

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

+ CrI.A.No.229/2009

% Reserved on: 16th March, 2010
Date of Decision: 19th March, 2010

GUDDU Appellant
! Through: Mr.A.J.Bhambhani, Adv.

versus

\$ STATE (N.C.T. OF DELHI) Respondent
^ Through: Mr.Jaideep Malik, APP

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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

: **V.K. JAIN, J.**

1. This is an appeal against the judgment dated 25.10.2008 and order of sentence dated 31.10.2008, whereby the appellant was convicted under Sections 363 and 376 of IPC and was sentenced to undergo RI for seven years and to pay fine of Rs.2,000/- or to undergo SI for two months in default.

2. In the night intervening 7/8 November, 2005, Anand Kumar Jha, father of the prosecutrix, came to PS Subzi Mandi and lodged a report stating therein that his daughter aged about 14 years, who was studying in VII Standard, had on that day gone to hospital, along with her younger brother Govind Jha, at about 9.00 a.m. She was standing in the queue, waiting for her turn. The guard did not allow her brother to go inside and, therefore, he was sitting outside. She, however, did not come out and could not be found. At about 6.00 p.m., she called his neighbour on his telephone and asked as to whether her brother had reached home. The neighbour told her that her brother had reached home. Thereafter she disconnected the call.

3. The case of the prosecution is that in the night of 11th November, 2005, the appellant Guddu rang up in the neighbourhood and informed that he had taken the prosecutrix with him. This is also the case of the prosecution that on 12th November, 2005, the prosecutrix was recovered in the company of the appellant from House NO.119 in Sector 22 of Noida. In her statement to the Magistrate, the prosecutrix stated that when she came out of the hospital,

she could not find her brother. The appellant Guddu, who used to reside in her neighbourhood met her at the gate of the hospital. She sought his help in tracing her brother. The appellant brought her to Nangia Park, from where he took her in a bus on the pretext that her brother could be available in Azad Pur. On the way, he made her get down at a deserted place from where he hired a rickshaw and brought her to ISBT. From ISBT, she was brought to Noida to the house of the sister of the appellant Guddu. She also alleged that in the night of 8th November, 2005, the appellant committed sexual intercourse with her against her consent. She further stated that on 12th November, 2005, she spoke to her mother on telephone and disclosed the place where the appellant had taken her. The police then recovered her from that place.

4. The prosecution examined 16 witnesses in support of its case. No witness was examined in defence.

5. The prosecutrix came in the witness box as PW-2 and stated that on the day of this incident she had gone to Hindu Rao Hospital along with her brother. She went inside the room for medical attention, whereas her brother stayed outside. When she came out, she did not find her brother and

looked for him. The appellant Guddu, who was her neighbour at that time, met her and assured to help her in finding her brother. The appellant then took her to a park and kept on assuring her that her brother would be found. He, however, did not help her in searching her brother. In the evening, the appellant suggested that probably her brother may have returned home and, therefore, they should go home. She thereupon boarded the bus suggested by the appellant. At a deserted place, they got down from the bus and the appellant hired a rickshaw which took them to ISBT. From there, the appellant took her to Noida, by bus, and kept her in the house her sister. The appellant applied Vermillion on her head and then committed sexual intercourse with her. She further stated that one day she spoke affectionately to the appellant assuring him that she wished to stay with him and requested him to allow her to speak to her parents. The appellant then permitted her to speak to her parents on telephone. Her sister spoke to the appellant and obtained address of the place where they were staying. Her sister Kalpana, along with her husband, reached there on 12th November, 2005 and rescued her with

the help of the police.

6. PW-4, Smt.Shobna Suresh is the person in whose house the appellant had kept the prosecutrix. She has stated that the appellant used to treat her as his sister and that in the morning of 8th November, 2005 at about 6.00 a.m. he came to her house along with the prosecutrix. Both of them told her that they were coming from the village. The appellant told her that they wanted to stay there for 2/3 days he will arrange another room in Noida. She further stated that thereafter she left her house at about 8.30 a.m. for going to her office. Her husband also went for his work. The appellant had also left for his work at 7.30 a.m. Both her sons had gone to the school. She returned to her house at about 7.00 p.m. whereas the appellant returned at 9.00 p.m. On enquiry, the prosecutrix told her that their luggage was lying in the house of the appellant in Azad Pur. She further stated that on 10th November, 2005, the prosecutrix told her that she had gone to hospital with her brother and from there she had accompanied the appellant. Thereupon, she got suspicious and enquired from the prosecutrix as to whether her parents were aware about her or not. The prosecutrix

told her that her mother was aware of her being with the appellant. The prosecutrix also told her that her parents would not acknowledge her marriage. According to her, the appellant and prosecutrix left her house on Sunday. In cross-examination, she stated that her house comprised two rooms besides toilet, bathroom and kitchen.

7. PW-13, Santosh Jha has stated that in the night of 11th November, 2005 he received a telephone call from the appellant Guddu on his mobile phone. He wanted to speak to Kalpana, sister of the prosecutrix, who earlier used to reside in a room opposite his room in the same house. He called Kalpana and handed over his mobile phone to her. After about 5-7 minutes, he received a call from the prosecutrix on his mobile. She also spoke to Kalpana on his mobile.

8. PW-14 Kalpana is the sister of the prosecutrix. She has stated that appellant Guddu made a telephone call on the mobile of her neighbour. When she spoke to the appellant, he told her that the prosecutrix was with her at Noida and he would be marrying her. Thereafter, the prosecutrix also spoke to her and informed her that she had been kidnapped by the appellant and had been kept at a house near bus

stand in Noida. They informed the police and reached the house in Noida where the appellant was arrested and her sister was recovered.

9. PW-15 SI Vijay Kumar is the IO of this case which he has stated that on 12th November, 2005, he along with Constable Pradeep and Kalpana, the sister of the prosecutrix, went to house No.H-119, Sector 22, Noida, where Ms.Shobhna Suresh was residing with her family. There, they met the prosecutrix and the appellant Guddu who were present in the house.

10. Only part of the deposition of PW-9 Babloo Kumar is available on the judicial file. It appears from the record that he was examined in pre-lunch as well as post lunch session on 13th February, 2007. His deposition recorded before lunch on that day is not available on the file. However, his deposition available on the file shows that, according to him, he had gone to the house of Smt.Shobhna along with IO and the appellant as well as the prosecutrix were found there. He stated that the prosecutrix and the appellant had run to that house from the bus stop and were found under a cart.

11. PW-1, Ram Kishan is an official of Government Girls

Secondary School, Model Town. He has stated that as per school record, the date of birth of the prosecutrix was 15th January, 1993. The copy of admission and withdrawal Register of the school produced before this court is Ex.PW-1/A, whereas copies of the application Form and School Leaving Certificate are PW-1/B & PW-1/C. He has also identified the signature of Vice-Principal of the School on the certificate Ex.PW-1/D.

12. PW-7, Dr.Priyanka examined the prosecutrix in the hospital on 13th February, 2005 and found that her hymen was torn, though no mark of external injury was found by her. The underwear of the prosecutrix Ex.P-1 was handed over by her to the police. PW-8 Dr.S.Natrajan examined the appellant Guddu in the hospital on 13th November, 2005 and handed over his underwear Ex.P-2 to the police. PW-12, Ms.Anita Chhari, Sr.Scientific Assistant (Biology) Forensic Scientific Laboratory, examined the articles sent to the laboratory by the police. She proved her report Ex.PW-12/A & Ex.PW-12/B and identified the underwear of the appellant Ex.P-2 and underwear of the prosecutrix Ex.P-1, which she had analysed in the laboratory.

13. In his statement under Section 313 Cr.P.C., the appellant admitted that he was the neighbour of the prosecutrix. He claimed that on 7th November, 2005, the prosecutrix had called her to the hospital and that he had taken her to Noida and kept her in the house of PW-4 Shobhna Suresh. He also admitted that the police had arrested him and recovered the prosecutrix from Noida. He, however, denied having committed sexual intercourse with the prosecutrix.

14. The first question which comes up for consideration in this case is as to whether the prosecutrix was raped by the appellant or not. In her deposition in the court, the prosecutrix has specifically stated that the appellant had committed sexual intercourse with her in the house of PW-14 in Noida. When the prosecutrix was examined in hospital after she was recovered in the company of the appellant, her hymen was found torn. I see no reason to disbelieve the testimony of the prosecutrix as regards the sexual intercourse with her. It is extremely unlikely that a young unmarried girl will falsely allege sexual intercourse with her, since she knows that by making such an accusation, she would be

sacrificing what is most dear to her. In a tradition bound non-permissive society like ours, a young girl would be reluctant even to admit an incident of sexual intercourse with her, conscious as she would be of being criticized not only by the society but also by her own family members, relatives and neighbors who may somehow or the other hold her at least partly responsible for the incident which happened with her. Even the parents of an unmarried girl would not report such an incident to the police unless they are absolutely sure of its truthfulness. The parents of an unmarried girl would always be aware of the risk that comes to be associated with the marriage of an unmarried girl who is subjected to sexual intercourse. They know that if such an incident becomes public it would be difficult for them to find a suitable match for their daughter from a respectable family. Their natural inclination would be to avoid giving publicity to such an incident lest their family name and family honour is brought under disrepute on account of an adverse publicity. Therefore, I find no good ground to reject the testimony of the prosecutrix to the effect that she was subjected to sexual intercourse by the appellant.

15. Even if I must look for the corroboration of the testimony of the prosecutrix as regards sexual intercourse with her, I find that corroboration is available in the form of the medical examination of the prosecutrix, chemical analysis of underwear of the appellant and the statement made by the prosecutrix under Section 164 of Cr.P.C. As noted earlier, the hymen of the prosecutrix was found torn. It was contended by the learned counsel for the appellant that hymen could be found torn for various reasons and does not necessarily establish sexual intercourse with her. No doubt there could be reasons other than sexual intercourse for the hymen being found torn, but, when the prosecutrix claims that she was subjected to sexual intercourse and her hymen is found torn, the court in the absence of compelling reasons taking a contrary view, must accept the deposition of the prosecutrix in this regard and must believe that she was subjected to sexual intercourse, as claimed by her. A perusal of the report of FSL shows that human semen was found on the underwear of the appellant when it was analysed in the laboratory. The appellant has not given any explanation for semen being found on his underwear. This is the same

underwear which the appellant was wearing at the time he was arrested by the appellant. Admittedly, the prosecutrix remained in the company of the appellant for a number of days. In the absence of any explanation from the appellant, the court must necessarily infer that the semen on the underwear of the appellant came on account of having committed sexual intercourse with the prosecutrix. Therefore, presence of semen on the underwear of the appellant was one more corroboration of the deposition of the prosecutrix as regards sexual intercourse with her.

16. In her statement to the Magistrate under Section 164 Cr.P.C. soon after her recovery by the police, the prosecutrix claimed sexual intercourse with her. This is yet another corroboration of her deposition in the court. I, therefore, has no hesitation in holding that the prosecutrix was subjected to sexual intercourse by the appellant.

17. The testimony of PW-1, coupled with School Leaving Certificate of the prosecutrix, Ex.PW-1/C and the record of the School Ex.PW-1/A & Ex.PW-1/B, shows that the date of birth of the prosecutrix was 15th January, 1993. In his statement under Section 313 Cr.P.C. the appellant did not

claim that the prosecutrix was not born on 15th January, 1993. Therefore, there is absolutely no reason for not relying upon the record of the School for the purpose of ascertaining the age of the prosecutrix.

18. In *Madan Gopal Kakkad vs. Naval Dubey & Anr.* (1992) 3 SCC 204 the Supreme Court, inter alia, observed as under:

"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."

19. In *Vishnu vs. State of Maharashtra* AIR 2006 SC 508, the Birth Certificate of Municipal Corporation and register of the hospital where the prosecutrix was born showed that she was less than 16 years of age. On the other hand as per the Ossification Test her age was 18-19 years with error of

margin of six months on either side. It was contended before the Supreme Court that determination of the age of the prosecutrix having been scientifically proved by conducting Ossification Test, should be accepted. Rejecting the contention, the Supreme Court, inter alia, held as under:-

24. In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother - PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.64, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness effects tendered by PW-1 and PW-13, supported by unimpeachable documents.

20. The judgment in the case of *Vishnu (supra)* was followed by the Hon'ble Supreme Court in *Arjun Singh vs. State of H.P.* AIR 2009 SC 1568.

21. I, therefore, hold that the prosecutrix was born on 1^{5th} January, 1993. Since the prosecutrix was less than 16 years of age at the time she was subjected to sexual intercourse the appellant is clearly guilty of rape even if it is presumed that the prosecutrix had consented to sexual intercourse with her.

22. The age of the prosecutrix was less than 13 years at the time appellant took her with him. Considering the tender age of the prosecutrix, she was not really capable of understanding the true import of what she was doing and, therefore, despite her having voluntarily accompanied the appellant, on the facts and circumstances, it cannot be said that appellant will not be guilty of offence punishable under Section 363 of IP. Had the prosecutrix been of a mature age, though less than 18 years, it could have been contended that she having abandoned the guardianship of her parents and having joined accused without any coercion or influence from him, offence under Section 363 IPC was not made out. But if a person takes a girl aged less than 13 years with him, to the house of a person related or known to him, and keeps her for days together, it is difficult to say that he is not guilty of kidnapping as defined in Section 363 IPC. Such a person

would clearly be guilty of taking the minor away from the lawful custody of her parent.

23. For the reasons given the preceding paragraphs, I hold that the appellant has rightly been convicted under Sections 376 and 363 IPC.

24. Though the minimum prescribed punishment is imprisonment for seven years coupled with fine, the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. At the time of commission of the offence the appellant was aged about 20 years and, therefore, was very young. The facts and circumstance of the case leave no reasonable doubt that the prosecutrix had willingly accompanied the appellant first to the park, then to ISBT and then to Noida. Admittedly, the appellant was not working in the hospital where he met the prosecutrix. Therefore, he could not have come to know about the prosecutrix going to the hospital on that day unless the prosecutrix herself chose to inform her. Therefore, the plea of the appellant that he was called to the hospital by the prosecutrix herself appears to be quite plausible and acceptable. According to the prosecutrix,

appellant had taken her first to Nangia Park where they were sitting till evening. Had the prosecutrix not been a consenting party to accompany the appellant, she would not have gone to the Nangia Park with him if she was looking for her brother. She definitely could not have expected her brother to be found in NangiaPark. After remaining in the company of the appellant in Nangia Park for many hours, the prosecutrix accompanied him in a bus and then in a rickshaw. Admittedly, she did not raise any alarm and willingly accompanied the appellant in the bus as well as in the rickshaw. There could have been no reason for her to accompany the appellant late in the evening, unless she was a consenting party to accompany him. According to the prosecutrix, from ISBT they gone to Noida in a bus. The prosecutrix does not claim that she was any kind of threat or coercion from the appellant. Neither in the bus while going to Noida nor after getting down from the bus in Noida the prosecutrix resisted accompanying the appellant. Everywhere she was a ready and willing companion of the appellant. From the bus stand in Noida, she went up to the house of PW-4 without any resistance or protest. There

could have been no reason for the prosecutrix to willingly accompany the appellant up to the place of PW-4 in Noida unless she was a willing companion. Even after reaching the house of PW-4, Shobhna Suresh, the prosecutrix did not register any protest. She did not complain to PW-4 that she had been brought to her house against her consent. As stated by PW-4, next day in the morning she as well as her husband and the appellant had gone for their respective work and their children had gone to school. Therefore, the prosecutrix was all alone in her house. Had she not been a consenting party, she had ample opportunity to leave the house of PW-4 or at least to inform her parents or relatives that she was being kept in a Noida in a house against her wish.

25. The deposition of PW-14 Kalpana Jha shows that it was the appellant who called up PW-14 Kalpana Jha and informed her that the prosecutrix was with him and had also given correct address of the place where they were staying. Had the appellant taken the prosecutrix without her consent, he would not have called up the sister of the prosecutrix and in any case would not have given his correct address to her.

The appellant knew it very well that once he gave his correct address to the sister of the prosecutrix, she was bound to inform the police, he was bound to be arrested and the prosecutrix was bound to be recovered by the police. Therefore, the conduct of the appellant in speaking to the sister of the prosecutrix and then making the prosecutrix also speak to her is a strong indicator that the prosecutrix had willingly accompanied her and that is why he had no hesitation in disclosing his correct address to the sister of the prosecutrix. In any case, had the prosecutrix not being a willing and consenting party to accompany him to Noida, the appellant would after speaking to the sister of the prosecutrix definitely have left the house where they were living in Noida and the appellant would not have been found there. This is one more circumstance which shows that the prosecutrix had willingly accompanied the appellant presumably on account of friendship which she had developed with the appellant while he was her neighbour.

26. According to PW-9, Babloo Kumar, the prosecutrix was found, when they ran from bus stand, under a cart, along with the appellant. This circumstance leaves no

reasonable doubt that the prosecutrix had willingly gone with the appellant to Noida and that is why on seeing the parents and family members, she tried to evade them by hiding under cart. All these facts and circumstances leave no reasonable doubt that the prosecutrix though of a very tender age at that time had willingly accompanied the appellant and had willingly stayed with him. Taking into consideration all the facts and circumstances of the case, including the age of the appellant, who on account of his indigency was not even able to engage counsel of his choice and was to be provided legal assistance by Delhi High Court Legal Services Committee, and the contributory role of the prosecutrix, I am inclined to take a lenient view in the matter on sentence by awarding less than minimum prescribed sentence, to the appellant. Taking into consideration all the facts and circumstances of the case, the appellant is sentenced to undergo RI for five years and to pay fine of Rs.10,000/- or to undergo SI for three months in default under Section 376 IPC. He is also sentenced to RI for one year under Section 363. Both the sentence shall run concurrently.

27. The appeal stands disposed of.

28. The record of the trial court be sent back and one copy of this order be sent to the appellant through Jail Superintendent.

(V.K.JAIN)
JUDGE

March 19, 2010
RS/