

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

Judgment reserved on: May 24, 2011
Judgment delivered on: June 02, 2011

+ **CRL.A.No.435/2010**

SHRI CHAND

....APPELLANT

Through: Ms. Rakhi Dubey, Advocate

Versus

STATE

.....RESPONDENT

Through: Ms. Fizani Husain, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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 Digest ?

AJIT BHARIHOKE, J.

1. This appeal is preferred against the impugned judgment of learned Additional Sessions Judge dated 07.08.2009 in Sessions Case No.62/2008, FIR No.71/2007 under Section 363, 366 and 376 IPC P.S. Najafgarh whereby the appellant has been convicted on the charges under Section 363, 366, 376 IPC as also the consequent order on sentence dated 10.08.2009.

2. Briefly put, case of the prosecution is that on 28.01.2007, PW4 Smt. Lalo Devi, mother of the prosecutrix visited P.S. Najafgarh and lodged her complaint Ex.PW4/A alleging therein that the prosecutrix went missing in the evening of 15.01.2007. A missing report in this regard was lodged at P.S. Najafgarh by her husband on 16.01.2007 morning vide DD No.14A. Lalo Devi alleged in the complaint that the appellant was living as a tenant in the portion of her house along with his family. His wife and children at the relevant time had gone to their native place in Bihar. The appellant did not turn up on 16.01.2007. Complainant further alleged that she searched for her daughter and the appellant, but they could not be traced. On 28.01.2007, prosecutrix returned home and from her she came to know that the appellant had enticed her and kidnapped her with the intention to marry her. It was also alleged in the complaint that the prosecutrix was perplexed and afraid and she would be produced before the police on the next day.

3. On the basis of said statement of Lalo Devi, formal FIR under Section 363/366 IPC was registered and the investigation was entrusted to SI Nirmala Sharma (PW14), who recorded statement of the prosecutrix under Section 161 Cr.P.C. wherein she disclosed that on 15.01.2007, the appellant took her to village Kakrola on the pretext that her mother was calling her. There, he kept her in a rented house and had forcibly sexual intercourse with her and threatened that in the event of her leaving that

room or informing anyone, he would kill her. On 28.01.2007, on getting an opportunity, she escaped from that room and came home and disclosed her experience to her parents. SI Nirmala Sharma moved an application and got statement of the prosecutrix recorded under Section 164 Cr.P.C. Prosecutrix was also sent for medical examination and her MLC Ex.PW9/A was obtained. The examining doctor took the nail clippings, pubic hair, vaginal swab as well as undergarments of the prosecutrix into possession and sealed the same. Those sealed packets were handed over to the Investigating Officer. Exhibits were sent for chemical analysis to FSL. Statements of the witnesses were recorded. On completion of the investigation, appellant was challaned and sent for trial.

4. Learned Additional Sessions Judge charged the appellant for offences under Section 363, 363 and 376 IPC. Appellant pleaded not guilty to the charge and claimed to be tried.

5. In order to bring home the guilt of the appellant, prosecution examined 15 witnesses.

6. Prosecutrix appeared as PW1. She testified that she had studied upto 6th Standard. On 15.01.2007 at around 8:00 pm, appellant Shri Chand came to her house and told that her mother was calling her. On this, she accompanied the appellant on a cycle and he took her to village Kakrola where he rented a room and kept her there. She further stated

that in the said room, appellant raped her and forcibly married her. Learned APP, with the permission of the court, cross examined the prosecutrix wherein she stated that the appellant threatened her that if she tried to leave the room or told anybody about the rape, he would kill her. The prosecutrix further stated that on 28.01.2007, she managed to escape from said room and reached her home and narrated the incident and her experience to her parents, who called the police and that police got her medically examined. She also stated that her statement under Section 164 Cr.P.C. was recorded by the Magistrate.

7. PW2 Ganesh Kamti is father of the prosecutrix. He testified that the appellant was a tenant in a portion of his house since a year prior to 15.01.2007. He also stated that on 15.01.2007 at about 7:45 pm, he noticed that the prosecutrix was missing. He searched for the prosecutrix and when she could not be found, he lodged a missing report Ex.PW2/A at P.S. Najafgarh. In the morning of 28.01.2007, prosecutrix returned. When he asked her as to what had happened, she told that the appellant had forcibly taken her away under the threat that if she declined to accompany him, he would kill her family members. PW2 Ganesh Kamti further stated that at the time of incident, age of the prosecutrix was about 14 years and 09 months. When the police asked him to give proof of birth of his daughter, he handed over school leaving certificate to the police. He has proved the photocopy of school leaving certificate mark

`A' and stated that the certificate was seized by the police vide memo Ex.PW2/C.

8. PW4 Lalo Devi, complainant is another important witness. She has also reiterated the version of PW2 Ganesh Kamti regarding the missing of the prosecutrix and lodging of missing report. She further stated that on 28.01.2007 prosecutrix returned back. She was under fear and she told that the appellant had taken her away. On this, she went to the Police Station and lodged the complaint Ex.PW4/A.

9. PW11 Hari Narain stated that he had rented a room at village Kakrola to the appellant Shri Chand who had brought a girl along with him. He stated that appellant introduced said girl as his wife and they both resided in the said room for a fortnight. In his cross-examination by the learned prosecutor, the witness gave the name of the prosecutrix as the girl who had accompanied the appellant.

10. PW8 Satbir Singh, a Teacher from GGSS School, Khera, Najafgarh deposed on the basis of admission register of the school and stated that the prosecutrix was admitted in the school on 08.04.2003 vide entry at Serial No.1157 and her name was struck off from the roll on 29.07.2004 due to long absence and parents' consent. He proved the relevant extract of register Ex.PW8/A and also photocopy of the school leaving certificate Ex.PW8/B.

11. The appellant in his statement under Section 313 Cr.P.C. denied the prosecution version in totality and gave following explanation:

"I am innocent. I was a tenant under the father of prosecutrix/victim. His father was a property dealer. I have also paid him some money for purchasing a plot. When I asked for my money he beat my wife and due to this fact only I have been falsely implicated in this case".

12. Vide order dated 12.03.2009, learned Additional Sessions Judge directed the ossification test of the prosecutrix to be got conducted at RTRM Hospital, Jaffarpur, Najafgarh.

13. Appellant examined Dr. L.R. Richhele as DW1 who testified that on examination of the X-ray plates of the prosecutrix Ex.DW1/2, he is of the opinion that the bone formation of the prosecutrix is suggestive of her bone age between 18 to 19 years.

14. Learned Additional Sessions Judge on consideration of the evidence found the appellant guilty on all the three counts and convicted and sentenced him for the offences under Section 363, 366 and 376 IPC.

15. Learned Ms. Rakhi Dubey, Advocate appearing for the appellant submits that prosecution case is based on sole testimony of the prosecutrix who is not a reliable witness and her evidence leads to an inference that this is a case of consensual sex. Expanding on the argument, learned counsel submitted that the prosecutrix claims in her

cross-examination that while she was detained in a rented room at Village Kakrola, she told about her plight to the wife of the landlord. She also stated that on 28.1.2007, she escaped from the said room with the help of a lady. Learned counsel argued that neither of those ladies have been examined by the prosecution to substantiate her version. This casts a shadow of doubt on the version of the prosecutrix. Learned Ms.Rakhi Dubey further contended that as per the version of the prosecutrix, she was taken away by the appellant on a false pretext that her mother was calling her, which version also is not reliable for the reason that PW-11 Hari Narain has testified that when the appellant took the room on rent from him, he was accompanied by the prosecutrix whom he introduced as his wife. Learned counsel argued that if the prosecutrix was persuaded by the appellant to accompany him on the false pretext that her mother was calling her, she, under the natural course of circumstances, was expected to protest before PW-11 Hari Narain when the appellant introduced her as his wife. Learned counsel has urged that this circumstance clearly shows that the prosecutrix had accompanied the appellant of her own accord and the story of misrepresentation made by the prosecutrix is false. Learned counsel also referred to the report of Radiologist (Ex.DW-1/1) wherein the Radiologist has opined that on examination of X-Ray plates of the prosecutrix on the basis of bone formation, he was of the opinion that the prosecutrix, on the date of

medical examination, was between 18-19 years. Learned counsel contended that in view of the aforesaid medical report, the prosecutrix was aged more than 16 years and this being the case of consensual sex, no offence under Section 376 IPC is made out. She also argued that since the prosecutrix had attained sufficient age of majority and she had gone along with the appellant of her own, even the offence under Section 363/366 IPC is not made out.

16. Learned APP, on the contrary, has argued in favour of the impugned judgment. She contended that the prosecution has been able to establish that the prosecutrix was below 16 years of age at the time of the incident. In support of this contention, she has referred to the extracts of admission and withdrawal register of the school of the prosecutrix wherein her date of birth is recorded as 02.04.1992 which imply that on the date of incident on 15.01.2007, the prosecutrix was less than 15 years old. Learned APP contended that the bone age test is not a conclusive test for the age of the prosecutrix and it cannot take precedence over the date of birth entered in the school record. Learned APP referred to the suggestion given to the prosecutrix in her cross-examination that appellant had sex with the prosecutrix with her consent and submitted this amounts to deemed admission of correctness of prosecutrix version. It is contended that once it is established that the appellant had sex with the prosecutrix, her consent becomes immaterial for the reason that the prosecutrix was

less than 16 years of age. Thus, it is vehemently urged that the charge under Section 376 IPC is established. Learned APP further submitted that from the statement of the prosecutrix, it is also established that the appellant had taken her away from the custody of her parents on false pretext, as such the charges under Section 363 and 366 IPC are made out.

17. I have considered the rival contentions and perused the record.

18. Case of the prosecution is essentially based upon the testimony of the prosecutrix who appeared as PW1. She has testified that on 15.01.2007, appellant Shri Chand came to her house and falsely represented her mother was calling her. Thereafter, he took her to village Kakrola where he hired a room and kept her there till 28.01.2007 when she managed to escape. During her stay at Kakrola, she was raped by Shri Chand. Aforesaid version of the prosecutrix does not inspire confidence for the reason that PW11 Hari Narain, landlord of the room at village Kakrola where the prosecutrix was kept by the appellant from 15.01.2007 till 28.01.2007 has testified that on the relevant day, appellant came with the prosecutrix to take the room on rent and he introduced the prosecutrix as his wife. If the prosecutrix was taken away from the custody of parents by the appellant on the false pretext that her mother was calling her, under the natural course of circumstances, when she was introduced to the landlord as wife of the appellant, it was

expected of her to protest and tell Hari Narain that she had been brought by the appellant on a false pretext. This, however, is not the case. Thus, in my view, the story of the prosecutrix regarding kidnapping is not reliable. Further, prosecutrix in her cross-examination testified that on 15.01.2007 after leaving her in the room, the appellant went away on a cycle and he came back in the morning at around 9:00 am and brought some food. She also testified that she had complained against the appellant to the landlady by going to the adjacent room. In her further cross-examination, the prosecutrix stated that on 28.01.2007, she managed to escape from the said room with the help of one another lady, who unbolted the room from outside and who used to reside at a distance of 25 paces from the room in which the prosecutrix was confined. Neither the landlady nor the other lady who helped the prosecutrix in escaping have either been cited or produced as witnesses. This circumstance also go against the case of the prosecution. Further, perusal of DD No.9A dated 28.01.2007 P.S. Najafgarh (Ex.PW7/A) reveals that on 28.01.2007 at about 8:30 am, Amarjit brother of the prosecutrrix reported to the police station that the prosecutrix had returned back after visiting some relations. Despite that, prosecutrix has not cared to either cite or examine said Amarjit to clarify as to what was the source of aforesaid information provided by him to the police. His non-production in evidence has also deprived the appellant of his valuable right to cross-

examine him and bring the true facts on record. Thus, under the circumstances, I do not find the version of the prosecutrix regarding her kidnapping by the appellant worthy of reliance and it appears that the prosecutrix left the house of her parents by her own accord and this is a case of consensual sex. Doubt against the correctness of prosecutrix version is further compounded by the fact that in the FIR which is based on the statement Ex.PW4/A of mother of the prosecutrix Lalo Devi, there is no allegation of rape.

19. Learned APP has referred to the extract Ex.PW8/A of the relevant entry pertaining to date of birth of the prosecutrix in the admission and withdrawal register of GGSS School, Khera, Najafgarh as also the copy of the school leaving certificate Exhibits PW8/B and submitted that from the aforesaid documents, it is established that the date of birth of the prosecutrix is 02.04.1992. The incident occurred between 15.01.2007 to 28.01.2007. Therefore, at the relevant time, the age of the prosecutrix was slightly below 15 years. Learned APP has referred to the definition of rape given under Section 375 IPC and submitted that as per this definition sexual intercourse with the girl below sixteen years of age, with or without her consent amounts to rape. Thus, it is contended that even if it is a case of consensual sex, the appellant is guilty of rape and he has been rightly convicted for the offence under Section 376 IPC.

20. I am not convinced with the above argument. Admittedly, birth of the prosecutrix was not registered with the municipal authorities. The entry regarding date of birth of the prosecutrix obviously is on the basis of information supplied by the parents of the prosecutrix. PW2 Ganesh Kamti, father of the prosecutrix has stated that he does not remember the date of birth of his daughter. Similarly, PW4 Lalo Devi, mother of the prosecutrix has stated that the prosecutrix was aged about 14 to 15 years at the time of occurrence. From the aforesaid version of the parents of the prosecutrix, it is obvious that they being illiterate persons are not definite about the date of birth of the prosecutrix. Therefore, it can be safely assumed that the date of birth recorded in the school register has been given as per approximation. In absence of definite proof of age of the prosecutrix, the learned Additional Sessions Judge had directed the ossification test of the prosecutrix. DW1 Dr. L.R. Richhele has proved his opinion regarding bone age of the prosecutrix on the basis of the examination of X-ray plates as DW1/1. As per the aforesaid report as on 18.03.2009, the age of the prosecutrix was between 18 to 19 years. It is well settled that in a criminal trial, if there are two opinions possible the opinion favourable to the accused is to be given precedence. Thus, the age of the prosecutrix as per the report is taken as 19 years as on 18.03.2009. Calculated backward, the age of the prosecutrix was to above 16 years at the relevant time between 15.01.2007 to 28.01.2007.

21. In view of the above, I do not find it safe to rely upon the testimony of the prosecutrix and a possibility cannot be ruled out that she of her own left the house of her parents and accompanied the appellant to village Kakrola and stayed there with him as his wife. Thus, I find it difficult to sustain the conviction of the appellant on either of the charges under Section 363, 366 and 376 IPC.

22. Accordingly, the appeal is accepted. Impugned judgment and consequent order on sentence are set aside and the appellant is acquitted giving him benefit of doubt.

23. Appellant is reported to be in Jail. He is directed to be released forthwith, if not required in any other case.

24. Appeal stands disposed of.

(AJIT BHARIHOKE)
JUDGE

JUNE 02, 2011

pst/ks