

HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on: February 15, 2010

Judgment pronounced on: February 22, 2010

+ Crl. Appeal No. 42 of 2004

% Kaptan
Son of Bachan Singh ... Appellant
Through: Mr. V.P. Singh and Mr. S.K. Jain,
Advocates.

versus

The State of NCT of Delhi ... Respondent
Through: Mr. R.N. Vats, Additional Public
Prosecutor for State.

**CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR**

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| 1. | Whether the Reporters
of local papers may be
allowed to see the | } | No. |
| 2. | judgment?
To be referred to | | |
| 3. | Reporter or not?
Whether the judgment
should be reported in
the Digest? | | |

SUNIL GAUR, J.

1. This appeal assails conviction of the appellant for the offence of kidnapping and rape and vide impugned order of 7th October, 2002, appellant stands sentenced to rigorous imprisonment of

seven years with fine for the main offence of rape and to lesser imprisonment for the allied offences.

2. On 24th April, 2001, FIR No. 121 of 2001, under Section 363 of the IPC was registered at Police Station Mandawali, Delhi, at the instance of Kailash (PW-4), father of the prosecutrix (PW-3), aged about thirteen years, regarding her missing from his house since the previous evening. Appellant-accused was named as a suspect in the aforesaid FIR. On the next day, i.e. on 25th April, 2001, appellant-accused with prosecutrix (PW-3) were seen in a cycle *rikshaw* in Noida, U.P., by Investigating Officer (PW-12) of this case and they were identified to be so, by the first-informant (PW-4), who was with the Investigating Officer. Statement of the prosecutrix (PW-3) was recorded and thereafter, appellant-accused was arrested. Medical examination of the prosecutrix (PW-3) as well as of the appellant-accused was got conducted and the exhibits of this case were sent for analysis. Bone Age Examination of the prosecutrix (PW-3) was got done. The investigation of this case stood completed, with the filing of the Charge-sheet and the appellant-accused had claimed trial for the offences under Sections 363/ 366 /376 of the IPC. The trial of this case opened with the recording of the medical evidence followed

by the testimony of the prosecutrix (PW-3), her parents (PW-4 & PW-7). Bone Age Report (EX PW-6/A) gives the age of the prosecutrix (PW-3) as above twelve years and below fourteen years. Investigating Officer (PW-12) and Special Police Officer (PW-8) had deposed regarding the investigation conducted by them in this case.

3. The precise stand taken by the appellant-accused before the trial court, deserves to be noted and is as under:-

“As stated earlier I left home on 23-4-2001 at about 5:00 p.m. and went to Sita Ram Bazar where I worked as a Halwai. I returned home, on 24-4-2001 at about 11:00 p.m.. when I was returning home, Girish Halwai stopped me at his shop at Phatak wala road Mandawali. He is an informer of the police. He asked me to work for him during the night and I agreed. In the meanwhile, two police officials in a civil dress came there on a two wheeler scooter and told Girish that they had been sent by Tyagiji. Girish pointed towards me and they took me to the Police Station where I was detained and was falsely implicated.”

4. Appellant-accused had chosen not to lead any evidence in his defence before the trial court. The trial of this case ended with the conviction, which is being assailed in this appeal.

5. At the hearing of this appeal, what has been urged on behalf of the appellant is that the prosecution version is highly contradictory and the same has been illegally relied upon by the

trial court to convict and sentence the appellant-accused. According to learned Counsel for the appellant, the Bone Age Report gives approximate age only and the prosecution has failed to produce the school record where prosecutrix (PW-3) had studied up to third standard. Reliance has been placed upon a decision of Himachal Pradesh High Court reported in **2000 (2) C.C. Cases (HC) 182** to highlight that in cases like the present one, the Bone Age Report was not relied upon. It has been argued that the prosecutrix (PW-3) had not suffered any injury when the alleged offence was committed, nor she had raised any hue and cry and from her MLC, it becomes clear that she was of a major age. It has been further argued that version of the prosecutrix (PW-3) is not trustworthy as the alleged incident could not have taken place in the crowded area without being noticed by other persons. Counsel for the appellant had concluded by asserting that without prejudice to the above submissions, a substantial period of four and a quarter year already undergone by the appellant, would meet the ends of justice and therefore, the sentence awarded deserves to be reduced to the period already undergone by the appellant. Thus,

it is urged that impugned judgment is unsustainable and ought to be set aside.

6. Aforesaid submissions are staunchly rebutted by learned Additional Public Prosecutor for the State, who contends that the version of the prosecutrix (PW-3) is consistent and reliable and it stands materially corroborated by the evidence of her parents (PW-4 & PW-7) and the medical evidence on record. Regarding the age of the prosecutrix (PW-3), it has been pointed out that there is unchallenged evidence of Doctor Rajpal (PW-6) who has opined the age of the prosecutrix (PW-3) as below fourteen years and the decision cited is sought to be distinguished by pointing out that the bone age in the cited decision, was found to be between fourteen to sixteen years and there was no categorical opinion in the said case that it was below sixteen years and thus, the conviction and the sentence imposed upon the appellant is well deserved.

7. Afore said submissions have been given due consideration and the evidence on record has been scrutinized in the light of the pertinent observations made by the Apex Court in *Dildar Singh V State of Punjab AIR 2006 SC 3084*, which are as under:-

“In the normal course of human conduct an unmarried girl who is victim of sexual offence would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the first information report.”

8. Whether prosecutrix (PW-3) was major in age or was minor, is the moot question which falls for consideration, in the first instance. Testimony of the prosecutrix (PW-3) does reveal that appellant –accused had expressed to her that he was in love with her and had wanted to marry her and had also committed sexual intercourse with her and had taken her to Noida, U.P.. Prosecutrix (PW-3) had deposed that she had studied up to third standard. There is no worthwhile cross-examination of the parents (PW-4 & PW-7) of the prosecutrix (PW-3) by the defence regarding birth certificate or school certificate of the prosecutrix (PW-3). Even the Investigating Officer (PW-12) has not been cross-examined by the defence as to why he had not made any effort to obtain birth or school certificate of the prosecutrix. In

such a situation, appellant–accused cannot be heard to say that the Bone Age Report (PW-6/A) of the prosecutrix (PW-3) ought not to be relied upon. More so, when it remains unchallenged by the defence. The decision of the Himachal Pradesh High Court in **2000 (2) C.C. Cases (HC) 182** can be no precedent as it was a border line case regarding the age of the prosecutrix and because in the aforesaid case, there was no categorical opinion about the age of the prosecutrix being below sixteen years. In any case, the evidence regarding the age of the prosecutrix (PW-3) in the instant case remains unchallenged and has been rightly accepted by the trial court.

9. Since the prosecutrix (PW-3) was a minor in age on the day of this incident, therefore, her so-called consent becomes immaterial. Likewise, the so called infirmities in the prosecution case are rendered sterile in view of the minor age of the prosecutrix (PW-3).

10. In the light of the aforesaid, I do not find any illegality or infirmity in the impugned judgment. The sentence imposed upon the appellant is the minimum under the law and there are no

adequate or special reasons for awarding the sentence less than the minimum prescribed.

11. This appeal lacks substance and is accordingly dismissed. Bail bonds of the appellant-accused are forfeited. Trial court to ensure that the appellant-accused serves out the sentence, as awarded to him by it. Trial court be apprised of this order.

12. The appeal and pending application, if any, stand accordingly disposed of.

Sunil Gaur, J.

February 22, 2010

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