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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on : December 15, 2008

Judgment delivered on : January 06, 2009

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Crl. A. No.215/2006

Kali Pado

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Appellant

Through: Ms. Purnima Sethi, Advocate

versus

The State

...

Respondent

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. Appellant is the brother-in-law (Jija) of the prosecutrix (PW-6). He has been convicted by the trial court for committing the offences under Section 363/366/376 of the Indian Penal Code and vide order dated 30th August, 2005, he has been sentenced for the offence under Section 376 of the Indian Penal Code, to RI for seven years and to pay a fine of rupees ten thousand and in default thereof, to undergo SI for one month. He has been also sentenced for the offence under Section 363 of the IPC to RI for two years and to a fine of rupees one thousand and in default thereof, to undergo SI for one month. Rigorous imprisonment of

three years has been awarded to the appellant for the offence under Section 366 of the Indian Penal Code and a fine of rupees one thousand has been also imposed upon him and in default thereof, appellant has been directed to undergo SI for one month. Aforesaid sentences have been ordered to run concurrently by the trial court.

2. In this appeal, aforesaid conviction and sentence has been assailed by the appellant.

3. The factual matrix of the prosecution case is as under :-

On 23.10.2003, Smt. Urmila Devi W/o Chalitra Paswan went to PS Okhla Industrial Area and got recorded her statement through SI Manoj Kumar vide Ex.PW3/A regarding kidnapping of her daughter Sanju on which SI Manoj Kumar made endorsement Ex.PW9/A and handed over the same to the Duty Officer for registration of FIR and SI Manoj Kumar started search for the appellant and prosecutrix but they could not be traced and SI Manoj Kumar sent WT message to CBI office, Crime Branch Office and the missing report was advertised in Doordarshan and the fact was also advertised in newspapers but the prosecutrix could not be traced. On 29.1.2004, SI Manoj Kumar received a secret information about the presence of the prosecutrix and the appellant near Machli Market, Gobind Puri and he immediately went to the place of information alongwith Ct. Chattar Singh and informer and as per the pointing out of the secret informer, and

as per the photographs of the prosecutrix, apprehended the prosecutrix and the appellant Kali Pado. SI Manoj Kumar then prepared recovery memo Ex.PW2/C, brought the appellant as well as prosecutrix to the police station and as per the directions of senior officers, appellant and the prosecutrix were handed over to W/SI Sangmitra alongwith the case for further investigation. Appellant was arrested and his personal search was conducted vide memo Ex.PW.2/A and he was interrogated and thereafter prosecutrix and the accused were sent to AIIMS for their medical examination in the custody of lady Ct Sunita and Ct. Chattar Singh and after medical examination of the prosecutrix, lady Ct. Sunita handed over one sealed pulanda and one sample seal which SI Sangmitra seized vide memoEx.PW.1/A and after medical examination of appellant, Ct. Chattaar Singh handed over four sealed parcels and sample seal which SI Sangmitra seized. Appellant was sent to lock up Kalka Ji and prosecutrix remained in the police station under the supervision of SI Sangmitra. Next day, accused and prosecutrix were produced before the court from where the prosecutrix was sent to Nari Niketan and appellant was sent to judicial custody. Investigating Officer seized certificate from Girls Senior Secondary School, Kalka Ji regarding the date of birth of the prosecutrix vide memo Ex.PW.5/B, recorded the statement of witnesses and case property was sent to CFSL. After completion of investigation,

charge-sheet for the offence under Section 363/366/376 of Indian Penal Code was filed against the appellant/accused.

4. Appellant was called upon by the trial court to face trial for the offences under Section 363/366/376 of the Indian Penal Code as he had not pleaded guilty to the aforesaid charges.

5. At trial, nine witnesses in all, have deposed. The star witness is the prosecutrix (PW-6). Urmila (PW-3) is the mother of the prosecutrix who is a witness to the kidnapping of the prosecutrix by the appellant/accused. Smt. Vrinda (PW-5) proves the school leaving certificate Ex.PW5/B of the prosecutrix, which gives the date of birth of the prosecutrix as 26th June, 1987. Dr. Sumana (PW-7) has proved the MLC Ex.PW.7/A of the prosecutrix. SI Sangmitra (PW-8) and SI Manoj Kumar (PW-9) have conducted the investigation of this case. Appellant alleges his false implication in this case at the instance of the parents of the prosecutrix. Upon conclusion of the trial, appellant stands convicted and sentenced as already noticed above.

6. Both the sides have been heard and the evidence on record has been perused.

7. It has been urged on behalf of the appellant that the prosecutrix was a consenting party and, therefore, she did not raise any alarm when she was allegedly abducted from the crowded area of Govind Puri. It has been also argued on behalf of the appellant that when the police came to Ashram alongwith

her father, even then she did not raise any alarm and thereafter the police had gone back. On the aspect of the age of the prosecutrix, it has been contended that she was a major and a consenting party. It has been pointed out that as per the bone age report of the prosecutrix, she was aged between fourteen to sixteen years and by giving benefit of margin of two years on either side, her age comes to eighteen years. According to the defence, there is unexplained delay of about two and a half months in lodging of the FIR of this case and it supports the plea of the appellant of prosecutrix being a consenting party to the whole affair. Thus, it has been contended on behalf of the appellant that the appellant has been wrongly convicted by the trial court and he deserves to be acquitted.

8. On behalf of the State, learned Addl. Public Prosecutor for the State urges that the testimony of the prosecutrix is consistent and reliable and the appellant has been rightly convicted and sentenced on the basis of the evidence on record and there is no merit in this appeal.

9. After having heard both the sides and upon perusal of the record of this case, I find that as per the school leaving certificate of the prosecutrix Ex.PW5/A, her date of birth is 25th June, 1987 and this incident is of 25th August, 2003. Thus, it is clear that the prosecutrix was aged slightly above sixteen years at the time of this incident. Her MLC Ex. PW.7/A corroborates it as her age

reflected therein is sixteen years and seven months. As per the bone age report of the prosecutrix, as noticed in the impugned judgment, her age was between fourteen to sixteen years, at the relevant time. The benefit of two years as claimed by the appellant is already given in the bone age report, while opining her age to be between fourteen to sixteen years and additional benefit of two years cannot be given by adding two years to the outer age of the prosecutrix as given in her bone age report. Therefore, it stands firmly established that the prosecutrix was aged more than sixteen years but was less than eighteen years on the day of this incident.

10. According to the appellant, prosecutrix was a consenting party. Although the prosecutrix has stated in her evidence that when she had tried to raise alarm, her mouth was shut by the appellant with his hand while she was being raped. However, she stands contradicted from the alleged history given by her to the doctor as contained in her MLC Ex.PW.7/A which reads as under :-

“Alleged to be kidnapped by brother in law. Acc. To the girl, she had married her brother in law 7 months back (in temple) and is continuously living with him at her own will.”

11. In the face of the aforesaid “*alleged history*” as given by the prosecutrix to the doctor at the time of her medical examination, the plea of the appellant of prosecutrix being a consenting party to the sexual intercourse merits acceptance and thereby

absolves the appellant of the charge of rape. Trial court has overlooked the aforesaid vital evidence which favours the appellant/accused and permits him to earn an acquittal for the offence of rape. However, there is clinching evidence of Urmila (PW-3), mother of the prosecutrix who has stated in her evidence that after they had got down from auto rikshaw, appellant had fled away with the prosecutrix. Since the prosecutrix has been found to be aged below eighteen years, therefore, in the light of the evidence of the prosecutrix and her mother, the charge under Section 363/366 of the Indian Penal Code stands duly proved against the appellant who has been rightly convicted by the trial court for the aforesaid offences.

12. Resultantly, the conviction and the sentence imposed upon the appellant for the offence under Section 376 of the Indian Penal Code is set aside. However, the conviction of the appellant for the offence under Section 363/366 of the Indian Penal Code is hereby maintained. For the aforesaid offences, appellant has been convicted by the trial court to rigorous imprisonment for three years and two years respectively and both the sentences have been ordered to run concurrently. As per the nominal roll of the appellant, he has already undergone the sentence of three years, two months and twenty three days as on 17th December, 2008. Appellant is in judicial custody. He be released, if not wanted in any other case. He be informed of this order through concerned Jail Superintendent.

13. With aforesaid modification, this appeal stands partly allowed.

SUNIL GAUR, J

January 06, 2009
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