

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

+ **CRIMINAL APPEAL NO. 911/2006**

% **Date of Decision : 07th October, 2010**

MOHD. UMAR Appellant

Through Ms. Anu Narula, Amicus Curiae.

VERSUS

STATE Respondent

Through Mr. Arvind Kumar Gupta, APP.

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 ?

SANJIV KHANNA, J:

1. By the impugned judgment dated 23rd September, 2006, the Appellant Mohd. Umar has been convicted under Sections 363, 366 and 376 of the Indian Penal Code, 1860 (hereinafter referred to as the IPC). By the impugned order on sentence dated 25th September, 2006, the appellant has been sentenced to undergo:

Section	Rigorous Imprisonment	Fine	In default of payment of fine
363 IPC	7 Year	Rs. 5000	RI 1 Year
366 IPC	7 Year	Rs. 5000	RI 1 Year
376 IPC	7 year	Rs. 5000	RI 1 Year

2. The allegation against the appellant is that he had abducted the prosecutrix aged about 12 years daughter of Ameeruddin on 7th October, 2004 and had taken her to village Saifini, district Rampur, U.P. and had repeated sexual intercourse with her. It is alleged that the prosecutrix was enticed, kidnapped and abducted from the lawful custody of her parents. It is alleged that the prosecutrix knew the appellant, who use to work in a meat shop near her house. It is alleged that the prosecutrix had stayed with the appellant from 7th October, 2004 till the night intervening 27-28th October, 2004.

3. Learned Amicus Curiae has submitted that arrest of the appellant was in suspicious circumstances. It is submitted that even as per the evidence produced by the prosecution, the prosecutrix had voluntarily gone with the appellant. It is submitted that with regard to the age of the prosecutrix, reliance was placed upon the school leaving certificate, but the certificate is not reliable and no ossification test was done. It is submitted that the school leaving certificate itself is doubtful as it is in the name of 'X' whereas the prosecutrix's name in the DD No. 6 A dated 8th September, 2004 stated by Ameeruddin, father of the prosecutrix is different. Reliance is placed on the three defence witnesses and my attention has been drawn to the statement of DW-3, Mohd. Salim, who is an uncle of the prosecutrix. It is submitted that statement of prosecutrix was recorded twice under Section 164 of the Code of Criminal Procedure, 1973(hereinafter referred to as the Code) but only one statement has been brought on record. Lastly, it is submitted that in

the present case the Amicus Curiae appointed by the trial court had failed to properly examine and question the witnesses and injustice and prejudice has been caused to the appellant as his defence case was never projected and brought out.

4. With regard to the name of the prosecutrix, Ameeruddin, father of the prosecutrix in his first complaint which has been marked Ex.PW-9/A had given the name of her daughter aged 12 years as 'Y'. This complaint was made on 8th October, 2004 and was registered as DD No. 6A in police station Chandni Mahal, Delhi. In the MLC, which is marked Ex.PW-7/A, the name of the prosecutrix is mentioned both as 'X' and 'Y' i.e. the name mentioned in the DD No.6A and the other name by which the prosecutrix was called. It is the case of the prosecution that prosecutrix was known by two names. Even in the charge sheet the prosecutrix has been described by the two names. In the subsequent statements of the father under Section 161 of the Code, the prosecutrix has been described by the two names 'X' and 'Y'. The prosecutrix, who had appeared as PW-2 at the time of her examination has been described as 'X' and 'Y'. She was not cross-examined in this regard. Thus the contention of the appellant that prosecutrix was known as 'X' and not 'Y' cannot be accepted.

5. The prosecutrix had stated that she had taken admission in class 1 and had studied in M.C. Primary School, Kucha Chellan, Chandni Chowk, Delhi. There is no dispute about the identity of the prosecutrix and the fact that she is daughter of Ameeruddin, who had appeared as PW-3. Ameeruddin has also stated that his daughter was studying in the 5th

standard in a school at Darya Ganj, Delhi in 2004. Nuzhat Begum, Head Mistress, Primary School, Kuch Chellan had appeared as PW-4 and had produced the admission records of the prosecutrix with the name 'X' daughter of Ameeruddin. She was admitted to the school on 28th April, 1999 at Sr.No.602. The original register maintained by the school was also produced and photocopy of the relevant entry was marked Ex.PW-4/A. In this register, date of birth of the prosecutrix given at the time of admission was mentioned as 1st January, 1993. The date of admission of the prosecutrix in class 1 is 28th April, 1999. At the time of admission the prosecutrix was about 6 years old. Learned Amicus Curiae submitted that the date 1st January, 1993, mentioned in the Ex.PW-4/A is an approximate date and not exact/ascertained date and in this regard it is pointed out that the parents of another student had also given the same date. There is some merit in the contention of the appellant but it is difficult to accept the contention of the appellant that the prosecutrix was more than 16 years of age at that time when she was abducted and subjected to sexual intercourse. In this connection, reference can be made to the cross examination of the prosecutrix wherein she had stated that for the first time she got MC (menstrual cycle) in the month of Ramzan in 2003 i.e. one year before the said incident. In the MLC marked Ex.PW7/A, the age of the prosecutrix has been mentioned as 12 years. PW-3, Ameeruddin, father of the prosecutrix and PW-4 Nuzhat Begum were not cross-examined on the question of age. Even the defence witnesses have not stated even a single fact to controvert and deny the age of the prosecutrix. The appellant in his statement under

Section 313 of the Code did not state or controvert the fact that the prosecutrix was 12 years of age. The appellant simply denied question No.1 when he was asked about enticement of the prosecutrix from the lawful guardianship of her parents and age of the prosecutrix was mentioned as 12 years. Similarly, with regard to the evidence of PW-4, Nuzhat Begum and Ex.PW-4/A and Ex.PW-4/B, the appellant had stated that he does not know.

6. Learned Amicus Curiae submitted that there is overwriting on the age of the prosecutrix in DD No.6A marked Ex.PW9/A. This is not correct. In any case, no such question was put to PW-9, SI Darbara Singh, when he was cross-examined.

7. In these circumstances, it is not possible to accept the contention raised on behalf of the appellant with regard to the age of the prosecutrix. In view of the aforesaid evidence and discussion, it can be safely held that the prosecutrix was less than 16 years of age at the time when the offences were committed.

8. Learned Amicus Curiae has relied upon the statement of the appellant under Section 313 of the Code wherein he had stated that he was falsely implicated and during the relevant period there was marriage of the sister of the prosecutrix at District Rampur, U.P. and he being a relative had also gone there to attend the marriage. This statement of the appellant under Section 313 of the Code virtually admits that the appellant and the prosecutrix were together in district Rampur, U.P. during the relevant period.

9. DW-1, Mohd. Akil has stated that in the month of October

perhaps in the second week of October, 2004, marriage of appellant's sister was to take place and the appellant had attended the said marriage in Sirsi. He had stated that no girl was present with the appellant at Sirsi. DW-2, Mohd. Nawab has stated that perhaps on 8th or 9th October, 2004, the appellant had come to Sirsi to attend his sister's marriage and the appellant had remained in Sirsi for about 15 days. He has stated that the appellant was arrested in Sirsi. There is contradiction between the statement of DW-1, DW-2 and the statement of the appellant recorded under Section 313 of the Code. DW-3 Mohd. Saleem has not spoken about the marriage of the appellant's sister at Sirsi during the relevant period and his statement will be examined later on. On the other hand, we have statement of PW-3 Ameeruddin, father of the prosecutrix and his report DD No.6A dated 8th October, 2004 marked Ex.PW-9/A that his daughter was missing from 7th October, 2004 at 9 P.M. He had stated that he had made inquiries but could not locate his daughter. No doubt in his initial statement PW-3 Ameeruddin had not mentioned the name of the appellant but in his subsequent statement to the police he had mentioned the name of the appellant. He has stated that subsequently the appellant was found to be missing and, therefore, he had suspected that the appellant had kidnapped and enticed his daughter. He has stated he had come to know that the appellant had taken his daughter to village Saifini district Rampur. He went there but by that time the appellant had run away with his daughter. Parents of the appellant had sought three days' time to produce them.

10. PW-2, the prosecutrix in her statement has clearly supported the prosecution version. She has stated that she knew the appellant, who use to work in a meat shop outside their street. The appellant had told her that he would keep her happy. She has stated that on 7th October, 2004, the appellant took her to the house of his parents at Saifini, district Rampur, U.P. His parents had told her that she should live with the appellant and in case police made inquiries she should support the appellant. She has stated that she had stayed with the appellant for 20-22 days and had sexual intercourse with the appellant. In her cross examination she has reiterated what she had stated in her examination-in-chief. Her statement is credible, reliable and trustworthy. There is no cause or reason for her to not state and speak the truth and to falsely implicate the appellant. Keeping in view the age of the prosecutrix, question of her consent is irrelevant. It has been repeatedly held that if the statement of the prosecutrix is credible and trustworthy, the same alone is sufficient for conviction for the offence under Section 376 IPC.

11. The allegation of rape of the prosecutrix is fully corroborated by medical evidence. PW-7, Dr. Raman Deep has stated that on 28th October, 2004 at about 2 A.M. the prosecutrix aged 12 years was brought for medical examination. On examination he found hymen torn and the patient was having history of sexual intercourse. The MLC has been proved as Ex.PW-7/A. The MLC records that the prosecutrix had named the appellant as the person, who had taken her to Saifini, district Rampur, U.P. and they had lived there for 20 days and had sexual relationship. As per the MLC, Ex.PW-7/A the hymen was found to be

torn and the vagina was admitting two fingers easily.

12. DW-3, Mohd. Saleem has stated that he is uncle of the prosecutrix. He was informed that the prosecutrix and the appellant, who was working in a meat shop located in the same area, had gone missing. Father of the prosecutrix suspected that the appellant had taken away his daughter. Later on the prosecutrix was recovered by the police. He has stated that some respectable family members of the prosecutrix and the appellant had agreed that the appellant's relatives shall take care of the prosecutrix's marriage expenses. Accordingly, a compromise Ex.DW-3/A was entered into and he was a witness to the said compromise. However, in the cross-examination by the APP, DW-3 has stated that he had spoken to the family members and neighbours and had come to know that the appellant had not taken away the prosecutrix. No such statement was made in examination in chief by the DW-3. The document Ex.DW-3/A states that the appellant was implicated by mistake as his name was given at the instance of some neighbours. Names of neighbours have not been given and stated by DW-3 in his examination. The compromise deed Ex.DW-3/A further records that after knowing the true facts, the family of the prosecutrix had compromised the matter with the brother-in-law of the appellant. It was agreed that the brother-in-law of the appellant would help the prosecutrix get married in a good family, in their close relatives or to a known person. Rather than supporting the defence version, the said document Ex. DW-3/A supports the prosecution case. It may be noted that the appellant as per the statement of DW-1, Mohd. Akil was about

40 years of age in 2004 and was a married man with 8 children. The eldest daughter of the appellant was about 15-16 years of age when statement of DW-1 was recorded.

13. Learned Amicus Curiae has drawn my attention to the statement of the prosecutrix recorded under Section 164 of the Code, marked Ex.PW-6/D. It is submitted that the said statement itself shows that the prosecutrix had earlier also made a statement, which was in favour of the appellant. The statement Ex.PW-6/D was recorded by Mr. Gurdeep Singh Saini, Metropolitan Magistrate. No such question was put to PW-6, Mr. Gurdeep Singh Saini. The said statement of prosecutrix was recorded on 30th October, 2004. The prosecutrix was produced before the ACMM on 29th October, 2004 along with an application for recording her statement under Section 164 of the Code. The matter was, however, marked to the link Metropolitan Magistrate. On 29th October, 2004, the prosecutrix was send to Nari Niketan and her statement under Section 164 of the Code was thereafter recorded on 30th October, 2004. There is nothing on record including the police file to show that the prosecutrix had made another statement under Section 164 of the Code.

14. As far as cross-examination of the prosecution witnesses is concerned, the appellant had a private counsel, who had cross-examined PW-2, the prosecutrix. Subsequently, at the request of the appellant he was given a legal aid/State counsel to defend him. While examining the question of the effort and cross-examination by the

Amicus Curiae hindsight, has to be avoided. Hindsight gives greater wisdom and sharper vision. I have in this regard examined the statement of the appellant under Section 313 of the Code. The appellant in his statement did not question and challenge the age of the prosecutrix and other aspects now raised and which have been considered. Probably the appellant did not want to challenge the age of the prosecutrix and the prosecution case on other aspects. In the present case, 3 defence witnesses were examined. In these circumstances, I do not think that there is any miscarriage of justice and any prejudice is caused to the appellant.

15. In view of the aforesaid findings, the judgment of the learned trial court convicting the appellant under Sections 363,366 and 377 IPC is upheld and confirmed. On the question of sentence also I do not see any reason to interfere, keeping in view the age of the prosecutrix and the conduct of the appellant. The appellant at the time of offence himself was 40 years of age and was father of eight children. The eldest daughter of the appellant was 15-16 years of age. Appeal is accordingly dismissed. Learned Amicus Curiae will be paid Rs.7,000/- for assisting the Court in the present matter.

SANJIV KHANNA, J.

OCTOBER 07, 2010
NA/J