

REPORTABLE

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

CRIMINAL APPEAL No. 812 OF 2009

% Judgment reserved on: April 22, 2010
Judgment delivered on: May 17, 2010

MOHAN

... Appellant

through : Mr. Ajay Verma, Advocate

VERSUS

STATE (G.N.C.T) OF DELHI

... Respondent

through: Mr. Lovkesh Sawhney, APP.

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of Local newspapers 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?

A.K. SIKRI, J.

1. This appeal arises out of the conviction of the appellant named Mohan aged 43 years under Sections 376 & 506, Indian Penal Code, 1860 vide decision dated 06.07.2009 and sentencing order dated 07.07.2009 passed by the learned Additional Session Judge vide which the appellant has been held guilty of the offence and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.15,000/.
2. The prosecution version of story as narrated on the basis of investigation carried out by the Investigating Officer, depicts sordid and grimy picture. It shows, believed to be correct by the Trial Court,

as to how a young and gullible girl can be exploited and her life ruined. The girl in question is Gudiya, aged about sixteen years, was found pregnant by Anita Kaushal (PW-12) on 14.05.2007, a Welfare Officer at Nirmal Chaya after finding the extra ordinary bulge of stomach. The medical test of Gudiya confirmed this. PW-12 scolded Gudiya (PW-1) for not telling the truth about her physical conditions. On the persistent coaxing Gudiya narrated the whole story to PW-12 that 7-8 months prior to 14.05.2007, the appellant who used to sell water on *rehri* outside the school (Sarvodya Kanya Vidyalaya, L-Block, Hari Nagar in IXth Class and school hours are from 7.15 am to 1.30 pm) and sometimes allowed inside the school premises in case of shortage of water, called Gudiya by telling lie that her madam was calling her. Taking an advantage of her innocence, the accused then pushed her into the bathroom of school premises and forcibly indulged in the sexual intercourse there itself. He threatened to kill her if she disclosed truth about his act. He also threw Rs.10-15 at victim so that she could keep her mouth shut.

3. She further disclosed that Mohan continued with the same acts (forceful intercourse) at same place in the school premises, even thereafter on number of occasions. He would give Rs.10-20 to find the middle ground with the situation. Also, at the same time, he would threaten her as well, with knife, if she disclosed anything about his act to anyone. It was stated by Gudiya that she was not aware that she was pregnant; and only after the medical test, it came to the knowledge of Gudiya that she was pregnant.

4. On the aforesaid disclosure made by Gudiya, accused Mohan was charged under Section 376 and 506 of IPC.
5. As the pregnancy was at advance stage, as the fetus was of 26 weeks old, it could not be terminated, Gudiya gave birth to a baby girl in July, 2007. Medical test on the basis of blood samples DNA and finger print, etc. proved that Mohan (the appellant) and Gudiya (PW-1) are the biological parents of the girl child. This confirms that the appellant had indulged in sexual intercourse with Gudiya.
6. On the conclusion of the trial of the accused, learned Additional Session Judge recorded the finding that the prosecution, after examining 21 witnesses including prosecutrix, supported by aforesaid medical evidence was also to prove its case beyond any reasonable doubt that the rape of Gudiya was committed by the accused Mohan and consequently convicted and sentenced the accused under Section 376 and 506 IPC.
7. The precise findings returned by the Trial Court, on the basis of evidence, can be summarized as under:
 - a) Blood samples were calculated for DNA, finger print by Dr. A.K. Srivastava, who was examined as PW-8 and conducted the test. The Geno Typing report, i.e., Allelic data of the source of Exhibit 1,2 and 3 proved as Ex.PW8/D conclusively proved that the biological parents of the baby girl were the appellant and Gudiya.

- b) From the statement of Anita Kaushal (PW-12), it was established that it was the appellant, who raped prosecutrix and she became pregnant and only thereafter acts of rape came to light in the manner already mentioned above.
- c) There was evidence to show that the appellant was performing sexual intercourse with the prosecutrix.
- d) There was also evidence to show that the appellant had the access inside the school, as he was permitted by the school to enter his *rehri* inside the school even the appellant had admitted this fact in his statement recorded under Section 313 of the Code of Criminal Procedure.
- e) The statement of Gudiya (PW-1) that she was raped by the appellant against her wishes was accepted as correct on the finding that there was nothing on record to show that prosecutrix had any reason of falsely implicate him.
- f) Her version that out of fear as appellant has threatened to kill her, she did not disclose this fact to anybody.

8. In this appeal, argued by Mr. Ajay Verma, learned counsel for the appellant. His submission was that:

- (i) The prosecutrix was not below sixteen and her age was not determined and fixed properly by any cogent evidence. It was argued that she was more than sixteen years of age and in absence of any proper determination of age, benefit of doubt should go to the accused.

(ii) On the premise that prosecutrix was more than sixteen years of age, the learned counsel argued that the sexual intercourse was consensual, *viz.*, with the consent of the prosecutrix and therefore, no offence of rape was made out.

9. Dilating his first submission, learned counsel pointed out that the learned Trial Court proceedings were on the basis that date of birth of the prosecutrix was 08.08.1992. This date of birth was taken from “Admission and Withdrawal Register where the prosecutrix had studied”. He argued that this could not be the basis of accepting the date of birth as held by the Supreme Court in the case of [1988 Supp (1) SCC 604]

“11. The question then arises whether the respondent has proved in accordance with law that Hukmi Chand and Suraj Prakash Joshi whose nomination papers were rejected by the Returning Officer had attained the age of 25 years on 1.1.1984. In the election petition the respondent pleaded that Hukmi Chand's nomination paper was improperly rejected on the basis of entry in the electoral roll which mentioned his age as 23 years while his correct date of birth was 13.5.1956 as evidenced by the certificate issued by the Head Master of the New Government School Jodhpur. The respondent had further pleaded that the nomination paper of Suraj Prakash Joshi was rejected on the sole ground that in the electoral roll his age was recorded as 23 years on 1.1.1984 but the entries contained in the electoral roll were not final and conclusive. The date of birth of Suraj Prakash Joshi was not mentioned in the election petition and there was no further pleading that on the date of filing his nomination Suraj Prakash Joshi had actually attained the age of 25 years. However it was pleaded that since Suraj Prakash Joshi had given a declaration that he had completed 25 years of age there was no reason to disbelieve him as no objection had been raised against the declaration made by him and therefore the returning officer acted improperly in rejecting his nomination paper. In his written statement the appellant denied the allegations made by the election petitioner and asserted that the Returning Officer acted rightly in rejecting the nomination papers of Hukmi Chand and Suraj Prakash Joshi as they were not qualified to contest the election as they had not completed 25 years of age on the date of nomination. The respondent produced oral and documentary evidence to support his

contention. Even before the High Court none of the two candidates whose nomination papers were rejected appeared nor their parents were examined by the respondent nor any person having special knowledge about the dates of birth of the two candidates was examined by the respondent. As regards Hukmi Chand the respondent produced Ex. 8 (a copy of scholars register) Ex. 9 (counter-foil of certificate of Board of Secondary Education) Ex. 10 (mark-sheet of Hukmi Chand) Ex. 11 (a copy of counter foil of certificate of Board of Secondary Education) relating to Suraj Prakash Joshi, and Ex. 12 (Tabulation record of marks obtained by Suraj Prakash Joshi). These documents were sought to be proved by Anant Ram Sharma PW 3 and Kailash Chand Taparia PW 5. Ex. 8 is a copy of the scholars register issued by the Head of the Government Higher Secondary School and entries contained therein show that Hukmi Chand had joined Government Middle School Palasani on 24.6.1972 and he had left the same on 10.6.1976 after having passed VIIIth class. In this document 13.6.1956 is mentioned as the date of birth of Hukmi Chand son of Sardar Mal. Ex. 9 is a certificate issued by the Board of Secondary Education Rajasthan certifying that Hukmi Chand Bhandari son of Sardar Mal Bhandari passed Secondary School Examination of 1974 from New Government Higher Secondary School Jodhpur, it also shows 13.6.1956 as date of birth of Hukmi Chand. Ex. 10 is a tabulation record containing the details of the marks obtained by Hukmi Chand at the Secondary School Examination 1974. In this document also his date of birth is mentioned as 13.6.1956. Placing reliance on these three documents the High Court held that Hukmi Chand's date of birth was 13.6.1956 and therefore his age on 1.1.1984 was more than 25 years. The High Court further held that view of the entry in Ex. 11, certificate issued by the Board of Secondary Education Rajasthan Suraj Prakash was born on 11.3.1959 and therefore he was qualified to contest the election as he was not less than 25 years of age. On these findings the High Court held that the respondent had successfully proved that the nomination papers of Hukmi Chand and Suraj Prakash Joshi had been wrongly rejected."

10. In support of his second submission, learned counsel argued that it was highly suspicious and unbelievable that for six to eight months, the appellant would indulge in repeated sexual intercourse which would be forced and contrary to the wishes and consent of the prosecutrix. Precise submission in this behalf was that the prosecutrix would not have suffered this silently and would have complained against the appellant, if it was a case of sexual assault

against her wishes. The prosecutrix herself mentioned that the appellant indulged in sexual intercourse with her repeatedly and this was not possible without her consent, and this could clearly be inferred from this circumstance. He made a fervent plea that this inference be drawn particularly having regard to the fact that the prosecutrix had herself said that every time after the act she was receiving money from the appellant. This would signify that she was giving consent to the aforesaid act in return of money which the prosecutrix was receiving every time.

11. We are not convinced with either of the submissions made by the learned counsel for the appellant.

Re: Age of Prosecutrix:

12. The admission register was proved as Ex.PW4/B. In the school register, date of birth of the prosecutrix was shown as 08.08.1992. Pregnancy of the prosecutrix came to notice in May 2007 when fetus was 26 weeks old. This means that she conceived sometime in January, 2007. In her statement, she stated that the appellant indulged in such an act for the first time seven to eight months prior to 14.05.2007 (date on which the statement was recorded). That will take us to September/October 2006 when the first act of sexual intercourse was performed. The prosecutrix was little over 14 years of age at that time. Even if the date of complaint is taken into consideration, viz., January 2007, she was incapable of giving consent and in any case, such an act has to be treated as rape.

13. It was because of this reason, the submission of learned counsel for the appellant was that this date of birth mentioned in the admission register should not be taken into consideration and once this document is ignored, no attempt was made by the prosecution to fix the age of the prosecutrix.
14. Arguments predicated on the admission register is clearly misconceived. The entire case proceeded on the basis that prosecutrix was fifteen years of age. This was so stated by Dr. Ajay Sharma (PW-18), Medical Officer, Blood Bank, DDU Hospital, Delhi. He had examined prosecutrix and prepared MLC Ex.PW18/A on 14.05.2007 and on the basis of medical examination, he had confirmed that prosecutrix was pregnant. In his testimony, he has categorically mentioned that prosecutrix was 15 years old. There is no cross-examination on this witness. Further, Smt. Poonam, PGT Home Science in the school, where the prosecutrix had studied, appeared as PW-4 and proved the register (Ex.PW4/B) showing the date of birth of Gudiya as 08.08.1992. The veracity of this register was not challenged in the cross-examination and only question put to her was as to whether she had any personal knowledge of date of birth of Guriya to which she replied in negative. Had there been any challenge to the veracity of the said register, prosecution could have taken step of conducting ossification test for determining the age of Gudiya. However, in the absence of any challenge, when the case also proceeded on the basis of that date of birth of prosecutrix was 08.08.1992, it is not open to the appellant to raise this argument for the

first time in the instant appeal. With this we revert to the second limb of argument.

Re: Consent of the Prosecutrix:

15. Once we proceed on the basis that the age of prosecutrix was less than sixteen years, the issue of consent goes into oblivion and becomes a non-issue. However, even if we proceed on the premise that prosecutrix was more than sixteen years of age, in the facts of the present case, it is difficult to absorb the submission of the learned counsel for the appellant that sexual intercourse was not forcible, but consensual. Merely because the prosecutrix did not reveal about the continued indulgence of the appellant would not mean that she was a consenting party.
16. The prosecutrix has categorically stated that the appellant used to extend threats to her that he would kill her in case she reveals these acts to any person. One cannot be unmindful of the fact that the prosecutrix was a teenager i.e. of tender age and the appellant was more than forty years of age. One also cannot be oblivious of the circumstances in which prosecutrix was brought up. She was not living with her parents. She was a destitute child and was taken care of by 'Nirmal Chhaya'. It is the Nirmal Chhaya, who admitted her in Sarvodaya Kanya Vidyalaya, L-Block, Hari Nagar for her education. Such a girl was clearly vulnerable. Taking advantage of her background and age, the appellant exploited her and invaded her person by raping her. We also cannot ignore the circumstances under which this ghastly act was performed for the first time by the

appellant. She was whisked away by the appellant on the pretext that her teacher was calling her and was taken to the bath room where the appellant committed sexual intercourse with her without her consent.

17. In *State of Punjab Vs. Gurmit Singh and Others* [1996 (2) SCC 384], the Supreme Court observed as under:

“The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down upon by the society. Her not informing the teachers of her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a felling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy.”

In *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujrat* [AIR 1983 SC 753], the Supreme Court elaborately dealt with psychological and social compulsions, which would deter such a rape victim to give out and openly make complaint. Following passage from that judgment needs to be extracted:

“10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because : (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial

home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

Similar sentiments were echoed by the Apex Court in the case of

State of Maharashtra Vs. Chandraprakash Kewalchand Jain [AIR

1990 (1) SCC 550] in the following words:

"18..... She suffers a tremendous sense of shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often than not, treated as a sinner and shunned. It must, therefore, be realised that a woman who is subjected to sex-violence would always be slow and hesitant about disclosing her plight. The Court must, therefore, evaluate her evidence in the above background."

18. In these circumstances, no consent can be read at all. We have also to bear in mind that she used to go to school from Nirmal Chhaya and would come back along with care taker of Nirmal Chhaya. There could not be an interaction between them of such a nature which would develop into an intimacy making Gudiya as a consensual partner in the act of sex intercourse.

19. The non-mentioning of such incidence, even when a child living in the aforesaid circumstances is repeatedly raped, splurges no surprise. A child without parents and natural guardians of this tender age when threatened would more likely remain silent. She did not tell anybody at any time till the act was revealed of its own when pregnancy became advanced and thus visible. Only then she revealed, that too when she was questioned about it. The incidents of child abuse culminated in sexual abuse often go unreported. It is a well-known phenomenon that unlike other crimes, sexual crime creates immense sensitivity in the society. Many times even the parents or family members of the child, who is sexually abused, do not want to report the matter to the police for fear of social stigma. Here, we are concerned with a child who was not even under the protective custody of her parents. The vulnerability and the helplessness of the said child would make it all the more easier for the rapist to overpower her through threat, bribe or mild force, since the children rarely put up strong physical resistance.
20. We may refer Section 114A of the Evidence Act, as per which the Court has to presume that the prosecutrix did not give her consent to intercourse where she states in her evidence before the Court she did not consent.

“114-A Presumption as to absence of consent in certain prosecutions for rape - In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

21. We thus reject both the contentions of the learned counsel for the appellant.

Re: Quantum of Punishment:

22. The learned Trial Court has treated the offence as heinous and awarded life sentence to the appellant. The learned counsel for the appellant questioned the wisdom of the learned Additional Session Judge is arguing that it was not a case where this extreme sentence should have been given to the appellant. He also submitted that the appellant was aged 43 years, married having wife and four children; elder was 13 years and youngest was 8 years of age. He was the first offender and was even father to support. Therefore, lenient view should be taken.
23. Precisely, this very argument was advanced before the learned Additional Session Judge also who remained unmoved and justified the sentence by pointing out that the appellant was having children and was own daughter who was around 10 years of age and prosecutrix was the girl who was of the age of his own child, moreso offence was not committed once, but repeatedly and also was putting threat to the child.
24. The Division Bench of this Court in its recent judgment dated 12.02.2009 in CrI. Appeal No. 772 of 2006 entitled *Shyam Narain Vs. State* upheld the life sentence observing as under:

“7. The child insisted that the injuries were due to fall. The appellant who took Baby ‘M’ to the hospital also stood by said fact.”

25. It cannot be ignored that the rape of a child is a terrible incident. It results in the external crisis in the life of the victim. Rape Trauma Syndrome is a label given to a collection of syndromes with which the victims are inflicted. Many psychologists have divided the Rape Trauma Syndrome with two effects, one is the immediate disruption and disorganization in the life-style of the victim in general and the second phase is the long-term effect in which some victims have nurtured suppressed feeling throughout the life while some attempt to reorganize their lives. Studies which have been conducted to assist the trauma of rape victims indicate that many such children report difficulty in sleeping; nightmares are often seen, and some cry out in sleep. It is very few children, who escape with no symptoms. Behavioural symptoms with which such children suffer include general irritability, behavioural problems at school, acute withdrawal, depressive symptoms, running away from home and expressive of delinquent behaviour. Long terms effects are more harmful. Sexual disorientation or psychoses are found to be related to childhood rape, labeled by psychologist as 'Psychological Time Bomb'. Therefore, sexual abuse of a child cannot be let off lightly.
26. That apart, there are other aggravating circumstances, which would persuade us not to interfere with the discretion exercised by the Trial Court, as this discretion cannot be termed as manifestly observed. As mentioned above, the victim is without her parents. She was in protection custody of an N.G.O. 'Nirmal Chhaya'. It has come on record that even in the school where she was studying normally access to outsider was not provided. However the appellant, as a

vendor, was allowed to come inside the girl school only because he was a vendor selling water by permitting him access in a girl school where the girls' were of ages varying between tender and teenagers. Trust was reposed in him. He belied that trust by indulging in such a devious act. Judicial trend set by the Apex Court, clearly demonstrates that the Court should not be liberal in taking generous view against the rapist by awarding the lesser sentence. It has been consistently held that the Court should give punishment in proportion with culpability of each offence and be stern in sentencing in offences which affect the society. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. In the case of *State of Madhya Pradesh Vs. Pappu @ Ajay* [JT 2008 (8) SC 647], the following yardstick on sentence was provided by the Apex Court:

"14.... The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance."

In *State of M.P. Vs. Bala @ Balaram* [(2005) 8 SCC 1] wherein also the Court was dealing with offence of rape, the Supreme Court observed that crime of rape is a heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. It was highlighted that in such a case, the punishment must fit the crime and that it is the duty of the court to impose a proper

punishment depending on the degree of criminality and desirability for imposing such punishment.

27. By his brutal acts, a minor girl of less than sixteen years was made a mother by the appellant. Not only the repeated acts of rape would be permanent scar on the victim, becoming mother at this age is neither physically nor psychologically feasible. It would, therefore, clearly be a case of aggravated form of sexual assault.

28. In the result, finding no merit in this appeal, we dismiss the same maintaining the sentence awarded by the learned Additional Session Judge.

(A.K. SIKRI)
JUDGE

(AJIT BHARIHOKE)
JUDGE

MAY 17, 2010.

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