

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

+ Crl. Appeal No. 263/2001

% Reserved on: 2nd November, 2010

Decided on: 16th December, 2010

Virender Singh Appellant

Through: Mr. Ranjeet Kumar Jha, Advocate with
Appellant in person

versus

State of Delhi. Respondent

Through: Mr. Pawan Behl, APP with SI Giraj
Singh, PS Badarpur, Delhi.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. By way of the present appeal the Appellant challenges the judgment of conviction for offence punishable under Section 366 IPC and a sentence of Rigorous Imprisonment for six months and fine of ₹10,000/-.

2. Briefly, the prosecution case is that on 30th July, 1997, a complaint was lodged by the father of the prosecutrix regarding the missing of his daughter

alleging that his daughter aged about 14 years, a student of VIIIth standard had gone to the school on 28th July, 1997 at about 7 a.m., but she neither reached the school nor came back to home. On further enquiries, the complainant Narender Mishra, father of the girl found out that his daughter had been taken away/enticed by his former tenant Pradeep S/o Vishwanath. On 6th August, 1997, on the basis of this statement of Narender Mishra a case was registered under Section 363 IPC. The police started its search for the girl and Pradeep. Search was conducted at various places and finally she was found in the area of P.S. Loni along with Pradeep on 16th September, 1997, where Pradeep was arrested by the Loni Police and a case punishable under Section 25 of the Arms Act was registered against him. The girl was then handed over to the Delhi Police who brought her to Delhi. Her statement was got recorded before the Magistrate under Section 164 Cr. P.C. on 17.09.1997 wherein she stated that on 28th July 1997, when she started from her house for her school at about 7 a.m., Virender, the Appellant herein who was living in her neighbourhood met her and told her that he would leave her at the school on the cycle; so she sat on his cycle. On reaching near Meethapur Pull, Pradeep met them and Virender left her there. Pradeep told the prosecutrix to accompany him and on her refusal he threatened to kill her father and brother, so she had to accompany him. Pradeep took her to ISBT by a TSR and from there, in a bus, took her to Kasganj where he kept her at the house of some “Bhaiya-Bhabhi” for 4-5 days and raped her every night. From there he brought her to Delhi and kept her in a house at

Indirapuri where she was confined and raped for 3-4 days. On 15th September, 1997 when Pradeep went somewhere, the prosecutrix availing the opportunity came to her parents' house. After completion of the investigation, on a charge sheet being filed, the Appellant herein was charged for offence punishable under Section 366-A IPC and Pradeep under Section 366/376 IPC.

3. Learned counsel for the Appellant contends that the only role attributed to the Appellant is that the prosecutrix accompanied him willingly on his bicycle. There is no allegation that the Appellant enticed or allured the prosecutrix for any act. Moreover, no alarm was raised by the prosecutrix. The prosecution has neither produced the attendance register of the school nor any teacher to show that the prosecutrix did not reach the school on the date of the incident. The prosecutrix allegedly lived with Pradeep for a period of two and a half months without raising any grievance or alarm or any complaint to anyone, and thus her conduct casts a grave doubt on her version. To prove that the age of the prosecutrix is 14 years, only a school leaving certificate has been produced which is not a cogent and convincing evidence of age. Reliance is placed on *Sunil v. State of Haryana (2010) 1 SCC 742* to contend that in a criminal trial conviction cannot be based on an approximate age which is not supported by any record and in the absence of cogent and convincing proof of age, the accused is entitled to the benefit of doubt, and on *Gabbu vs. State of M.P. AIR 2006 SC 2461* and *Jinish Lal Sha vs. State of Bihar AIR 2003 SC 2081* to

contend that there was no meeting of mind of the co-accused and the Appellant. The enticement should be by deceitful means and merely dropping at the place where the co-convict was present does not fall within the ambit of commission of an offence punishable under Section 366 IPC especially when the version of the prosecutrix itself is doubtful.

4. Learned APP on the other hand reads out Section 366 IPC to contend that all the ingredients of the offence punishable under Section 366 IPC have been proved beyond reasonable doubt by the prosecution in the present case. The prosecutrix examined as PW1 in the Court has stated about the role of the Appellant whom she called as 'Mama' of taking her on his cycle on the pretext of dropping at the school, however, leaving her near Meethapur Pul with the co-convict Pradeep. The prosecutrix has not been cross examined on the aspect that the Appellant herein did not take her and no suggestion has been put to her that the Appellant did not leave her with Pradeep. The only suggestion put to the prosecutrix qua the present Appellant was in regard to his living in the neighbourhood. Learned APP further contends that the offence under Section 366 IPC is punishable up to an imprisonment for a period of 10 years and the Appellant has already been dealt with very leniently as he has been awarded a sentence of Rigorous Imprisonment for six months. Hence, no further leniency is deserved.

5. I have heard learned counsels for the parties and find no infirmity in the impugned judgment. An act of meeting of minds has to be inferred from the circumstances of the case. In the present case, the Appellant made the prosecutrix sit on his bicycle to drop her at the school, however, instead of dropping at the school, he took her to a place where Pradeep was already present. The very fact that he did not drop her at the school speaks about the premeditation and meeting of the minds of the Appellant and the co-convict Pradeep. No explanation has been rendered by the Appellant for this conduct of his. The Appellant was known to the family of the prosecutrix. His conduct of in not informing them about his dropping her with Pradeep is a conscious omission and is also a relevant fact. This conduct shows malice on the part of the Appellant and is an incriminating circumstance to prove his connivance with the co-convict.

6. There is no force in the contention raised by the learned counsel for the Appellant that the prosecution has not been able to prove the age of the girl relying on the school leaving certificate. There is evidence on record that besides the school leaving certificate, ossification test of the prosecutrix was also got conducted and as per the report of Radiologist Ex. PW8/A, her age was opined to be between 14½ and 17 years. Reliance placed by the Appellant on *Sunil (supra)*, is misconceived as in the said case, the prosecution did not get the prosecutrix examined from the dental surgeon or the radiologist, which could

have helped in forming an opinion about the age of the prosecutrix. Moreover, the school leaving certificate produced by the prosecution was also not found reliable as the brother who got the prosecutrix admitted in the school was not examined nor was any admission form produced from the school. Furthermore, the school leaving certificate produced by the prosecution was also procured six days after the incident and 3 days after the arrest of the Appellant therein. Hence the case relied by the learned counsel for the Appellant has no application to the facts of the present case. In the present case, the prosecution has established its case by producing the report of the Radiologist who conducted the ossification test Ex. PW-8/A. Also PW9 Saroj teacher of government school where the prosecutrix studied was examined as a witness. Thus the prosecution in this case has been able to establish that the prosecutrix was a minor.

7. I do not find any merit in the contention that from the allegations on record no case under Section 366 IPC has been made out. The statement of the prosecutrix is cogent, convincing and consistent. She has described the role of the Appellant. The Appellant enticed her on her way to the school on the pretext that he would drop her at the school on his bicycle, however dropped her at the place where co-convict Pradeep was already present. From the facts of the case, the knowledge that the prosecutrix is likely to be seduced to illicit intercourse is clearly attributable to the Appellant. Thus the prosecution has proved beyond

reasonable doubt the commission of offence punishable under Section 366 IPC by the Appellant.

8. Learned counsel for the Appellant prays in the alternative that since he has undergone a period of one month therefore, he be released on the period of sentence already undergone.

9. The incident is 13 years old and though uprooting the Appellant from his settled life is a mitigating fact in his favour, however, the aggravating fact that because of the act of the Appellant, the prosecutrix faced a serious offence has also to be borne in mind. The offence under Section 366 IPC is punishable with imprisonment which may extend to ten years and fine. The Appellant has already been dealt with leniently as he has been awarded a sentence of Rigorous Imprisonment for a period of six months and ₹10,000/- as fine and in default to further undergo Rigorous Imprisonment for three months. I see no reason to further reduce the sentence of the Appellant.

10. Accordingly, the appeal is dismissed. The Appellant be taken into custody to undergo the remaining period of the sentence awarded. Bail bond and Surety bond are cancelled.

(MUKTA GUPTA)
JUDGE

DECEMBER 16, 2010