

*** HIGH COURT OF DELHI : NEW DELHI**
Judgment reserved on : March 26, 2009
Judgment delivered on : April 08, 2009

+ (1) Crl. A. No. 194/2006

% Anil Kumar ... Appellant
Through: Mr. Rajesh Kumar, Advocates

versus

State ... Respondent
Through: Mr. Amit Sharma, Additional Public
Prosecutor for State

+ (2) Crl. A. No. 1026/2006

% Ramesh ... Appellant
Through: Mr. Vijay Singh Charak, Advocates

versus

The State of NCT of Delhi ... Respondents
Through: Mr. Amit Sharma, Additional Public
Prosecutor for State

CORAM:
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. The above captioned two appeals arise out of a common impugned order and so counsel representing both the appellants/accused urged that they be heard together and

these two appeals be disposed of together. Appellant- Ramesh, son of Sh. Surender Paswan and appellant- Anil Kumar, son of Sh. Mahender Singh, have been convicted and sentenced by the trial court for kidnapping and raping the prosecutrix (PW-2) and in this appeal both the appellants are assailing their conviction and the sentence imposed upon them for the aforesaid offences.

2. The relevant facts, as noted by the trial court and apparent from the record of this case are:-

Vijender Singh (PW-1) is the Complainant of this case and on 6th March, 2004, he lodged a complaint in police station Vivek Vihar that his daughter, aged about 13-14 years, while she left for school, had not returned to home since 3rd March, 2004, and he suspected that his neighbour Ramesh, had kidnapped her. DD No. 28-A, was recorded and investigation of this case was entrusted to ASI Charan Singh (PW-5), who along with Constable Uday Chand (PW-9), on coming to know that two boys, who had kidnapped the prosecutrix, were present near Vivekanand College, reached the spot, on the identification of Vijender Singh- father of the prosecutrix (PW-1), apprehended Ramesh and Anil.

In her statement, the prosecutrix (PW-2) deposed that on 3rd March, 2004, while she was in her school, at about 9:00 a.m. she went out of her class to drink water when both the appellants/accused- Ramesh and Anil, who were standing outside her school, called her outside and told that her father had met with an accident at Ghaziabad. She got nervous and on the pretext of taking her to her father, both the appellants/ accused first took a *rickshaw* to reach railway station and then boarded a train and took her to some other station. Appellant/accused- Anil, who happened to be her parental cousin (*Tau's son*), asked her not to worry and change the school dress. Then again both the appellants/accused, made her to board another train and bus along with them. On 4th March, 2004, they all reached the village

of appellant/accused- Ramesh, where the prosecutrix (PW-2) was first asked to sleep separately, but later appellant/accused- Ramesh lied down on her cot and raped her twice on that night. On the next morning, her clothes were got changed and she was brought to railway station. All three of them spent one night on the railway station and bus stand. Prosecutrix (PW-2) asked them to take her back to her house or else she would raise alarm and get them arrested by police. Both the appellants/accused, on reaching Delhi railway station, were arrested.

3. Aforesaid is the initial version of the prosecutrix (PW-2). After their apprehension by the police, statement of prosecutrix (PW-2) under Section 161 of the Code of Criminal Procedure, was recorded and the prosecutrix as well as both the appellants/ accused were got medically examined. Both the appellants/ accused were *challaned* for the offences under Sections 363/376 of the IPC. The trial court, framed Charges against both the appellants/accused under Section 366 read with Section 34 of the IPC and a separate Charge under Section 376 of the IPC, was framed against appellant/accused – Ramesh, to which both the appellants/ accused did not plead guilty and trial commenced.

4. Prosecution had got examined nine witnesses in all. Out of them, the material evidence is of the prosecutrix (PW-2) and her father (PW-1). Smt. Devi Rani (PW-7) has proved the age (Exhibit PW-7/A) and date of birth of the prosecutrix. Doctor Poonam Sharma (PW-6), who had medically examined the prosecutrix, has proved the MLC as EX. PW-1/A. Assistant Sub

Inspector Charan Singh (PW-5) is the Investigating Officer of this case

5. Both the appellants/accused in their statement, under Section 313 of the Cr.P.C., had stated before the trial court that they are innocent and have been falsely implicated in this case and in their defence, both the appellants/accused got themselves examined as DW-1 and DW-2 respectively.

6. After the trial, both the appellants/accused have been convicted and sentenced by the trial court vide impugned judgment and order on sentence of 10th February, 2006, to undergo RI for ten years each and also to pay fine of Rupees five thousand and in default of payment of fine, to suffer SI for one year for committing offence under Section 366/34 of the IPC. Appellant/accused- Ramesh has been convicted and sentenced to undergo RI for ten year and to pay a fine of Rupees five thousand and in default of payment of fine, to suffer SI for one year, for commission of offence under Section 376 of the IPC. However, both these sentences of appellant Ramesh have been ordered by the Trial Court to run concurrently.

7. Both the sides have advanced their submissions and with their assistance, the evidence on record has been scrutinised.

8. The first and foremost crucial aspect of this case, which is touched upon by the defence is the testimony of the

prosecutrix (PW-2). It is pointed out that the alleged history given in MLC (Ex.PW-6/A) is of '*running away from home*'. Thus, it has been contended that the prosecutrix (PW-2) was a consenting party and she had pressurized Appellant – Ramesh to marry her, otherwise she would consumed poison. In defence, Appellant - Ramesh has deposed as DW-1 that he had told the prosecutrix (PW-2) that they are minors but on the insistence of the prosecutrix, they had married at his native place, in Patna, and he has placed on record his photographs with prosecutrix (PW-2) as Ex. D-1. Appellant – Anil Kumar had also deposed as DW-2 and has stated that he had come to know that the prosecutrix (PW-2) had eloped with Appellant - Ramesh and he had also gone to Bihar to search for the prosecutrix (PW-2) who is her cousin sister and he was also apprehended by the police and was falsely implicated in this case. Appellant – Anil claimed that he had falsely implicated in this case due to inimical relations between his family and the family of the prosecutrix (PW-2).

9. The infirmity pointed out in the evidence of the prosecutrix (PW-2) by the counsel for the Appellants is that the assertion of the prosecutrix (PW-2) of having taken permission from the teacher for taking water in the school is an improvement made by her in her evidence. It is pointed out that prosecutrix (PW-2) has admitted in her evidence that her father had asked Appellant - Ramesh to vacate the tenanted

portion of the house, which was with him and Appellant - Ramesh had refused to vacate it. What has been suggested to the prosecutrix (PW-2) in her cross-examination by the defence is that she has been tutored by her father to falsely depose against the Appellants. Lastly, it is contended on behalf of the Appellants that the conviction and the sentence imposed upon the Appellants is bad in law and deserves to be set aside and benefit of doubt ought to accrue to the Appellants. Nothing else has been urged on behalf of these two Appellants/accused.

10. On behalf of the Respondent – State, learned Additional Public Prosecutor submits that from the school leaving certificate, Ex.PW-7/A of the prosecutrix (PW-2), which is supported by the relevant entry in the school register Ex.PW-7/B, it stands proved that the prosecutrix (PW-2) was aged little more than 12 years at the time of this incident and even if it is taken that she was a consenting party, still her consent is of no avail to the defence as she was minor at the time of this incident. Thus, it is submitted that the conviction and sentence imposed upon the Appellants is well deserved and there is no substance in this appeal.

11. From the evidence of the school head-mistress (PW-7), it stands conclusively proved that the prosecutrix (PW-2) was aged a little above twelve years at the time of this incident. The age of the prosecutrix (PW-2) as stated by her and her father (PW-1) was thirteen years at the time of this incident. There is

no worthwhile challenge to the evidence regarding the age of the prosecutrix (PW-2) from the side of the defence.

12. The testimony of prosecutrix (PW-2) has to be appreciated in the light of the observations made by the Apex Court in the case of “*State of Himachal Pradesh vs. Asha Ram*” **AIR 2006 SC 381**, which are as follows:-

“It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliance. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.”

13. In the instant case, it transpires from the evidence of the prosecutrix (PW-2) that she was in the school on the day of this incident and when she had come out from her class to take water, Appellant – Anil signaled her to come out and both the Appellants told the prosecutrix that her father had met with an

accident at Ghaziabad and since she knew both the Appellants, as one of them was her father's tenant and the other one was her cousin, therefore, she accompanied them. Prosecutrix (PW-2) has stated in her evidence that she did not raise any alarm while she was taken in the train because her cousin brother was with her. It has come in her evidence that she had left her bag in the school. Had she been a consenting party, then she would have carried her bag with her. In any case, nothing turns on this aspect or upon the so called improvement made by her in her evidence regarding taking of permission from teacher for going out for taking water, because even if it is taken that she was a consenting party, still her consent is immaterial, as she was minor at the time of this incident. Trial court has rightly relied upon the two decisions of the Apex Court, i.e., '*Vishnu Undrya vs. State of Maharashtra*' (**AIR 2006 SC 508**) and '*State of Himachal Pradesh vs. Shree Kant Shekari*', (**2004 IX AD SC 5**), to hold that the consent of the prosecutrix is really of no consequence as she was a minor.

14. Although it has been asserted on behalf of the Appellants that the prosecutrix (PW-2) has been tutored by her father (PW-1) to depose against the Appellants/accused, but it has neither been so suggested to her father (PW-1) nor it can be so made out from the evidence of the prosecutrix (PW-2). Nothing worthwhile has come on record, as to why the prosecutrix (PW-2) or her father (PW-1) would falsely implicate the

Appellants/accused in this case. As already observed above, the theory of consent is of no avail to the case of the Appellants/accused.

15. Looked from any angle, I find that the evidence on record clearly implicates both the Appellants/accused and therefore, their conviction by the trial court is well merited and it calls for no interference by this court in this appeal. So far as the sentence awarded to the Appellants/accused is concerned, it appears that for the offence of rape, Appellant - Ramesh has been convicted and it carries a minimum sentence of seven years with a proviso to the effect that for adequate and special reason, the sentence imposed can be for a term less than the minimum provided. It is true that the Appellant - Ramesh was aged twenty years at the time of this incident and he has a blind mother and a younger brother to support as his father is no longer alive, but this, to my mind, would not be sufficient to award lesser sentence than the minimum prescribed. Though trial court has awarded rigorous imprisonment for ten years for the offence of rape to the Appellant Ramesh but I find that in view of the clean antecedents of the Appellant - Ramesh and his family background, as noticed above, his substantive sentence for the offence of rape deserves to be reduced to the minimum as provided under the law. Resultantly, the substantive sentence imposed upon the Appellant - Ramesh for the offence of rape, is reduced from rigorous imprisonment for

ten years to rigorous imprisonment for seven years. However, the sentence of fine is maintained.

16. For the offence under Section 366/34 of the Indian Penal Code, both the Appellants have been sentenced to undergo rigorous imprisonment for ten years each. Appellant – Anil was aged about 22 years at the time of this incident and he is said to be the only son of his parents and that he is having clean antecedents, and as per his nominal roll, he has remained behind bars in this case for a period of three years, eleven months and three days as on 16th February, 2008 and his sentence was suspended in this appeal on 19th February, 2008. His conduct in jail during the aforesaid period has been found to be satisfactory. Appellant – Anil has faced the agony of trial and appeal proceedings since March, 2004. The offence under Section 366 of the Indian Penal Code which does not carry any minimum punishment.

17. In the facts and circumstances of this case, the substantive sentence imposed upon both the Appellants for the offence punishable under Section 366/34 of Indian Penal Code is reduced from rigorous imprisonment for a period of ten years to rigorous imprisonment for seven years in the case of Appellant – Ramesh and to rigorous imprisonment for **four years and eight months** in the case of Appellant – Anil Kumar, i.e., to the period already undergone by him. However, the sentence of fine of both the Appellants for this offence is

maintained.

18. Appellant - Ramesh is in custody and he be informed about this order regarding the fate of his appeal through the concerned jail superintendant. Appellant – Anil Kumar is granted three weeks time to deposit the fine imposed upon him, if not already deposited.

19. Both the these appeals stand partly allowed in the terms as aforesaid. Trial court be apprised of this order, to ensure its compliance.

20. Both these appeals stand disposed of.

SUNIL GAUR, J.

April 08, 2009

Rs/pkb