

*** HIGH COURT OF DELHI : NEW DELHI**

Judgment reserved on: February 11, 2010
Judgment pronounced on: February 16, 2010

+ Crl. A. No. 92/2004

% Sohan @ Sonu s/o Late Amar Singh ... Appellants
Through: Mr. Ramesh Rawat and Mr.
Sunder Lal, Advocates

versus

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

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

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| 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. On the plea of consent, impugned conviction and sentence for the offence of rape, etc., is sought to be challenged in this appeal, by asserting that prosecutrix (PW-1) was aged seventeen years on the date of this incident, which took place on 3rd day of October, 2001. On that very day, a report, regarding the missing of the prosecutrix (PW-1), was lodged by her father (PW-5),

leading to registration of FIR No. 543/01 under Section 363 of the Indian Penal Code at Police Station Okhla Industrial Area, New Delhi.

2. Age of the prosecutrix (PW-1) disclosed in the Police Report (Ex. PW-5/A), was fourteen years. On 8th October, 2001, upon recovery of the prosecutrix (PW-1) and appellant/accused, they were got medically examined. Age Certificate of the prosecutrix (PW-1) was obtained. Statements of the prosecutrix (PW-1) and her parents and that of other material witnesses were recorded. Bone age examination of the prosecutrix (PW-1) was got done and its report (Ex. PW-9/A) was obtained. Completion of investigation of this case, resulted into charge sheeting of the appellant/accused for the offences under Section 363/366/376 of Indian Penal Code. Appellant/accused had claimed trial for the aforesaid offences by pleading not guilty to the charges framed under the aforesaid provisions of law.

3. Recording of the prosecution evidence began with the deposition of the prosecutrix (PW-1) and stood completed with the recording of the evidence of the Investigating Officer (PW-14). The deposition of public witness - Pradesh Kumar (PW-2) is regarding the recovery

of the prosecutrix (PW-1). Apart from the evidence of PW-5 – father and PW-6 - mother of the prosecutrix (PW-1), there is medical evidence and the evidence of the official witnesses, regarding the age certificate of the prosecutrix (PW-1) on record.

4. Before the trial court, appellant/accused had not taken a specific plea of consent. Rather, plea of *alibi* was taken by him in his statement under Section 313 of Cr. P.C. and to support it, he had got two witnesses examined. Impugned judgment accepts the prosecution version and reject the defence plea and convicts the appellant/accused for the offence of kidnapping and rape and imposes minimum sentence of rigorous imprisonment for seven years with fine, which is under challenge in this appeal.

5. At the hearing of this appeal, detailed submissions were advanced and the evidence on record was adverted to, and the decisions reported in 2010 (1) JCC 140 (SC); 2007 Cri.LJ (NOC) 665; 2004 (3) JCC 1754 (Delhi); AIR 1998 SC 2694; AIR 1995 SC 2169; and AIR 1982 SC 1297, have been carefully perused and appreciated in the light of the clinching observations made by the Apex Court in *Dildar Singh vs. State of Punjab*, **AIR 2006 SC 3084**, which are

as follows:-

“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.”

6. The principal submission made on behalf of the appellant/accused is regarding the age of the prosecutrix (PW-1). Prosecutrix (PW-1) as well as her parents (PW-5) and (PW-6) in their deposition had maintained that the prosecutrix (PW-1) was aged fourteen years on the day of this incident. Their testimonies have been meticulously scrutinized. No worthwhile infirmity in their depositions has been pointed out by the defence, nor detected to show that the prosecutrix (PW-1) was aged sixteen years or above on the day of this incident.

7. School certificate Ex. PW-4/A shows that the date of

birth of the prosecutrix (PW-1), was 10th February, 1988. School record was produced by the Vice Principal (PW-4) of the school to prove the aforesaid School Certificate and her deposition remained unchallenged by the defence. During investigation of this case, appellant/accused had produced some college document (Mark-A) to indicate that he was aged a little more than sixteen years on the date of this incident. This document was got verified by the police and as per deposition of the College Principal, (PW-3), the document (Mark-A), purported to be issued by the College of PW-3 is forged one. Certificate to this effect issued by PW-3 is Ex. PW-3/A, which is duly proved on record by the College Principal (PW-3) and his deposition remains unchallenged by the defence.

8. It is on the basis of the Bone age report (Ex. PW-9/A), margin of error of two years on either side is claimed by the defence and by adding two years to the upper age given in the certificate, it is asserted on behalf of the appellant/accused that prosecutrix (PW-1) was aged seventeen years and eight months and so her consent becomes meaningful. Bone age report (Ex. PW-9/A) stands proved on record by Dr. Shashi (PW-9) whose deposition remains unchallenged by the defence. To claim the benefit

of margin of two years on either side, this witness (PW-9) ought to have been cross-examined, which has not been done by the defence. Therefore, no advantage to the defence accrues on this account. The Bone age report (Ex. PW-9/A) has to be read as it is and when the range of age given in this report is between 14.5 and 15.8 years, it has to be accepted, being unchallenged evidence.

9. According to Appellant's counsel, secondary evidence, i.e., School Certificate (Ex. PW-4/A) has been relied upon, whereas the primary evidence, i.e., from the initial school of the prosecutrix (PW-1) at Ferozabad, UP, is not forthcoming. Submission of this kind being advanced for the first time in appeal, cannot be appreciated, for the reason that there is no cross-examination of the prosecutrix (PW-1), her parents (PW-5) and (PW-6) and of the Investigating Officer (PW-14) on this aspect. Therefore, this submission deserves to be rejected out rightly and is being accordingly done. Simply because, prosecutrix (PW-1) has uttered in her deposition that in her school record, her year of birth is 1985, it cannot override the School Certificate (Ex. PW-4/A) itself, which gives the year of birth of prosecutrix (PW-1) as 1988 and because it remains unchallenged.

10. This Court is of the considered opinion that the trial court has committed no error or illegality in relying upon the unchallenged evidence, i.e., school certificate (Ex. PW-4/A) of the prosecutrix (PW-1) to hold the prosecutrix (PW-1) was minor on the date of this incident. The resultant effect would be to render the consent of the prosecutrix (PW-1) meaningless. The decisions cited can very well be distinguished on facts and can be no precedents.

11. During the hearing of this appeal, it was pointed out by Counsel for the Appellant that the prosecutrix (PW-1) had not disclosed the name of the appellant/accused at the time of her medical examination. There is no need to wonder about it, because there is no cross-examination of the prosecutrix (PW-1) on this aspect. Prosecutrix (PW-1) in her deposition disowns the version given by her in her police statement by asserting that it was under coercion by the police and supports the prosecution case. Since it has been found that the prosecutrix (PW-1) was minor on the date of this incident, therefore, question of consent need not be gone into.

12. The cumulative effect of the entire evidence on record, persuades this Court to uphold the impugned judgment as it does not suffer from illegality or infirmity. Resultantly, this appeal stands dismissed. Bail bonds of the appellant/accused are forfeited. Trial court to ensure

that he is taken into custody to serve out the sentence, as awarded by it.

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

Sunil Gaur, J.

February 16, 2010
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