

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

+ Crl.Appeal No.152/2010

% Decided on: 17th March, 2010

Sonu Appellant

Through: Mr. V. Madhukar, Amicus Curiae
Versus

State (NCT) of Delhi Respondent

Through: Mr.M.P.Singh, APP for the State

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J. (ORAL)

1. Appellant has been convicted under Sections 363/366/376 of the Indian Penal Code (IPC) by the learned Additional Sessions Judge, Delhi; sentenced to face rigorous imprisonment for a period of three years and fine of Rs.1,000/- under Section 363 IPC; in default of payment of fine to undergo simple imprisonment for a period of fifteen days; sentenced to face rigorous imprisonment for a period of five years and fine of Rs.2,000/- under Section 366 IPC; in default of payment of fine to

undergo simple imprisonment for a period of thirty days and sentenced to face rigorous imprisonment for a period of seven years and fine of Rs.2,000/- under Section 376 IPC; in default of payment of fine to undergo simple imprisonment for a period of thirty days. All the sentences were ordered to run concurrently.

2. As per the prosecution, appellant took away the prosecutrix with him to his village on 7th October, 2006 after enticing her. Prosecutrix was minor at that time. He kept the prosecutrix with him till 13th October, 2006. During this period he had sexual intercourse with the prosecutrix against her wishes. Thus, appellant had committed offences under Sections 363/366/376 IPC.

3. Prosecutrix was examined as PW1. On the basis of evidence adduced before it, learned trial Court returned a finding that the prosecutrix was a consenting party and had accompanied the appellant of her own free will and accord. Prosecutrix stayed in the house of appellant for about a week, of her own free will.

4. However, as per the learned trial Court, prosecutrix was less than 16 years of age and was a minor. In absence of birth certificate or any other cogent evidence, learned trial Court

placed reliance on the report given by the PW9 Dr. Pooja Bhasin which was based on the radiological examination of the prosecutrix. As per this report Ex. PW9/A, age of prosecutrix was between 12 to 14 years. Learned trial Court concluded that as prosecutrix was less than 16 years of age, her consent was of no consequence in view of Clause sixthly of Section 375 IPC. Consequently, appellant was convicted under Section 376 IPC. Learned trial Judge was also of the view that appellant had taken away the prosecutrix with him from the protection of her lawful guardian with the intention to marry her and knowing fully well that she would be subjected to sexual intercourse, therefore, he was liable to be convicted under Sections 363/366 IPC as well.

5. Though, the learned trial Court found the prosecutrix to be a consenting party, he yet convicted the appellant, she being less than sixteen years of age. In this scenario, in my view, age of the prosecutrix assumes great importance. In case prosecutrix is found to be sixteen years and above, appellant may not be convicted for the offence under Section 376 IPC, prosecutrix being a consenting party. Thus, I propose to determine the age of the prosecutrix on the basis of evidence adduced on record.

6. Admittedly, no documentary evidence in the shape of birth

certificate, school certificate was adduced during the trial to prove her age. No other cogent evidence was placed on record by the prosecution to indicate her exact age. Testimony of the father of the prosecutrix on this count is shaky. Only evidence available in this case was her bony age report Ex. PW9/A of Dr. Pooja Bhasin, which was based on a radiological examination of the prosecutrix. PW9 Dr. Pooja Bhasin deposed that on 3rd November, 2006 she examined skiagrams of prosecutrix and after examining the same she opined that her bone age was between 12 to 14 years.

7. It is well settled that the age determined through radiological examination is not exact and may vary by two years on either side. Margin of error in such a radiological examination is two years on either side and according to the settled principles of criminal jurisprudence benefit of this variation must go to the accused; if such benefit is extended to accused, age of the prosecutrix can be taken above than 16 years.

8. In *Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir & Ors.*, reported in AIR 1982 SC 1296, Supreme Court took note of the fact that margin of error in age ascertained by radiological examination is to be taken as two years on either

side.

9. Father of the prosecutrix, PW2 has given evasive replies with regard to date, month and year of birth of prosecutrix. He stated that prosecutrix was born after three years of his marriage, which took place about 20 years ago. At one stage, he stated that prosecutrix was born after the death of the then Prime Minister Late Shri Rajiv Gandhi. Meaning thereby, as per PW2 prosecutrix was born sometime in the year 1991. If that is so, then she would not be fourteen years of age and this fact also shows that the age, as determined by the doctor does not indicate exact age of prosecutrix.

10. In view of uncertain, doubtful and ambiguous evidence, I conclude that prosecutrix was above sixteen years of age as on the date of incident, thus, this case would not fall within the meaning, ambit and scope of clause sixthly of Section 375 IPC which in effect provides that consent of a woman below the age of sixteen years would be inconsequential.

11. Prosecutrix being more than 16 years of age and having accompanied the appellant of her own free will and accord; she being a consenting party, ingredients of the offence under Section 376 IPC are not attracted in this case. Accordingly,

appellant is acquitted of the offence under Section 376 IPC.

12. In State of Karnataka vs. Sureshababu Puk Raj Porral reported in AIR 1994 SC 966 Supreme Court held as under :-

“When the age is in doubt, then the question of taking her away from lawful guardianship does not arise. However, the second requirement that taking or enticing away a minor out of the keeping of the lawful guardian is an essential ingredient of the offence of kidnapping. In the instant case, we are not concerned with enticement. But what we have to find out is whether the part played by the accused amounts to taking out of the keeping with the lawful guardian. From the evidence of P.W.7., it is clear that she was also anxious to go with the accused to see places. In such a case, it is difficult to hold that the accused had taken her away from the keeping of her lawful guardian and something more has to be shown in a case of this nature like inducement.”

13. Prosecutrix having herself accompanied the appellant to his village; staying with him for about one week, it cannot be said that appellant had taken her away from the protection of her lawful guardian within the meaning of Section 361 IPC. Reliance is also placed on S. Varadarajan vs. State of Madras, reported in AIR 1965 SC 942.

14. Ingredients of offence under Section 366 IPC are also not attracted in this case in absence of any evidence to show that appellant had taken prosecutrix with him by using force or

inducement. The statement of prosecutrix shows that she willingly accompanied the appellant to his village and stayed with him there.

15. Accordingly, I am of the view that no offence under Section 366 IPC is made out. Appellant is acquitted of the charges under Sections 363/366 IPC as well.

16. Appeal allowed.

17. Copy of this order be sent to the Superintendent Jail for serving on the appellant and also for compliance.

A.K. PATHAK, J

March 17, 2010

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