

R-8

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

+ CRIMINAL APPEAL NO. 166/2009

Date of decision: 6th September, 2010

AJIT

..... Appellant

Through Mr. A.J. Bhambhani & Ms. Lakshita
Sehti, Advocate.

Versus

THE STATE

..... Respondent

Through Ms. Fizani Husain, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

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

ORDER

1. The appellant has challenged his conviction and sentence under the following provisions of the Indian Penal Code, 1860 (hereinafter referred to as IPC):-
 - a) Section 376- Rigorous Imprisonment of seven years and a fine of Rs. 5,000/- and in default thereof to further undergo Simple Imprisonment of six months, and
 - b) Section 363- Rigorous Imprisonment of two years and fine of Rs.5,000/- and in default to further undergo simple imprisonment of six months
2. Learned counsel for the appellant has submitted that even if the prosecution story is to be accepted, the prosecutrix by consent had

willingly had gone with the appellant. He relies upon the MLC Exhibit PW-4/A, which does not indicate any scratch mark, signs of struggle or injury. He submits that the allegation of sexual intercourse is not proved and established in view of the statement of PW-4, Dr. Sunita Seth, who has stated that the hymen of the prosecutrix had an old tear and the prosecutrix may have had sexual intercourse earlier also. It was lastly contended that keeping in view the age of the appellant at the time of the offence and the fact that the appellant and the prosecutrix were known to each other, the sentence imposed by the learned trial court should be reduced.

3. As per the date of birth certificate placed on record, the prosecutrix on the date of the offence, i.e., 1st April, 2006, was 14 years and 4 months old. PW-13, Brahm Prakash, Sub-Registrar (Birth & Death), MCD, Rohini Zone has stated that the prosecutrix was born on 28th December, 1991. The name of the mother of the prosecutrix is recorded as Phoolwati and the name of the father of the prosecutrix is recorded as Hukam Chand. There is no ground to disbelieve the date of birth mentioned in the certificate. In view of the age of the prosecutrix, the question of her consent is immaterial.

4. PW-2, Hukam Chand, in his statement has stated that his daughter, the prosecutrix, had left the house on 1st April, 2006 at about 5 p.m. for purchasing vegetables and did not return. He tried to search for her but could not find her. He lodged a police report Exhibit PW-2/A. In this police report it is mentioned that he had suspected that the appellant herein, who used to live in the neighbourhood had taken the prosecutrix. Subsequently, on 2nd April, 2006, he along with his wife Phoolwati produced the prosecutrix at the police station vide memo Exhibit PW-2/B. Phoolwati had appeared as witness PW-5 and has made a similar statement. She has also stated that on the next date, i.e., 2nd April, 2006 the prosecutrix returned home in the morning and had

stated that the appellant had allured her to second floor in a vacant house in Jahangir puri and had committed rape on her. She along with her husband took the prosecutrix to the police post and from there she was taken to a hospital and was medically examined.

5. PW-9, ASI Madan Lal, has stated that on 1st April, 2006 he was posted at police post Shahbad Dairy, Police Station Bawana and that on receipt of DD No. 30, he along with Constable Gajender had gone to the house of Hukam Chand but could not meet him as he had gone out in search of his daughter. When Hukam Chand returned, his statement Exhibit PW-2/A was recorded and an endorsement was made and a rukka Exhibit PW-9/A was prepared. The same was handed over to Constable Gajender for registration of an FIR. Thereafter, at about 6 a.m. on 2nd April, 2006, Hukam Chand and Phoolwati along with the prosecutrix came to the police station and recovery memo Exhibit PW-2/D was prepared. Statement of the prosecutrix was recorded under Section 161 Cr. P.C. and she was taken to M.B. Hospital, Pooth Khurd, Delhi for medical examination. The appellant was arrested on 2nd April, 2006 at Akhara, Shahbad Dairy. He has also stated that the statement of the prosecutrix was recorded under Section 164 Cr.P.C. on 5th April, 2006.

6. The prosecutrix herself appeared as PW-1 and identified the appellant. She has stated that on 1st April, 2006 at about 5 p.m. she was going to the market when she met Rahul and went inside his house. The appellant called her outside and asked her to go to the house of her mother. As she prepared to go home, the appellant slapped her and took her in a cycle rickshaw to Sector 16 and then in a three wheeler scooter to Jahangir puri. He took her to a flat on the first floor and had sexual intercourse 4-5 times with her. He left her in C-Block, Shahbad Dairy at about 5 a.m. on the next day. She returned home and narrated the incident to her parents. She was taken to police station by her parents.

Her statement under Section 164 Cr.P.C, Exhibit PW-1/A is identical but more elaborate and detailed.

7. From the aforesaid, it is clear that the prosecutrix was missing from about 5 p.m. on 1st April, 2006 and had returned back to her house only in early morning of 2nd April, 2006. The father of the prosecutrix and the police had tried to search for the prosecutrix on 1st April, 2006 but did not succeed. As far as sexual intercourse/rape is concerned, the statement of the prosecutrix PW-1 is absolutely lucid, clear and categorical. She has stated that the appellant had sexual intercourse with her 4-5 times on the said night. Similar statement was made by her under Section 164 Cr.P.C. before the Metropolitan Magistrate, which was recorded on 5th April, 2006. It may be noted that 2nd April, 2006 was Sunday.

8. I have examined the cross-examination of the prosecutrix and the medical evidence in form of MLC Exhibit PW-4/A as well as statement of PW-4, Dr. Sunita Seth. PW-4, Dr. Sunita Seth, has stated that hymen of the prosecutrix had an old tear. According to the counsel for the appellant this shows and establishes that rape was not committed or that the appellant did not have sexual intercourse with the prosecutrix on 1st/2nd April, 2006. I do not agree with this contention of the counsel for the appellant. The age of the prosecutrix was only 14 years and 4 months at the time of the said incident. The statement of the prosecutrix with regard to the rape is unchallenged in the cross-examination. The statement is trustworthy. It is well settled that statement of the prosecutrix, if credible, can be relied upon and is sufficient for conviction. Corroborative evidence is not necessary. The fact that the prosecutrix went missing and came back after one night is established beyond doubt. With regard to the actual act of rape, the statement of the prosecutrix proves the prosecution case. There does not appear to be any motive or reason for a young girl to falsely implicate the appellant. The

only allegation made in the cross-examination is that the prosecutrix knew some boys in the neighbourhood and used to see the accused. It is pointed out that the prosecutrix in the cross-examination had admitted that she had been seeing the accused since 4-5 years before the incident in question and similar statements have also been made by PW-2 Hukam Chand and PW-5 Phoolwati, father and mother of the prosecutrix. Merely because the prosecutrix used to be friendly with the accused and some other boys does not mean and did not give liberty to the accused to commit rape or have sexual intercourse with a girl aged 14 years and 4 months. It appears that the appellant took advantage of the fact that he knew the prosecutrix. A suggestion given in the cross-examination of the prosecutrix was that there was a quarrel on account of breakdown of talks of marriage between the prosecutrix and the accused. This has been denied by PW-1, the prosecutrix and PW-2, Hukam Chand in their cross-examination. The prosecutrix was very young and barely in her teens. She was studying. There is no material or evidence placed on record to show and establish that there were talks of marriage between the parents of the appellant and the prosecutrix. Mere suggestion in the cross-examination without other material/evidence on this point does not help the appellant.

9. It is submitted that no semen was detected on the garments of the prosecutrix. Learned trial court has referred to the statement of the prosecutrix under Section 164 Cr.P.C. wherein she had stated that the appellant had used condoms. It is also noted that the appellant was arrested on 2nd April, 2006 at 9.15 p.m as per the arrest memo. The sexual intercourse had taken place in the night on 1st April, 2006 after 5 p.m. and before 5 a.m. on 2nd April, 2006. In view of the clear and categorical statement of the prosecutrix, which is trustworthy and reliable, non-detection of semen cannot be regarded fatal.

10. Learned counsel for the appellant has relied upon *Radhu versus*

State of Madhya Pradesh, JT 2007 (11) SC 91. My attention was drawn to paragraph 5 of the said judgment. It is pointed out that in the said case the prosecutrix was between 13-14 years of age as per the X-ray report. The factual matrix of the said case is entirely different as is apparent from paragraph 13 of the judgment. In the said paragraph, the Supreme Court has noted various circumstances, which made it highly improbable that rape was committed on the prosecutrix in the said case. In the present case, as per the date of birth certificate placed on record, the age of the prosecutrix was slightly more than 14 years as on 1st April, 2006. Therefore, the question of consent is irrelevant. Further, absence of injuries on the prosecutrix cannot be a ground to reverse the finding and disbelieve the prosecution case that the appellant had committed rape. In **Radhu** (supra) also the Court has held that it is now well settled that absence of injuries on the private parts of the victim will neither by itself falsify the case of rape, nor be construed as an evidence of consent. In this regard, it may be appropriate to reproduce the following statement in *Modi's Medical Jurisprudence and Toxicology* (22nd Edition at page 495):-

“....It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.”

11. On the question of sentence, it is submitted that the appellant was about 20 years of age as on 30th April, 2008, when the order on the question of sentence was passed. It is stated that the appellant has clean past antecedents. However, I am not inclined to reduce the sentence of 7 years rigorous imprisonment awarded to the appellant under Section 376 IPC, which is the minimum sentence. The prosecutrix was only about 14 years and 4 months of age at the time of the offence. She was young, vulnerable and the incident in question must have left her completely shattered. It also appears that the appellant took advantage of the fact that he knew her. Accordingly, the order on sentence is also maintained and does not require any interference.

12. Keeping in view the aforesaid, I do not find any merit in the present appeal and the contentions raised by the learned counsel for the appellant. The appeal is dismissed.

SANJIV KHANNA, J.

SEPTEMBER 06, 2010
VKR