

*

HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on : February 01, 2010
Judgment pronounced on : February 08, 2010

+

Crl. A. No. 74/2004

% Rajesh son of Devi Dayal ... Appellant
Through: Mr. Sanjiv Vashisht, Advocate

versus

The State (NCT of Delhi) ... Respondent
Through: Mr. Amit Sharma, Additional
Public Prosecutor for the State

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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

SUNIL GAUR, J.

1. The conviction of the appellant herein is for the offences of kidnapping and rape of prosecutrix (PW-5), who was a minor, on the day of this incident i.e. on 30th October, 2001. Trial Court had sentenced the appellant to rigorous imprisonment for seven years with fine of rupees

two thousand for the main offence of rape. Impugned order awards similar sentence for the offence of kidnapping.

2. This incident of kidnapping of the prosecutrix (PW-5) was reported to the police on 6th November, 2001, which led to registration of FIR No.684 of 2001 under Section 363/366/376 of the IPC at Police Station Kalkaji, New Delhi. The First information of this incident reveals that appellant/accused was a petty employee in Kalkaji Mandir, where father of the prosecutrix (PW-5) was a Pujari and prosecutrix used to frequently visit this Mandir to assist her father and appellant/accused used to often send her to get pan etc. for him and this is how, he became acquainted with her. Pertinently, appellant/accused is named in this FIR as a suspect. It is prominently stated in this FIR that all efforts were made to search for the prosecutrix (PW-5) but her whereabouts could not be known, then this matter was reported to the police.

3. Investigation of this case reveals that on 14th December, 2001, prosecutrix (PW-5) and the appellant/accused were spotted by the police, while they were sitting at the Anand Vihar Bus Stop of route No.534 in East Delhi. Upon their apprehension, they were sent for

medical examination. Version of the prosecutrix was recorded by the police and after completion of the necessary investigation, charge-sheet in this case was filed against the appellant/accused, who chose to contest the charges under Section 363/366/376 of the IPC framed against him by the Trial Court. The evidence led, not only consists of the deposition of the prosecutrix (PW-5) but also of her father (PW-6) and apart from the medical evidence, there is evidence of the Investigating Officer (PW-12).

4. Despite opportunity given by the Trial Court, appellant/accused had not led any evidence in his defence, but had denied the prosecution case and had taken the following stand:-

“I was in Kalka Mandir, prosecutrix used to visit Mandir Daily. Then we developed friendship and she told me to tell her parents that I will marry her. I told her that I belong to different caste and I will not tell this to her parents and prosecutrix told me that in case I do not tell these facts to her parents then she is ready to come with me and I should take her and then I told her if she wants so she can accompany me. And I married her in court. Thereafter, I was apprehended by Police. I am innocent.”

5. Trial of this case concluded with the conviction of the Appellant, which is assailed in this appeal.

6. After having heard counsel for the parties and upon analysis of evidence on record, this Court finds that the stand of the appellant/accused is that the prosecutrix (PW-5) was a consenting party to the sexual intercourse and it was preceded by marriage between them. According to Appellant's counsel, trial court has illegally ignored the true version of the prosecutrix (PW-5) as given by her in her statement under Section 164 of Cr. P.C. which renders the impugned judgment unsustainable. As regards the age of the prosecutrix (PW-5), being between 15 to 16 years, as per the bone age report, Ex. PW-9/A, it is asserted on behalf of the Appellant that the benefit of margin of two years on either side has to be given in view of the various decision of this Court as well as of the Apex Court and trial court has erred in not doing so. Finally, it is asserted on behalf of the appellant/accused that apart from the aforesaid infirmities, there is a inordinate delay in lodging of the FIR, which makes the plea of consent taken by the appellant/accused probable and therefore, the impugned judgment deserves to be set aside.

7. First of all, the age aspect has to be dealt with.

Prosecutrix (PW-5) in the first instance, at the time of her medical examination gives her age as fifteen years, which is reflected in MLC (Ex.PW-11/A). She is an illiterate girl. Her father (PW-6), who is also illiterate, in his report to the police, gave the age of the prosecutrix (PW-5) as twelve years. However, statement of the prosecutrix (PW-5) - Ex. PW-7/B, recorded under Section 164 of Cr. P.C., indicates that the age of the prosecutrix (PW-5) is sixteen years. The explanation given by the prosecutrix (PW-5) in this regard, in her evidence, is that appellant/accused upon being apprehended with her by the police, had told her that in case she does not depose in his favour before the Magistrate, she would be killed and therefore, she had exonerated the appellant/accused and had incorrectly given her age as sixteen years in her statement under Section 164 of Cr. P.C.

8. Trial court has relied upon the categoric evidence of Dr. Preeti (PW-9), to hold that the prosecutrix (PW-5) was not aged more than sixteen years. Regarding giving the benefit of margin of two years on either side, while assessing the bone age, the best person to give an expert opinion was Dr. Preeti (PW-9). Unfortunately, she has not been cross-examined regarding the giving of benefit of

two years on either side. For this, the appellant/accused has to suffer. The benefit of error of two years while assessing the bone age is not to be blindly given and expert witness on this aspect has to be questioned about it. In fact, there is unchallenged relevant evidence of Dr. Preeti (PW-9) which needs to be highlighted as under:-

“When I had given the range, it cannot be more than sixteen years.”

9. In such a situation, trial court had no other option except to hold that the prosecutrix (PW-5) was aged below sixteen years on the day of this incident. I have no reason to take a different view than the one taken by the trial court on this crucial aspect.

10. Now, the testimony of the prosecutrix (PW-5) has to be reappraised in the light of the apt observations made by the Apex Court in *Dildar Singh vs. 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.”

11. The delay in lodging the FIR in this case is hardly of one week. The reason for this delay is disclosed in the FIR itself and is not difficult to comprehend in cases like the present one. The reason is that the parents of the prosecutrix (PW-5) had made frantic search for the prosecutrix (PW-5) and when they could find her, then ultimately, they had reported this matter to the police. In any case, the delay is hardly of any consequence as the clear cut stand of the appellant/accused is of prosecutrix (PW-5) being a consenting party to the sexual intercourse.

12. A scrutiny of the testimony of the prosecutrix (PW-5), clearly repels the plea of consent raised by the appellant/accused. Prosecutrix (PW-5) has maintained her stand of her accompanying the appellant/accused under threat of being eliminated and she is clearly asserted that her statement under Section 164 of Cr. P.C. was also made after she was threatened by the appellant/accused. In the light of this assertion, there was a need of a searching cross-examination of the prosecutrix (PW-5) as

to why she had not disclosed to the Magistrate at the time of recording of her statement under Section 164 of Cr. P.C. that she was under threat of the accused. This has not been done.

13. Even the contents of the statement of the prosecutrix (PW-5) under Section 164 of Cr. P.C. has not been put to her in cross-examination by the defence. Had there been any truth, in the statement of the prosecutrix (PW-5) under Section 164 of Cr. P.C., the same would have found reflection in the alleged history given by the prosecutrix (PW-5) at the time of her medical examination. As per the deposition of Dr. Pradeep (PW-11), the alleged history given by the prosecutrix (PW-5) at the time of her medical examination was of rape. Even on this aspect of alleged history, prosecutrix (PW-5) has not been cross-examined by the defence. Furthermore, there is not even a suggestion to the prosecutrix (PW-5) that her evidence before the Court, is tutored one and at whose instance. Appellant/accused claims to have married the prosecutrix (PW-5) but he fails to lead any evidence to support this plea. There is no cross-examination of the prosecutrix (PW-5) on the marriage aspect.

14. The tenor of the deposition of the prosecutrix (PW-5)

does not even remotely suggest that the prosecutrix (PW-5) was a consenting party. In the totality of the circumstances of this case, there is no plausible reason to doubt the version of the prosecutrix (PW-5), which is infact found to be consistent and reliable.

15. As a sequel, this appeal is found to be without any merit. Impugned judgment and sentence does not suffer from any illegality or infirmity. There are no adequate or special reasons for awarding sentence less than the minimum prescribed. This appeal is without any substance and is hereby dismissed. Bail bonds of the Appellant are forfeited. Trial court is directed to take the Appellant into custody to serve out the sentence as awarded by it and to submit compliance report at the earliest.

16. This appeal as well as pending application, if any, are accordingly disposed of.

Sunil Gaur, J.

February 08, 2010
pkb