

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

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Decided on: 6th July, 2011

1. **CRL.A. 37/2010**

SUNIL KUMAR SHARMA

..... Appellant

Through:

Mr. Alok Bachawat, Mr. Syed Hasan
Isfahani & Mr. Sankalp Kashyap,
Advocates

versus

STATE NCT OF DELHI

..... Respondent

Through:

Mr. Manoj Ohri, Advocate.

AND

2. **CRL.A. 169/2010**

MONTOO SHARMA

..... Appellant

Through:

Mr. Alok Bachawat, Mr. Syed Hasan
Isfahani & Mr. Sankalp Kashyap,
Advocates.

versus

STATE

..... Respondent

Through:

Mr. Manoj Ohri, Advocate.

AND

3. **CRL.A. 324/2010**

MUKESH SHARMA

..... Appellant

Through:

Ms. Kanchan Kumar, Advocate.

versus

STATE

..... Respondent

Through:

Mr. Manoj Ohri, Advocate.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. These appeals arise from a common impugned judgment whereby all the three Appellants have been convicted for offence punishable under section 366/34 IPC and awarded a sentence of Rigorous Imprisonment for five years and to pay a fine of ₹1000/- each and in default of payment of fine to further undergo simple imprisonment for one month. The Appellant Sunil Kumar Sharma has also been convicted for offence punishable under Section 376 IPC and awarded a sentence of Rigorous Imprisonment for seven years and to pay a fine of ₹2,000/- and in default of payment of fine to further undergo Simple Imprisonment for two months.

2. Briefly the prosecution case is that on 25th October, 2003 the PW4 Complainant Kusuma Devi got recorded her statement Ex. PW4/A wherein she stated that she is a permanent resident of village Nangla Dharmpal, PS Barnahal, District Mainpuri, UP and is presently residing in Manav Mangal

School, Prahladpur , New Delhi and is also working in the said school. Her daughter (the prosecutrix) studying in 8th Class in the said school aged about 13-14 years is missing from the house since 25th October, 2003 at around 6.00A.M. She suspected that Sunil Sharma S/o Gopal Sharma R/o village Dhamdha South Toll PS and Post Dhamdha, District Purnia, Bihar who does the wood work in the school has abducted her daughter and taken her away by alluring her. A case under Section 366, IPC bearing FIR No. 604/2003 was registered at Police Station Sangam Vihar, Delhi on the basis of the said statement. Investigation was conducted and the prosecutrix was recovered. Her statement was recorded both under Sections 161 and 164 Cr.P.C. wherein she stated that she was residing at IInd floor of Manav Mangal Public School. Sunil Sharma was working as a Carpenter in the school and used to come to IInd Floor for drinking water. He used to tease her but she did not tell anybody about it as her father was strict and she was afraid of him. On 24th October, 2003 at around 5:00- 5:30 P.M. Sunil Sharma had come to IInd Floor to drink water. He told her that the next day being a holiday they should go somewhere. She refused and said that she will not go anywhere with him on which he said that he wanted to go to the temple with her. She agreed to accompany him. At that time no one was there at her house. On 25th October, at about 5.30 A.M. Sunil Sharma telephoned her and called her outside the

school. At about 6 A.M. she went downstairs where he was present along with Mukesh Sharma and Montoo. They forced her into a TSR and took her to Tamur Nagar and from there to New Delhi Railway Station. At the Railway Station Montoo and Sunil Sharma sat with her and Mukesh Sharma went to purchase the tickets. Thereafter, accused Sunil Sharma and Mukesh Sharma took her to Bhagalpur in a train. From there they hired a Tata Sumo and took her to Purnia. After that they took her to Hanuman temple and the Appellant Sunil Sharma forcibly married her there. He took her to village Dhamdha and kept at his place for two days that is on 27th and 28th October. On 28th October, 2003 Sunil Sharma came to know that police was coming from Delhi and he took her back to Purnia and said that they would marry in Court and thereafter go anywhere. There four persons Sunil Sharma, Babloo Sharma, Mukesh Sharma and an uncle of Sunil Sharma were present. They kept her hiding in field because of the fear of the police and on the same day brought her back to Purnia and kept her in his brother-in-law's house till 1st November, 2003. On 2nd November they asked her to give a call to her uncle (Mama) to tell that they could take her provided they withdrew the case instituted by her mother Kusuma. On 3rd November, they also made her call her nanaji whom she told everything. She was brought back to Purnia and kept in other relative's house. Finally she was brought back to Delhi by her

uncle who had come to Bihar. These people that is the Appellants herein made her sign documents. Sunil Sharma raped her against her wishes on 26th, 27th and 28th of October and again physically assaulted her against her wishes on 2nd, 3rd and 4th of November. After completion of investigation a charge sheet was filed. Pursuant to the prosecution evidence and the statement of the Appellants under Section 313 Cr.P.C. the Appellants were convicted and sentenced as above.

3. Learned counsel for the Appellant contends that from the perusal of the statement of PW3, the prosecutrix it is clear that she is a consenting party and she willingly went along with the Appellant and married the Appellant Sunil Sharma. Despite number of opportunities available to her she neither raised any alarm nor protested. Thus, offence of rape under Section 376 IPC is not made out. Moreover, as per the allegation the alleged rape was committed on the prosecutrix only after the marriage was performed and though the marriage with a minor under the Hindu Marriage Act is voidable marriage, however, the same continues to be a valid marriage till it is avoided. The punishment prescribed for an offence of rape of once wife is imprisonment upto two years.

4. It is further contended that the prosecution was duty bound to prove the age of the prosecutrix however, no cogent and convincing evidence of the date

of birth has been produced. The only evidence produced is a certificate issued by PW1 Mrs. Rama Arora, the Headmistress of the school where the prosecutrix joined in the 8th standard just two months prior to the incident, that is, on 14th August, 2003. The date of birth so depicted in the school record is not based on any document from the Registrar of Births. This date of birth has been entered on the basis of the affidavit of the father. Neither the affidavit has been produced nor has the father of the prosecutrix been examined as a witness. PW4 Kusuma Devi the mother of the prosecutrix admits that the prosecutrix was born in the village and she did not get her birth registered there. Moreover, as per PW4 Kusuma Devi she got the Prosecutrix admitted in Manav Mangal School for the first time and before that she had not studied anywhere. She was admitted directly in class 8th and that too in the mid session. The mother of the prosecutrix is in Delhi for the last 10 years and admittedly her youngest child was also born in the village. The prosecutrix is the eldest child and as per PW4 there was a gap of 2 years each in the five children and thus, calculating the age of the prosecutrix in this manner, she was 17 years to 18 years of age at the time of the incident. It is urged that it was the duty of the prosecution to prove the essential ingredients of the offence that the prosecutrix was minor and thus, was not capable of giving consent. The prosecution having not discharged the onus, the benefit of doubt

has to be given to the accused. Not only this, the Appellant had moved an application for getting the ossification test of the prosecutrix conducted and the said application was opposed by the Prosecution and subsequently dismissed by the learned Metropolitan Magistrate vide order dated 21st January, 2004. The revision against this order filed before the learned Additional Sessions Judge was also dismissed on 12th May, 2004. The prosecution has thus, withheld the best evidence and, therefore, an adverse inference should be drawn against it.

5. PW4 Kusuma Devi was working as an Aya in the school and the date of birth entered in the school record was on the basis of an affidavit given by the father of the Prosecutrix, also the Prosecutrix was admitted in mid-term just two months prior to the incident. Neither the affidavit has been proved nor the father who had sworn the document, has been examined. This action of the prosecution smacks of mala fide and unerringly points towards the fact that this is a manufactured document as PW4 was working in the school and was thus, naturally very closely associated with PW1, the principal of the school.

6. Besides the testimony and the conduct of PW3, the Prosecutrix, her consent is also apparent from the greeting card sent by her to the Appellant Sunil Sharma which has been admitted to be sent by PW3 to the Appellant. In the said greeting card Ex. PW3/D1 PW3 has expressed her love for the

Appellant Sunil Kumar Sharma. Reliance is placed on *Lalta Prasad vs. State of Madhya Pradesh, 1979 (4) SCC 193* wherein the Hon'ble Supreme Court disbelieved the story of the prosecutrix that she was taken away under threats, in view of her letters which were written to the Appellant before the incident which showed that the girl was immensely in love with the Appellant therein and allowed the appeal. Reliance is placed on *Sunil vs. State of Haryana, (2010) 1 SCC 742* wherein it was held that the failure to get the prosecutrix examined from the dental surgeon and the radiologist was a serious flaw in the prosecution version. It was held that in the absence of primary evidence, reports of the dental surgeon and the radiologist would have helped the Court to arrive at the conclusion regarding the age of the prosecutrix. Relying on *State of Karnataka vs. Sureshbabu Pukraj Porral, AIR 1994 SC 966* it is contended that when the age is in doubt then the question of taking away the prosecutrix from her lawful guardianship does not arise.

7. Learned counsel for Appellant further contends that for an offence punishable under section 366 IPC two essential ingredients are required to be proved by the prosecution; firstly taking or enticing minor out of the keeping of a lawful guardian without the consent of such guardian; secondly that the said kidnapping should be with the intent that she will be compelled to marry and subjected to illicit intercourse against her wish. In the present case from

the perusal of the testimony of PW3 it is apparent that she was a consenting party and thus, where there is consent of the prosecutrix no offence under Section 366 IPC is made out. Reliance is placed on *Shayam and others vs. State of Maharashtra, 1995 Cri.L.J. 3974* wherein it was held that prosecutrix was a fully grown up girl may be one who had yet not touched the age of 18 years but still she was in the age of discretion, sensible and aware of the intention of the accused therein that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. Thus it was expected of her to jump down from the bicycle or put up a struggle and, in any case, raise alarm to protect herself. Since no such step was taken up by her she seemed to be a willing party to go with Shyam the Appellant therein on her own and that there was no 'taking' out of guardianship of her mother. Reliance is also placed on *S. Vardharajan vs. State of Madras, AIR 1965 SC 942*.

8. It is further contended by the learned counsel for the Appellant that if this Court comes to the conclusion that the girl was a minor that is below 18 years of age as her consent is writ large, and this Court should reduce the sentence and release the Appellants for the period already undergone for special and adequate reasons.

9. Per contra, learned APP for the State contends that from the testimony

of PW3, the Prosecutrix and PW4 Kusuma Devi, the mother of Prosecutrix it is clear that the age of the prosecutrix is slightly more than 14 years and this fact is corroborated by the fact that the prosecutrix was the eldest child and the youngest child of PW4, Amit had completed his 8th birthday on 14th August, 2005 which would mean that he was born on 14th August, 1997. According to PW4 Kusuma Devi there was a gap of two years in between all the children and thus, even on this calculation the age of the prosecutrix comes to be around 14 years and three months. The prosecutrix in her testimony has clearly stated that accused married her forcibly and everything was done without her consent. Moreover, she could not have raised any alarm as some or the other person always use to be along with her. It is contended that the exception as a clause sought to be invoked for offence punishable under Section 376 also requires that the age of the wife should not be less than 15 years. Even in the MLC the prosecutrix has given her age as 14 years and thus from the testimony of all the witnesses it is clear that she was less than 15 years and thus the question of her consent either for sexual intercourse or for moving out of the custody of the parents is wholly irrelevant. It is thus prayed that the appeals be dismissed and the judgment of conviction and sentence be upheld.

10. I have heard learned counsel for the parties and perused the record. At

this stage it would be relevant to reproduce certain portions of the testimony of the Prosecutrix PW3:

“I was studying in 8th class at that time. On 25th October, 2003 at about 6.30 a.m. Sunil Sharma telephoned me. I knew him as he was doing the work of carpenter in the school. He called me outside the school where he was standing. I thought he must be alone but there were three boys. The other two boys were namely Mukesh Sharma and Manta @ Montu. Mukesh Sharma was also doing the carpentry job in the school and was known to me but Montu was not working there. They asked him to accompany them for roaming about. I refused. On my refusal they forcibly made me sit on an auto rickshaw. I was taken to Tamur Nagar. At Tamur Nagar the auto stopped and Mukesh Sharma and Montu left. After a long time they came back and from there they took him to New Delhi railway station. Mukesh Sharma went to purchase the ticket and the other two boys remained with me. Thereafter accused Sunil and Mukesh Sharma took to Bhagalpur in the train. Montu remained at the railway station. There is a place Zeromal from Bhagalpur I was taken to that place from there they hired Tata Sumo and took me to Poornia. There Mukesh purchased clothes for me despite my protest for him as well as for co-accused. Thereafter they took me to one hanuman temple where they paid Rs. 250/- to the pandit of the temple and Sunil Sharma forcibly married me. Thereafter I was taken to village Dhamdha. In the village I was kept by them for three days. There accused Sunil raped me on every day. There accused knew that police from Delhi was coming therefore, they brought me to Poornia. I was kept at Poornia for three days where also Sunil raped me twice. Delhi police had arrived at Dhamdha but I was already removed to Poornia. The police reached Poornia. At Poornia, I was kept at the house of sister of the accused Sunil Rudal Sharma and brother of accused Sunil did not allow the police to meet me. Delhi Police came back and I was again taken back to Dhamdha. Sunil had asked me to telephone my parents and someone to take me back. My maternal uncle Pramod, Raju and Raj Kumar and my Mosaji Lalta Prasad along with the police came to Dhamdha. After I

had telephoned my parents at the instance of Sunil I was again brought to Poornia when my family members visited Dhamdha I was not available there. The accused Sunil again raped me twice at Poornia. On 5.11.03, Lalta Parsad, Raju, Raj Kumar & Parmod reached Poornia. They had not brought the police because of threat of the accused. I was made to meet them at 12 O'clock in the mid night. I asked the accused to send me back to my parents house but they refused and told me that I have to be re-married to Sunil when I refused they took me to Court. Sunil Sharma, Rudal Sharma, Baleshwar and other took me to the court where we were apprehended by lady police after making enquiries from me. We all were brought to Police Station. From where they telephoned the Delhi police. On 9th November, 2003 Delhi Police reached there. Thereafter, we were produced in the Court and from where we were brought back to Delhi.”

11. From a perusal of the statement of the Prosecutrix it is clear that the prosecutrix was moving freely with the Appellant Sunil Sharma and Mukesh Sharma everywhere. Though she states that initially she was forcibly made to sit in an auto-rickshaw however, there was no persistent threat and despite number of opportunities, she neither raised any alarm nor objected nor made an attempt to move out of their custody. From the cross examination of the Prosecutrix, it has been brought out by the learned counsel for the Appellants that despite the fact that she used to go out from the place where she was kept by the Appellant Sunil and used to meet people she did not tell anyone that she had been taken and kept there contrary to her will. The facts brought out clearly fortify that there was no threat from the Appellants and the

Prosecutrix had gone and was staying with the Appellant Sunil Kumar Sharma of her own wish. The conduct of the prosecutrix of moving freely with the Appellants herein shows consent which fact is further fortified by the greeting cards Exhibit PW3/D1 sent by her to the Appellant Sunil Sharma in which she has expressed her love for him. PW3 has admitted writing this card to the Appellant Sunil Sharma.

At this stage it would be appropriate to reproduce the observations of the Hon'ble Supreme Court in case of *Shayam and Ors.* (Supra):

“3. In her statement in Court, the prosecutrix has put blame on the Appellants. She has deposed that she was threatened right from the beginning when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be difficult to dislodge, but having regard to her conduct, as also the manner of the so-called "taking", it does not seem that the prosecutrix was truthful in that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or that her whereabouts would be under check by both the Appellants/accused and that they would emerge at the scene abruptly to commit the offence of kidnapping by "taking" her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, That he was taking her away for a purpose. It was not unknown to her with whom she was

going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam the Appellant on her own and in that sense there was no "taking" out of the guardianship of her mother. The culpability of neither Shyam, A-1 nor that of Suresh, A-2, in these circumstances, appears to us established. The charge against the Appellants/ accused under Section 366, I.P.C. would thus fail. Accordingly, the Appellants deserve acquittal. The appeal is, therefore, allowed acquitting the Appellants."

12. Thus the other material issue which is required to be considered is the age of the prosecutrix i.e. was she a minor and whether less than 16 years or 18 years at the time of Commission of the alleged offence. The evidence produced in this regard is the testimony of PW1 Mrs. Rama Arora, Headmistress of Manav Mangal School, Prahladpur, New Delhi who has stated that the prosecutrix was admitted in the school on 14th August, 2003 in class 8th and the date of birth as per the school records is 9th August, 1989. Her certificate in this regard is Ex. PW1/A. In her cross-examination this witness has admitted that the date of birth has been entered in the school record at the time of admission of the Prosecutrix on the basis of an affidavit furnished by her parents and they had not given any date of Birth Certificate. Thus, from the evidence of this witness it can be concluded that this date of birth which is recorded in the Certificate Ex. PW1/A is neither based on any earlier school leaving certificate nor any entry in the municipal records. As

per the PW4 Kusuma Devi, she had got the prosecutrix admitted in the said school for the first time and before that she was not studying anywhere. She was admitted in Class 8th and was studying in Manav Mangal School without admission from 3rd Class. The witness has further deposed that the Prosecutrix was got admitted on the basis of an affidavit and no other document was submitted at the time of admission of the Prosecutrix except the affidavit. It is neither stated as to whose affidavit it was nor as the same has been produced and placed on record. Moreover, she was admitted in Class 8th for the first time only 2 months prior to the alleged incident.

13. There is yet another anomaly in the testimony of PW4 Kusuma Devi. According to her prosecutrix was admitted in Manav Mangal School in class 8th for the first time and before that she was not studying anywhere. This version of PW4 is contradicted by her own statement where she has deposed that the Prosecutrix was studying in Manav Mangal School from 3rd Standard without any admission. This fact is also belied by the card Ex. PW3/D1 sent by the prosecutrix to Sunil Kumar Sharma which the Prosecutrix has identified and admitted to have written in her own handwriting, PW3 the Prosecutrix in her testimony has stated that she is 8th standard pass and she could read and write Hindi language. She knows a little bit of English language and could read and write well in English language. She had stated

that she had sent the greeting card Ex. PW3/D1 and that the same was written by her in her own handwriting in Hindi as well as in English language. She has further deposed that this card was written by her to a friend namely Pooja and in reply to the court question put to her she changed her answer deposing that she had written the said greeting card at the instance of Appellant Sunil on the occasion of New Year; which new year she did not remember. Also in reply to the other question put to her she answered that she herself had purchased the card from a shop but she did not now remember the same. The language of the card both in Hindi and English and the manner of writing clearly depicts that the person who has written is well versed and is a literate person who can read and write Hindi and English properly. Thus, the version of the mother that her daughter was admitted in Manav Mangal School for the first time without studying in any other school and that also directly in class 8th is a bundle of lies. From the handwriting and the language used in the card it is evident that the Prosecutrix PW3 has studied earlier also and thus a reasonable inference can be drawn that facts have been deliberately withheld so that the true age of the prosecutrix is not revealed. This inference is further fortified by the fact that despite no cogent evidence of her date of birth being available, the ossification test of the prosecutrix was not got conducted. Not only this on an application moved by the Appellant for getting the ossification

test of the prosecutrix conducted, the same was opposed by the prosecution resulting in dismissal of the application by the learned Metropolitan Magistrate. The revision petition against the said order was also dismissed. Thus it is apparent that the prosecution has withheld the best evidence and an adverse inference needs to be drawn against the prosecution.

14. PW4 in her testimony has stated that her youngest son was eight years old on 14th August, 2005 and there is a gap of two years between her children. PW3 the Prosecutrix has stated that they are five brothers sisters and PW3 is the eldest. Learned counsel for the State seeks to draw an inference from these facts that taking the same into consideration the date of birth of the prosecutrix is falls in the year 1989 as has been mentioned in the birth certificate of the school. I am of the opinion that it would be inappropriate to return a finding of date of birth on this basis, especially when there is no date of birth of the youngest child and in the testimony of PW4, she has deposed that as on 14th August, 2005 her son has completed his 8th year. She has admitted in her cross-examination that she has no birth certificate of her son Amit Kumar issued by an authority. According to her, her children were born in her house in village. All these facts show that the prosecution has not been able to prove by any cogent and convincing evidence that the prosecutrix was a minor at the time of incident and she was taken away from the custody of

her guardians against her will.

15. For the reasons aforesaid, the Prosecution has failed to prove its case beyond reasonable doubt, the Appellants are entitled to the benefit of doubt. They are acquitted of the charges framed. The appeals are accordingly allowed. The impugned judgment of conviction and order on sentence are set aside. The Appellants are in custody. They be released forthwith by the Superintendent, Tihar Jail, if not required in any other case.

(MUKTA GUPTA)
JUDGE

JULY 06, 2010
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