

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

% *Date of Decision : 13th April, 2010*

+ **CRL.APPEAL NO.234/2010**

DALIP Appellant
Through: Mr.V.Madhukar, Advocate.

versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

Yes

PRADEEP NANDRAJOG, J. (Oral)

Crl.M.A. No.4651-52/2010

1. Mr.V.Madhukar, learned counsel appointed by the Delhi High Court Legal Services Committee to represent the appellant states that at a video conference held with the appellant on 26.3.2010 he has been instructed by the appellant not to press both the applications. Learned counsel submits that he has been instructed not to press the plea of the appellant being a juvenile when the crime was committed.

2. We note that as per the impugned decision, issue of

the appellant being a juvenile was never raised and the appellant disclosed his age to be 19 years when he was medically examined after he was apprehended.

3. We dismiss both the applications as not pressed.

Crl.Appeal No.234/2010

1. The appeal is listed for arguments on 19.4.2010, but learned counsel for the appellant and the State pray that since they are prepared to argue the appeal the date may be pre-poned and the appeal may be heard today itself.

2. Accordingly, we pre-pone the date of hearing of the appeal from 19.4.2010 to today.

3. Returning a finding that the prosecutrix Kumari 'S' was a minor as also returning a finding that the prosecution has successfully established that Kumari 'S' was recovered from the custody of the appellant finding returned is that the prosecution has successfully established that the appellant committed the offence punishable under Section 363 IPC. Holding that the MLC of the prosecutrix shows that she was subjected to sex, finding returned is that the prosecution has succeeded in establishing that the appellant has committed the offence punishable under Section 366 as also Section 376(2)(f) IPC.

4. For the offence punishable under Section 363 IPC,

the appellant has been sentenced to undergo rigorous imprisonment for 7 years. For the offence punishable under Section 366, the appellant has been sentenced to undergo rigorous imprisonment for 10 years. For the offence punishable under Section 376(2)(f) IPC the appellant has been sentenced to undergo imprisonment for life.

5. The prosecutrix Kumari 'S' who appeared as PW-8 admitted that she knew the appellant and that she was not admitted in any school by her parents and that her mother used to scold her. Though she did not specifically admit that she left her parental house with consent, but we note that she has not explained as to how she was led or misled by the appellant to run away from the house of her parents. As per her, the appellant took her to Agra where she resided in a building in which not only the parents of the appellant resided but there were many other families residing in the same building.

6. It is apparent that the building in which the prosecutrix resided with the appellant was a multi tenanted building.

7. In her cross-examination, the prosecutrix admitted that in the residential building where she resided in Agra there were 4 to 5 rooms on the ground floor and the first floor and

that 4 to 5 families resided in the house. She admitted that it was correct that she used to meet those families and used to converse with them. She also admitted that it was correct that she used to leave for purchasing etc., the house where she and the appellant reside in Agra.

8. Anu Chaudhary PW-11, the mother of the prosecutrix also admitted that the prosecutrix was not being sent to school. She admitted that the prosecutrix was not born to her from her present husband i.e. Krishna Chaudhary.

9. It is apparent that the prosecutrix had a foster father who never much cared for the prosecutrix.

10. From the fact that the prosecutrix was allowed to move freely in Agra and as admitted by the prosecutrix she used to go to the market and even talk to the neighbours, is a fact where from it can be inferred that the prosecutrix went happy with the appellant. The reason appears to her being ill-treated in her house by her natural mother and foster father who did not even bothered to send the unfortunate girl to a school.

11. It is apparent that the prosecutrix voluntarily left the custody of her parents as she was being ill treated. She went along with the appellant. But since the prosecutrix was a minor, her consent being irrelevant, we concur with the view

taken by the learned Trial Judge that the appellant is guilty of the offence punishable under Section 363 IPC.

12. Pertaining to the offence punishable under Section 366 IPC and Section 376(2)(g) IPC we note the testimony of Dr.Deepa Seth PW-1 and the MLC Ex.PW-1/A of the prosecutrix.

13. The prosecutrix and the appellant went missing on 23.7.2004. The prosecutrix was recovered on 14.2.2005. It is apparent that the appellant and the prosecutrix stayed together for about 6½ months.

14. In the words of Dr.Deepa Seth: *'On local examination, I found no fresh injuries. No redness. Hymen was not intact. No inflammation. The hymen admitted tip of little finger'.*

15. It is apparent that the prosecutrix was not subjected to frequent and repeated sexual intercourse, for had it been otherwise the vagina would have easily admitted the forefinger. The fact that only tip of the little finger could be admitted in the vagina shows that the prosecutrix was not subjected to repeated sexual intercourse by the appellant.

16. It appears to be a case where appellant could hardly manage any meaningful sex with the prosecutrix; probably due to her young age she was not comfortable with free sex with a male aged 19 years. It highlights the fact that

the appellant did not treat the prosecutrix with bestiality or cruelty. He did a wrong act, but treated the prosecutrix with compassion and as a human being.

17. Had the appellant desired a free and full sex, nothing prevented him from overpowering the prosecutrix and subjecting her to a full blooded sexual assault and if this was so, the vagina of the prosecutrix would have admitted more than the tip of the little finger being inserted therein.

18. Though one can safely say that the medical evidence rules out full penetration, but the law being that even partial penetration would constitute the offence of rape, the medical evidence suggesting partial penetration, we concur with the view taken by the learned Trial Judge that the offence of having raped the prosecutrix stands established against the appellant and so does the offence punishable under Section 366 IPC.

19. But the question arises as to what should be that term of sentence?

20. By amending the law of rape and where the victim is a minor by amending the sentence, it can safely be said that the maximum sentence of 10 years rigorous imprisonment laid down by the legislature has factored the fact of the victim being a minor. To impose the higher sentence of

imprisonment for life, logic guides us, that the Court must find aggravating factors.

21. We note that in a case of rape of an adult the minimum sentence prescribed is 7 years. In case of child rape it is 10 years. We note that in both cases i.e. rape of an adult and the rape of a minor, for special reasons, sentence less than a minimum prescribed can also be imposed.

22. In the instant case, the mitigating circumstances which we find against the appellant is his young age being 19 years when the offence was committed. Though neither mitigating nor aggravating, we take note of the circumstance that the prosecutrix was being maltreated by her parents and for said reason voluntarily walked away with the appellant who had treated her with sympathy, albeit wrongful in law.

23. Taking into account the totality of the circumstances, in our opinion, the sentence required to be imposed upon the appellant for the offence punishable under Section 376(2)(f) IPC is the minimum sentence to undergo rigorous imprisonment for 10 years.

24. The appropriate sentence for the offence punishable under Section 366 IPC would be to undergo rigorous imprisonment for 7 years.

25. In a nutshell, amending the conviction of the

appellant, we alter the sentence, in that, for the offence punishable under Section 363 IPC as also the offence punishable under Section 366 IPC we direct that for each offence the appellant shall undergo imprisonment for a period of 7 years for the offence punishable under Section 376(2)(f) IPC the appellant shall undergo rigorous imprisonment for 10 years. All sentences shall run concurrently. Needless to state the appellant shall be entitled of the benefit of Section 428 Cr.P.C. and remission policy of the Executive as notified from time to time.

26. The appeal stands disposed of modifying the sentence as aforesaid.

27. Since the appellant is still in jail we direct that a copy of this decision be sent to the Superintendent, Central Jail, Tihar for being made available to the appellant.

PRADEEP NANDRAJOG, J.

APRIL 13, 2010
dk

SURESH KAIT, J.