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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Hearing & Decision: 26th August, 2011

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CRL. L.P. 240/2011

STATE NCT OF DELHI

..... Petitioner

Through: Ms. Richa Kapoor, APP for the State.

versus

RISHI PAL

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

1. Whether reporters of local papers may be allowed to see the Order?
2. To be referred to the Reporter or not?
3. Whether the Order should be reported in the Digest?

J U D G M E N T

G. P. MITTAL, J (OPEN COURT)

1. The State seeks leave to file an appeal against a judgment dated 30.04.2010 passed by the Addl. Sessions Judge in Sessions Case No.139/2009 whereby the Respondent Rishi Pal (the accused) was acquitted of the charge for the offences punishable under sections 376/ 328/ 506/ 363 Indian Penal Code (IPC).
2. In a nut shell, the prosecution case is that on 27.06.2006 the complainant Ranbir Singh (prosecutrix's father) reached Police Station (PS) Narela reported that his

- daughter aged about 14 years had left the home on 21.06.2006 at about 6 P.M. He (the complainant) searched for his daughter but without any success. He informed the Duty Officer that he suspected that his daughter had been kidnapped by said Rishi Pal, a boy living in the neighbourhood.
3. The investigation was assigned to SI Mahender Singh PW-11 (IO). The IO received a secret information that the prosecutrix "S" and the accused (Rishi Pal) were likely to come to old Delhi railway station (the railway station). He (the IO) along with the complainant reached the railway station. At about 3:30 P.M. Rishi Pal and "S" were seen coming out of the railway station. "S" was recovered from the accused. Statement under section 161 Criminal Procedure Code (Cr.P.C.) of "S" was recorded. The accused was interrogated and then arrested. The prosecutrix and the accused were medically examined. On medical examination the doctor did not notice mark of any struggle. The hymen was not seen. Ossification test of "S" was conducted and the bone age of the prosecutrix was estimated to be between 16 to 17 years. After completion of the investigation a report under Section 173 Cr.P.C. was filed against the accused.
 4. On accused's pleading not guilty to the charge, the prosecution examined 13 witnesses.
 5. PW-1 Ranbir Singh is the complainant and prosecutrix's father. He deposed that on 21.06.2006 at about 6:00 P.M. his daughter "S" went to Narela to buy some vegetables. She did not return till 8:30 P.M. He made inquiries from his wife's sister and in the market. It was revealed that the prosecutrix was seen in the market (at Narela) at 9:00 P.M. Thereafter she was not seen. He testified that on 21.06.2006 at about 11:00 A.M., he went to PS Narela and lodged a report suspecting the accused. The complainant then deposed about arrest of the accused and recovery of the prosecutrix from the railway station.
 6. PW-2 is the prosecutrix. She deposed that one day perhaps it was 27th, she went to Narela Mandi to purchase vegetables. The accused met her and gave her *prasad* in the form of a *Rasgulla*, after eating which she became unconscious.

The accused took her to his aunt's (*Bua*'s) house at Shamli (U.P.). He did *galat kaam* with her. After one day the accused took her to Dehradun and kept her there for 2 – 3 days in a rented room and had sexual intercourse after threatening her with a knife. She deposed that the accused took her to the jungle/ hilly area and raped her. He spent his money and brought her back to Delhi by a train. At the railway station, they were apprehended by the police.

7. In order to give him an opportunity to explain the incriminating evidence produced by the prosecution, the accused was examined under Section 313 Cr.P.C. He denied the prosecution allegation, and stated that he was in love with the prosecutrix. On 21.06.2006 the prosecutrix herself expressed her desire to go out and spend some holidays together. On 21.06.2006 they went to Shamli. On 22.06.2006 on the prosecutrix desire they went to village Khusalpur District Saharanpur at his friend's house. They returned to Delhi on 26.06.2006. On reaching Narela Shiv Bhagwan, Pradhan informed them that the prosecutrix's father (the complainant) was about to lodge a false complaint against them. They went to Police Station Narela. The police called the prosecutrix's father, who asked him to marry the prosecutrix. He refused as he was already married. The prosecutrix was threatened and scolded by her father at the Police Station. She was also slapped by the police official. The accused took the plea that the prosecutrix had deposed falsely against him under pressure of her father and that she had accompanied him of her own free will and consent.
8. The accused examined Smt. Darshan (the accused's *Bua*) as DW-1. She testified that on 21.06.2006 the accused came at her house with the prosecutrix. He told her that he was in love with the prosecutrix. They were served dinner. Next morning the accused and the prosecutrix went to Dehradun. She deposed that prosecutrix was fully conscious and active while she was at her house.
9. By impugned judgment the Trial Court acquitted the accused of all charges holding that there was no documentary evidence regarding the prosecutrix's age. The oral evidence adduced was contradictory and as per ossification test her age

was between 16 to 17 years. The Trial Court held that the prosecutrix had accompanied the accused of her free volition and had sexual intercourse with him of her free will. The Trial Court disbelieved the prosecutrix that she was given any *Rasgulla* (laced with any sedative). The Trial Court opined that if the prosecutrix was not a consenting party, she had the opportunity to raise an alarm while she was travelling in a Jeep, in a Tractor and on foot from one place to another i.e. at Shamli, Dehradun, etc. The Trial Court further held that as per ossification test, the age of the prosecutrix was between 16 to 17 years. The accused was entitled to the benefit of two years as per the law laid down by the superior courts. The Trial Court relied on *Narender Singh v. State of M.P.*, (1996) CrL. L. J. 198; *Jaya Mala v. Home Secretary, Government of J & K*, AIR 1982 SC 1297.

10. Ms. Richa Kapoor, learned APP argues that the Trial Court committed an error in drawing an inference that the prosecutrix was a consenting party simply on the ground that the prosecutrix had travelled from one place to another in the accused's company. It is contended by the learned counsel that once the doctor said that the margin of age was between 16 to 17 years, no further concession could have been given to the accused and, therefore, even if the accused was not guilty for the offence punishable under Section 376 IPC, he was surely liable under Section 363 IPC as a girl cannot attain majority before completion of the age of 18 years for the purpose of Section 363 read with Section 361 IPC. The reasoning given by the Trial Court for disbelieving the prosecution version is extracted hereunder: -

“13. PW-2 “S”, prosecutrix could not give the month and year of the incident. She gave the date of incident as 27th while as per prosecution case, the incident is dated 21.06.2006. She stated that she had gone to Narela Mandi for purchasing vegetables. Accused met her and gave her Rasgulla as Prasad and after eating the Rasgulla, she became unconscious. She was taken by the accused to his aunt's (Bua) house where he did “Galat Kaam” with her. According to her, Bua of accused lives in Shamli, UP and that when she was being taken to Shamli, at a place, some police persons were present but on seeing them,

accused threatened her to pose as his sister and she did the same. She further stated that accused kept her at his Bua's house for one day and thereafter took her to Dehradun and kept her there for 2-3 days where again he did "Galat Kaam" with her showing knife. She deposed that accused had taken a room on rent and paid ₹ 500/- as advance. She was kept in the room for two days where accused made sexual intercourse with her without her consent. She further deposed that accused then took her to a jungle/ hilly area and again committed rape on her. After he finished money, he took her back to Delhi in a train. Accused wanted to leave her at Old Delhi Railway Station but was caught by the police. In cross examination, she stated that she had gone to Narela Mandi without informing her parents. She further stated that her father was not at home at that time and that her mother gave her ₹ 100/- to bring vegetables. She further stated that she knew the accused about one and a half months prior to the incident as he was residing in a rented accommodation near to her house. She denied having stated to the police that she knew the accused since last 5-6 months. She was confronted with previous statement Exbt. PW-2/DA given to the police, where it is so recorded. She further stated that she cannot tell as to how the accused took her from Narela Mandi as she was unconscious. According to her, she regained her consciousness after two days and came to know that accused had taken her to his Bua's house after three days when he himself stated so to her. She further stated that she was fully conscious on the way but later improved by stating that she was semi-conscious and accused was holding her hand. She then stated that she was taken to the house of Bua of accused in a jeep from Narela and that jeep was being used to ferry passengers and that two persons were sitting in the jeep at that time. She further stated that she was unable to raise alarm as her mouth was tied with a handkerchief. She could not tell as to how many vehicles were changed from Narela to the house of Bua of accused at Shamli. She could not tell as to how much time and how many days it took them to reach Shamli. She further stated in cross examination that she was not conscious of the fact that her mouth was tied with a handkerchief. She denied that she had not stated in her statement under Section 161 Cr.PC before the police or under Section 164 Cr.PC before the learned MM that accused did "Galat Kaam" at his Bua's house. She was confronted with the statements Exbt. PW-2/A and Exbt. PW-2/D where it not so recorded. She stated in her cross examination that the size of the knife which the accused was having was 9-10 inches and that at the time of showing the knife, police persons were only at a distance of 4-5 feet. She admits that she did not tell the police personnels that she was being taken forcibly as she was already

threatened. She stated that she had seen a lady at the house of Bua of accused who was aged about 40-45 years. She further states that the Bua's house was surrounded by other houses. She admits that she did not tell the Bua of the accused that accused had kidnapped her as she was threatened by the accused. According to her, she was taken to Dehradun in a tractor and the tractor was taken from the bus stand. She stated that they had gone to bus stand on foot and it took them 15-20 minutes to reach the bus stand. According to her, they travelled in a trolley attached with a tractor.

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14. *It is quite evident from the testimony of prosecutrix (PW-2) that there are major improvements in her testimony, in as much as, in her previous statements given to the police and the learned MM, she did not state that accused had threatened her with knife or had committed "Galat Kaam" while showing her the knife. She had also not stated the fact that her mouth was tied with handkerchief either before the police or in her statement under Section 164 Cr.PC. There is also improvement in her testimony that the accused did "Galat Kaam" with her at his Bua's place. There is no averment either in the statement under Section 161 Cr.PC or under Section 164 Cr.PC of the prosecutrix that she was raped at the house of Bua of accused. Obviously, these are material improvements and the evidence regarding the commission of rape is at variance from what was recorded in her statement under Section 164 Cr.PC. In the case of **Ashok Kumar @ Bhura Vs. State of UP 1991 Criminal Law Journal 2895** in a case under Section 376 IPC the Hon'ble Court had found variance of material points between FIR and the statement made during trial. There was no corroboration in the testimony of the prosecutrix. The eye witnesses denied the occurrence of sexual assault. It was held that conviction on the sole testimony of prosecutrix was not proper.*

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15. *The testimony of the prosecutrix is inconsistent. She has not only made improvements but has also contradicted herself by changing her statement time and again. In court, she states that she knew the accused one and a half months prior to the incident but in the statement before the police, she stated that accused was known for the last 5-6 months to her. At one place in cross examination, she stated that she had gone to Narela Mandi without informing her parents but in the same breath, she states that her mother had given ₹ 100/- to her for purchasing vegetables. While*

lodging FIR, the father of the prosecutrix stated that prosecutrix had left the house without informing anyone but in his cross examination in court, he stated that he had given ₹ 100/- to his daughter for the purchase of vegetables. PW-1 states in cross examination that her daughter and accused were not known to each other but the prosecutrix states that she knew the accused since last about one and a half months of the incident. The statement given by prosecutrix in her cross examination that no one was present in the Mandi at about 6.00 – 6.30 pm at the cloth shop of the accused, appears to be improbable. It is difficult to accept that at the evening time, no person was present in Mandi which usually bristles with lot of crowd. At one place in her cross examination, prosecutrix states that she does not know as to how the accused took her from Mandi and that she had gained consciousness after two days but thereafter, changed her version by stating that she was taken to the house of Bua of accused in a jeep. At one place, she states that she came to know that accused had taken her to his Bua's house after three days when the accused himself stated so to her but in further cross examination, she stated that she had seen a lady aged about 40-45 years at the house of Bua of accused. She admits in cross examination that when she had left the house of Bua of accused in the morning, she was fully conscious but despite this, she did not tell the Bua of the accused that she was kidnapped by accused or he was threatening her. She made no resistance against accused taking her to Dehradun in a tractor. As per her own admission, the tractor was taken from the bus stand and that they had gone on foot to the bus stand. It appears that she made no effort to escape and made no hue and cry against her taking by the accused. There is a long distance between Shamli and Dehradun. She continued travelling with accused without any resistance. It appears that she did not complain to any person at Dehradun or at hills where she was kept by the accused. She made no complaint even to the two police personnels who were only at a distance of about 4-5 feet when she noticed them in Shamli. Her explanation that she was threatened by accused by showing her knife is not acceptable as the prosecutrix had sufficient opportunity to escape and complain against accused to the police officials and other people. The conduct of the prosecutrix is suspicious and it appears that she herself was willing to accompany the accused. On scrutiny of her evidence, it becomes clear that she neither offered any resistance or raised any alarm. On the contrary, it appears that she accompanied the accused in the jeep, tractor and train.....”

11. PW-6 Dr. Shipra Rampal conducted ossification test to determine the prosecutrix's age. After examining the X-ray plates, she estimated prosecutrix's bone age to be between 16 to 17 years. Her testimony was not challenged in cross-examination. It was not put to her that any further concession could be given in the estimation of the age. In the case of *State of U.P. v. Chhotey Lal*, 2011 (2) SCC 550, the Supreme Court deprecated the practice of adding two years in the age of the prosecutrix opined on the basis of radiological examination. In para 13 the Supreme Court observed as under: -

"13. We find ourselves in agreement with the view of the trial court regarding the age of the prosecutrix. The High Court conjectured that the age of the prosecutrix could be even 19 years. This appears to have been done by adding two years to the age opined by PW 5. There is no such rule much less an absolute one that two years have to be added to the age determined by a doctor. We are supported by a three-Judge Bench decision of this Court in State of Karnataka v. Bantara Sudhakara wherein this Court at SCC p. 41 of the Report stated as under: (SCC para 12)

"12. Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years age has to be added to the upper age-limit is without any foundation."

12. Thus addition of two years by the High Court in the age of 17 years on the basis of ossification test was disproved by the Supreme Court. Therefore, in the absence of any challenge to PW-6's testimony determining the prosecutrix's age to be between 16 to 17 years, we feel that the Trial Court ought not to have ventured to give the benefit of two years in the age of the prosecutrix.
13. We are unpersuaded to find any fault with the reasoning of the Trial Court that the prosecutrix's testimony regarding administering *Rasgulla*, threatening her at knife point and committing rape on her are completely unbelievable. We do agree with the Trial Court that the prosecutrix's testimony was contradictory to her version as given in the statement to police under Section 161 Cr.P.C. and statement made to the Magistrate under Section 164 Cr.P.C. From the evidence adduced on

record, it appears that the prosecutrix planned to flee sometime with the accused and that is why she did not raise any alarm while going from one place to another, travelling in a Jeep or in a Tractor or while living in a rented room. Thus the Trial Court rightly held that the charge for the offences punishable under Section 376/ 328/ 506 IPC was not proved against the accused beyond reasonable doubt.

14. As far as prosecutrix's kidnapping from the lawful guardianship of her parents is concerned, it is true that the prosecutrix was aged about 16 to 17 years and thus less than 18 years. We have to find out the import of the words "taking away" and "enticing" to form an opinion of the accused is guilty of the offence punishable under section 363 IPC. These words were interpreted by the Supreme Court in *S. Varadarajan v. State of Madras*, AIR 1965 SC 942. It was held that a reference to Section 361 will show that taking or enticing away a minor out of the custody of a lawful guardian is an essential ingredient of the offence of kidnapping. The Supreme Court observed that it must be borne in mind that there is a distinction between taking and allowing a minor to accompany a person. The two expressions are not synonymous with each other for the purpose of Section 361 IPC. Where the minor alleged to have been taken by the accused, left her father's protection knowing and having accepted to know the full import of what she was doing, voluntarily joined the accused, the latter cannot be said to have taken her away from the keeping of her lawful guardian. It was held that something more had to be shown i.e. there has to be some kind of inducement held out by the accused or an active participation by him in the formation of the intention of the manner to leave the house of the guardian. It is not the prosecution case that the accused in any way induced or persuaded the prosecutrix to leave the house of her guardian.
15. Similar observations were made by the Supreme Court in *Lalta Prasad v. State of M. P.*, (1979) 4 SCC 193 wherein it was held that when the prosecutrix aged about 18 years accompanied the accused of her free will, the offence of kidnapping or abduction was not committed. A reference is also made to *State of*

Haryana v. Raja Ram, 1973 Cr.L.J. 651 and *Shyam and Anr. v. State of Maharashtra*, 1995 Cr.L.J. 3974.

16. It is evident that the prosecutrix herself left the guardianship and willingly went with the accused to have his company. Applying the ratio of *S. Varadarajan, Lalta Prasad, Raja Ram* and *Shyam* (supra) it cannot be said that the prosecutrix was taken out of the lawful guardianship. Thus the finding of the Trial Court on this count too cannot be faulted.
17. The conclusion reached by the Trial Court is based on correct appreciation of law and does not call for any interference. It is well settled that the High Court entertain a review and a second look against an order of acquittal where there are substantial and compelling reason i.e. where the High Court finds that there is gross misreading of the evidence and non-application of law resulting into miscarriage of justice. None is found here. We are, therefore, not inclined to entertain the leave petition. The same is accordingly dismissed.

G. P. MITTAL, J.

S. RAVINDRA BHAT, J.

AUGUST 26, 2011

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