

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

+ **CRL. APPEAL NO. 278 OF 2000**

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Reserved on: 2nd May, 2011

Decided on: 31st May, 2011

BRIJ PAL @ BAIJU

..... Appellant

Through: Mr. Sumeet Verma, Amicus Curiae.
versus

STATE

..... Respondent

Through: Mr. Manoj Ohri, APP for the State.

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. By this appeal the Appellant lays challenge to the judgment dated 6th October, 1999 convicting him for offence punishable under Sections 366/376 IPC and order on sentence dated 8th October, 1999 awarding the sentence of Rigorous Imprisonment for a period of seven years and a fine of ₹2,000/- and in default of payment of fine to further undergo Rigorous Imprisonment for a

period of six months for offence punishable under Section 376 IPC; three years Rigorous Imprisonment and a fine of ₹1,000/- and in default of payment of fine to further undergo Rigorous Imprisonment for a period of three months for offence punishable under Section 366 IPC.

2. Briefly the prosecution case is that PW 2 Smt. Kamal Sharma, mother of the prosecutrix lodged a missing report of her daughter vide DD No. 54B Ex. PW 2/B on 31st March, 1998. Thereafter on 2nd April, 1998 the Complainant lodged a complaint Ex PW2/A against the Appellant stating that he used to reside in their neighbourhood at Mahavir Enclave and is a native of village Hamirpur, District Farukabad. He had induced and taken away her daughter with him and thus an FIR was registered on the said complaint. PW2 in her testimony before court has further stated that she had gone to the village of the Appellant after 3-4 days alongwith 2-3 relatives and brought back her daughter from there. On coming to know that the Complainant had come in search of her daughter, the Appellant had run away from his house at that time. She produced the prosecutrix on 4th April, 1998 whereafter the statements of prosecuterix were recorded including one under Section 164 Cr.P.C. and her medical examination was got conducted. Subsequently, the Appellant was arrested on 5th July, 1998 from his native village. During investigation the school leaving certificate of the prosecutrix was seized

Ex.PW3/A which bore her date of birth as 22nd May, 1986. After completion of investigation, a charge-sheet was filed. After recording the statements of witnesses and examining the accused under section 313 Cr.P.C. the Ld. Trial Court convicted and sentenced him as aforesaid.

3. Learned counsel for the Appellant contends that as per the history given in the MLC by the prosecutrix herself has stated that she had eloped with the Appellant on 30th March, 1998 in a bus of her own free will. The date of birth of the prosecutrix, as per the school leaving certificate was rejected by the learned Trial Court as it was not based on any contemporaneous record. The age of the prosecutrix according to the school leaving certificate as on the date of incident was around 12 years whereas at the time of incident, the Prosecutrix was more than 16 years of age. Despite the advice of the doctor in the MLC Ex.PW7/A the prosecutrix did not get the ossification test conducted and thus an adverse inference should be drawn against the prosecution. The defence has proved the marriage certificate and since the parties have married of their own free will and the prosecutrix was more than 16 years only an offence under Section 376 (1) IPC is made out. Thus, the sentence awarded by the learned Trial Court could not have been more than 2 years imprisonment. The testimony of the mother of the prosecutrix cannot be relied upon as in her cross examination she has exaggerated by stating that the

Appellant came to their house along with 2-3 persons and gave a call and after she opened the door he put a knife on her and took away her daughter. This was neither stated in the complaint nor anything on similar lines has been deposed by the prosecutrix. It is contended that the consent of the prosecutrix is evident from the fact that though she was admittedly taken in bus yet she did not raise any hue and cry. The consent is further evident from the history given by her in the MLC. It is thus prayed that the Appellant be acquitted of the charges framed or in the alternative the sentence be reduced as stated above.

4. Learned APP for the State on the other hand contends that Section 376 (1) IPC would not be applicable to the facts of the case as the Appellant had to prove a valid legal marriage which onus has not been discharged by him. Moreover, no suggestion has been given to the prosecutrix that the marriage was performed first and thereafter sexual intercourse was committed on her. According to the learned APP for the State, the learned Trial Court wrongly rejected the Principal's testimony who had brought the register and thus proved the age of the prosecutrix. Even in the MLC the age given by the prosecutrix is 14 years consistent with the school leaving certificate and the statement of the mother. The Appellant in his statement recorded under Section 313 Cr.P.C. in reply to the question of the Court that he had taken the

prosecutrix from her house to Hamirpur in a bus, confined her in a room and committed rape on her, has replied that the prosecutrix had gone with him to his village as she wanted to marry him and he had also committed sexual intercourse with her consent. Thus neither the provision of Section 376 (1) IPC is applicable nor the Appellant is entitled to be acquitted of the offence under Section 376/366 IPC because the prosecutrix was below 16 years and thus her consent was immaterial. According to the learned APP no case for reduction of sentence is made out as the Appellant has not brought out any adequate or compelling reasons to reduce the same.

5. I have heard learned counsel for the parties and perused the record. PW 1, the prosecutrix has stated that the Appellant used to visit her house and in the month of March, 1998 he asked her to accompany him to his house but she refused. Thereafter he threatened her on the point of knife and asked her to accompany him to his house. At about 10.30 P.M. on 30th March, 1998, the Appellant took her to Village Hamirpur, Farukhabad, U.P. by bus where he confined her in a room and committed rape on her two-three times. Then her mother and uncle came there and recovered her. The prosecutrix has admitted in the cross-examination that she did not tell to any passenger, driver or conductor that the Appellant was taking her forcibly. The MLC Ex.PW7/A in the history given by the prosecutrix herself records that she had eloped with

the boy namely Brijpal on 30th March, 1998 and he had intercourse with her six-seven times. Thus there is contradiction in her statement. Though it was advised that X-ray of wrist, joint etc. of the prosecutrix be conducted for age confirmation, however, no effort in this regard had been made by the investigating agency. As per the testimony of PW3 Asha Sharma, Principal, Government Girls School, Bindapur, Janakpuri, Delhi the date of birth of the prosecutrix was recorded as 22nd May, 1986. However, she could not produce any record or the document on the basis of which the said date of birth was recorded. Thus, the date of birth mentioned in the school leaving certificate is without any contemporaneous document showing the true date of birth of the prosecutrix. Learned Trial Court after appreciating the evidence arrived at the conclusion that the age of the prosecutrix was 14 years on the basis of the statement made by the mother and the prosecutrix in her MLC and in the Court. Even if taking that the age of the prosecutrix as shown in the school record is not based on any contemporaneous record, however the fact remains that whenever age is recorded in the school at the time of admission an error of one or two years on either side may exist but the same cannot be a difference of four years. Thus, even if giving that marginal benefit of two years, the prosecutrix's age was not more than 16 years.

6. Hon'ble Supreme Court in *AIR 2006 SC 508 Vishnu Vs. State of Maharashtra* has held that the ossification test cannot form the basis of determination of age of the prosecutrix as it varies. Also, when the prosecutrix is not subjected to the ossification test, it cannot be said that the best evidence has not been placed on record by the prosecution. The ossification test is not the best evidence to determine the age the opinion is based on the fusion of joints in the human body and there is always a possibility of an error of +/- 2 years in such determination.

7. To bring the offence under the provisions of Section 376 (1) IPC the onus was on the Appellant to discharge. No valid marriage has been proved by the Appellant. He has not produced any witness nor has he substantiated this claim on the basis of any other legal documents. In the absence of the said proof it cannot be said that the marriage was performed and the Appellant can only be said to have committed the offence of rape on his wife.

8. The factum of sexual intercourse has been admitted by the Appellant. Thus, the issues which arises for consideration before this Court is whether the same was with the consent of the prosecutrix and whether she was legally competent to consent. In view of the discussion above since the age of the prosecutrix was less than 16 years on the date of commission of offence therefore, her consent was immaterial. I find no error in the order of the

learned Trial Court convicting the Appellant for offences punishable under Sections 366/376 IPC.

9. The quantum of sentence has to be decided on the basis of the facts and circumstances of each case, the mitigating and the aggravating factors have to be considered and thereafter the delicate balance has to be arrived at. While exercising the discretion for awarding sentence below the statutory minimum, adequate and special reasons are to be noted. In the present case the MLC of the prosecutrix, wherein she has given the history herself, says that she had willingly gone with the Appellant. Her subsequent conduct of not informing anybody or raising any alarm while she was on the bus also shows that she had willingly accompanied the Appellant. Thus, all these factors persuade this Court to take a lenient view in the matter by awarding sentence less than the minimum prescribed. The Appellant has been in custody for more than four years now and it would be thus in the interest of justice to reduce the sentence of imprisonment awarded to the Appellant to the period already undergone.

10. The appeal is accordingly, partly allowed. While maintaining the conviction of the Appellant for offence punishable under Sections 376/366 IPC the sentence is modified to the period of imprisonment already undergone.

11. Copy of the order be sent to the Appellant through the Superintendent, Tihar Jail and the Appellant be released forthwith if not required in any other case.

MUKTA GUPTA, J

MAY 31, 2011

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