made unconscious, confined in a room and was raped. She further deposed that when she came to her senses, A-1 committed rape on her person. She however could not give details regarding the dates when rape was committed on her person. She also failed to state the time when she was raped. She clarified that at that time, she was perplexed as for most of the time, the accused persons used to make her unconscious. In the further cross examination, she again reiterated that both the accused persons had consumed liquor and A-1 had committed rape on her person. She further stated that after rape, she found her clothes off from her person/body.

5. The aforesaid observations made by the Learned ASJ does not suffer from any illegality or infirmity. Charge of criminal intimidation under Section 506 IPC levelled against appellant has been set aside because the prosecution has failed to prove this charge neither the revolver nor the alleged car involved in the incident was recovered from the appellant.

6. It is quite clear from the contentions raised by the appellant that he himself was not sure of the main ground due to which, he has been implicated in the present case as alleged by him, i.e., whether it was on account of an affair between him and prosecutrix or it was due to enmity between his family and complainant.

7. In these circumstances, when such like heinous crime is committed on a school going girl, some deterrence is required. To show

mercy in such like cases would be travesty of justice. The testimony of the prosecutrix is consistent and overboard. Her demeanour was not found to be abnormal and events unfolded by the girl satisfy standards of ordinary human behaviour, natural course of events and tenets of veracity. The conviction of the accused does not suffer from any illegality or infirmity, therefore, needs to be confirmed.

8. However, taking into consideration all the facts of this case it is apparent that the punishment awarded by the Learned Sessions Judge to the present appellant to undergo R.I. for a period of 10 years is not based upon any justifiable reasons but probably proceeds on the basis that the prosecutrix was a minor, though according to her own statement under Section 164 Cr.P.C. she was aged about 17 years.

9. As far as the offences under Section 363/34 IPC are concerned, the Sessions Judge sentenced the appellant to undergo R.I. for 5 years with fine of Rs. 1,000/-and failing to pay the said fine to further undergo S.I. for 1 month in respect of the offences punishable under Section 363/34 IPC. However, benefit of Section 428 Cr.P.C. was also granted to them.

10. The appellant has already undergone approximately 7 years of sentence in judicial custody.

11. Taking these factors into consideration while maintaining the conviction of the appellant on both the counts, I reduce the sentence awarded to the appellant under Section 376 IPC to R.I. for 7 years and in case the appellant has completed the said period, he may be released forthwith as the other sentence stand concluded which are

less than 7 years, after depositing of fine as imposed upon him.

12. The appeal is disposed of accordingly. TCR be sent back forthwith.

MOOL CHAND GARG, J.

JULY 01, 2009
ag