

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL 507/2009

% Judgment decided on: 21st January, 2011

ALI SHER @ RAJU

.....APPELLANT

Through: Mr. Rajesh Mahajan and
Ms. Satsheel Sheokand,
Advs.

Versus

THE STATE & ANOTHER

.....RESPONDENTS

Through: Mr. M.P. Singh, APP for the
State

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be
reported in the Digest? | No |

A.K. PATHAK, J. (Oral)

1. Appellant has been convicted under Sections 363/376 IPC by the Trial Court; sentenced to undergo rigorous imprisonment for seven years with fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for three months under Section 376 IPC; sentenced to undergo rigorous imprisonment for two years with fine of Rs.500/- and in default of payment of fine to undergo simple imprisonment for one and half months under Section 363 IPC.

2. It is this judgment which is under challenge in this appeal.

3. Prosecution case as unfolded is that one Sauraj Singh came to the Police Station Vasant Vihar on 11th October, 2006 and made a statement that his daughter (hereinafter referred to as the “prosecutrix”) aged about 14 years was missing from the house since 10th October, 2006. His neighbor Alisher @ Raju (appellant) was also missing. On his this statement FIR No. 491/2006 under Section 363 IPC was registered. Investigation was handed over to SI Pradeep Rawat. During the investigation he came to know that appellant and prosecutrix were in Agra. He along with Sandhya, aunt of the prosecutrix went to Agra on 17th October, 2006 and found prosecutrix and appellant present at the bus stand of Vidya Niketan Colony. On the pointing of Sandhya, appellant and the prosecutrix were apprehended. They were brought to Delhi. Medical examination of prosecutrix was conducted in Safdarjung Hospital. Hymen was found torn but no mark of injury was found on the body of prosecutrix.

4. Appellant was also medically examined in the same hospital. No marks of external injury were found on the body of the appellant as well. Doctor opined that there was nothing to suggest that appellant was not competent to perform sexual intercourse under normal circumstances.

5. Age of the prosecutrix was got determined through radiological examination by a medical board of doctors since no document could be produced by the parents of the prosecutrix in support of her age. After examining the x-ray plates of her wrist, elbow, shoulder and pelvis, doctors opined that age of the prosecutrix was between 14 to 16 years.

6. Statement under Section 161 Cr.P.C of the prosecutrix was recorded. It may be noted here that investigation of the case was handed over on 18th October, 2006 to Women Assistant Sub Inspector Kailash (hereinafter referred to as the "I.O.") who recorded the statement under Section 161 Cr.P.C of the prosecutrix. In her statement prosecutrix stated that appellant was her neighbor. He was married. Appellant and his wife used to quarrel almost daily. On 10th October, 2006 she was sad as her parents had reprimanded her. Appellant asked her as to why she was upset at which she narrated the entire story to him. He told her that he was also fed up with his wife. He suggested that they should go somewhere else and set up a new home. Appellant took her to Agra where they stayed in the house of a friend of appellant located in Vidya Niketan Colony. Appellant introduced her to them as his wife. Appellant did "bura kaam" with her for 2/3 days. While they were going to some other house police officials apprehended them at the bus stand.

7. On 19th October, 2006 statement of the prosecutrix was recorded under Section 164 Cr.P.C before Metropolitan Magistrate, Delhi wherein she stated that on 10th October, 2006 she was standing outside her house when appellant came there and took out one cloth from his pocket and waived it in front of her face. Thereafter, she followed him meekly. He took her to Agra. There he kept her in his friend's house. He gave beatings to her. He kept her there for several days. During this period he did "galat kaam" with her after removing his clothes and her clothes. When she objected to this he gave beatings to her. Appellant used to bolt the room from outside whenever he went out. One day she saw someone outside the room and called him. Said person opened the latch of the room and she went to a nearby STD booth. She rang up her aunt who brought the police officials with her to Agra.

8. Charges under Sections 363/376 IPC were framed by the Trial Court against the appellant to which he pleaded not guilty and claimed trial.

9. Prosecution examined eight witnesses in all to support its story. Prosecutrix has been examined as PW1. Her father Sauraj has been examined as PW4. Her aunt Sandhya has been examined as PW2. SI Pradeep Rawat has been examined as PW8. I.O. has been examined as PW5. Dr. G.A. Sunil has been examined as PW3. He has deposed that the appellant

was potent to perform sexual intercourse. PW6 Dr. Garima had clinically examined the prosecutrix. She has proved her report as Ex. PW6/A. She has deposed that the possibility of rape and sexual assault cannot be ruled out. PW7 Dr. M.K. Wahi has proved bony age report as Ex.PW7/B. He was Chairman of the Board which had examined the x-ray plates and opined the age of prosecutrix above 14 years and below 16 years. He has deposed that margin of error of six months to one year on lower side of the age as well as on the higher side of the age is possible in such cases. All other witnesses are formal in nature being police officials having been joined with the investigation at one or the other stage.

10. After prosecution closed its evidence, statement under Section 313 Cr.P.C. of the appellant was recorded wherein entire incriminating material, which had come on record, was put to him. The case of the appellant is that of simple denial. He claimed that he had been falsely implicated on account of earlier quarrel between his wife and the prosecutrix. He has not led any evidence in his defense.

11. After scrutinizing evidence regarding the age of prosecutrix, Trial Judge has held that there was possibility that prosecutrix was above 16 years of age.

12. Learned Amicus Curiae has vehemently contended that age of the prosecutrix has to be taken 18 years after extending

benefit of two years on the higher end, as determined by the doctors through radiological examination. Conduct of the prosecutrix as emerges from the record indicates that she was a consenting party. Prosecutrix had accompanied the appellant and stayed with him for about seven days without raising any alarm or making any effort to escape which itself shows that she was a consenting party. During this period she had passed through crowded places and travelled by public transport without raising any alarm, She even did not complain to any person including her fellow passengers that appellant had been taking her with him forcibly. Prosecutrix has not deposed that appellant had threatened her by showing any weapon or otherwise and for this reason she had meekly accompanied him. Testimony of prosecutrix is discrepant as she has taken inconsistent stand at different stages. In nutshell, his contention is that prosecutrix being a consenting party, no offence of rape within the meaning of Section 375 IPC is made out against the appellant. Reliance has been placed on **Satish Kumar Vs. State (Delhi) 1987 (3) Times 597**. He has further contended that offence under Section 363 IPC is not made out since the prosecutrix had accompanied appellant voluntarily. Reliance has been placed on **S. Varadarajan Vs. State of Madras 1964 (1) SCR 243**.

13. Per contra, learned APP has vehemently contended that prosecutrix is a trustworthy and reliable witness. In her statement under Section 164 Cr.P.C as also while deposing in the Court, she has categorically deposed that appellant had taken her away against her wishes. She was made to smell one handkerchief. Thereafter, she lost her senses and accompanied the appellant without raising any alarm. Prosecutrix has deposed that she was confined in a room by the appellant, thus, there was no occasion for her to raise any alarm. One day, she saw a person outside the room who helped her in coming out of the room. She went to a STD booth and rang up her aunt and narrated the incident to her. Police officer was informed. Police officials along with aunt of the prosecutrix went to Agra and apprehended the appellant. In nutshell, contention of learned APP is that prosecutrix was not a consenting party.

14. I have considered the rival contentions of both the parties and meticulously scrutinized the evidence led before the Trial Court. First of all, it would be relevant to return a finding regarding age of the prosecutrix. In case, prosecutrix is found below 16 years of age her consent would be immaterial in view of clause sixthly of Section 375 IPC which provides that sexual intercourse with a woman under 16 years of age with or without her consent would amount to rape. In this case, no

documentary evidence was made available to the Trial Court regarding exact age of the prosecutrix. No ocular evidence is also there to conclusively indicate that the age of prosecutrix was below 16 years as on the date of incident. Only medical evidence is available in this regard. PW7 Dr. M.K. Wahi was the Chairman of the Board which had rendered opinion regarding the age of the prosecutrix on the basis of radiological examination. He has deposed that x-ray plates were examined by him and other members of the Board. From the physical, dental and radiological examination it was found that prosecutrix was above 14 years but below 16 years of age. At the same time he has admitted that there is possibility of margin of six months to one year error on lower side of the age as well as on the higher side of the age. Thus, it is clear that age of a person cannot be conclusively determined by radiological examination. Margin of error is always there. In **Jaya Mala Vs. Home Secretary, Govt. of Jammu & Kashmir & Ors. 1982 SCC 502**, it has been held that one can take judicial notice that the margin of error in age ascertained by such examination is two years on either side. In **Satish Kumar (Supra)**, Senior Radiologist had opined the age of the prosecutrix between 14 to 16 years. It was held that there can be existence of variation in the age on account of climatic, diabetic or hereditary factors extending upto one to two years, thus, age of the prosecutrix, could be between 17 to 18 years.

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In **Azim vs. State 2010 III AD (Delhi) 823**, as per the opinion of the doctor, who had examined the x-ray plates, age of the prosecutrix was above 14 and below 16 years. A Single Judge of this Court held that since there can be variation of up to two years in the bony age determined by examination of X-ray plates, the age of the prosecutrix could be up to approximately 18 years at the time she left the house of her parents. In this case no other evidence is available except report of PW7 according to which age of the prosecutrix was between 14 to 16 years. By giving benefit of margin of error of two years, the age of the prosecutrix can safely be taken as approximately 18 years. Thus, prosecutrix is to be taken as major as on the date of incident.

15. A perusal of testimony of prosecutrix makes it clear that she was a consenting party. Such inference can be drawn from her conduct. Prosecutrix has admitted that appellant was her neighbor. In her statement recorded on 16th October, 2010 she has nowhere stated that appellant had waived a cloth on her face and, thereafter, she followed him meekly till they reached Agra. Instead, she has stated that on 10th October, 2006 she was sad on account of scolding by her parents. Appellant came up to her and told that he was also fed up on account of quarrels with his wife and they should go somewhere and set up a new home. Thereafter, she

accompanied him to Agra where he kept her in his friend's house. She has admitted in her cross-examination that while she was travelling with the appellant from Delhi to Agra, as also during her stay with him for about seven days, she did not raise any alarm nor complained anyone that appellant had brought her forcibly and against her wishes. In her cross-examination, she has stated that from their house they went to bus stand in an auto rickshaw. Before boarding the auto rickshaw they had walked for about 10 minutes through the market. There were so many passengers at the bus stand as also in the bus. Bus reached Agra at about 2 am in the night. From the bus stand they went to the house where they stayed, on foot, which was at a walking distance of 5 to 10 minutes. Appellant asked her to stand outside the house while he went inside the house. He came back and took her inside the house. There was no toilet in the house. Her this statement clearly shows that she was a consenting party and had accompanied the appellant voluntarily. Prosecutrix walked with the appellant through the crowded market. At the bus stand lot of passengers were there. She travelled with the appellant in a crowded bus. Judicial note of the fact can be taken that at the railway station/bus stand presence of police officials can be noticed. In spite of this, she did not make any effort to raise alarm or to tell the people that appellant had been taking her against her wishes. In her statement under CRL. A. 507/2009

Section 164 Cr.P.C., she has stated that she was standing outside her house, when appellant came there and waived a cloth in front of her face where after she followed him. It is hard to fathom that she would have walked for about 10 minutes before boarding the auto rickshaw and thereafter travelled in the crowded bus and thereafter walked again for about 10-15 minutes in semi-conscious state. She has vividly described the way they reached Agra which also makes this story set up by her highly improbable. It is unlikely that such a detailed description can be given by a person who had been allegedly in semi-conscious state. Her conduct makes her a consenting party.

16. Prosecutrix has deposed that appellant used to bolt the room from outside whenever he went out. One day she saw somebody near the room and called him. He opened the door, thereafter, she went to a nearby STD booth and talked to her aunt Sandhya on telephone narrating her plight. Her aunt along with police officials came to Agra and apprehended appellant. However, her this statement is suspicious having remained uncorroborated from the testimony of PW2 Sandhya, who has nowhere deposed that she had received any call from the prosecutrix. The story propounded by the prosecutrix also fails to inspire confidence that she was confined in a room by the appellant. She has admitted that there was no toilet inside

the house. If that is so, then she had been going out to ease herself. Prosecutrix had stayed in the said house for about seven days. It cannot be said that during this period in spite of her going out for easing herself she had no opportunity to raise alarm or to escape. PW2 Sandhya has deposed that the prosecutrix was standing at the bus stand while appellant was purchasing something from a shop, before they were apprehended. There was lot of crowd at the bus stand. This shows that appellant had not kept the prosecutrix in his strict captivity and had given enough freedom to her, during which period she could have raised alarm.

17. Conduct of the prosecutrix meekly accompanying the appellant from her house to the bus stand in an auto rickshaw and, thereafter, to Agra in a bus, staying with him at Agra for a considerable long period without raising any alarm goes against her and an inference can safely be drawn that she was a consenting party. It is difficult to assimilate her failure to put up any resistance or struggle against the appellant in the public places to save herself, had she not been a consenting party.

18. For the forgoing reasons, I am of the view that Trial Court was not right in convicting the appellant under Section 376 IPC. Since the prosecutrix has been taken as major, therefore, no offence under Section 363 IPC is also made out. Even if

prosecutrix is considered below 18 years then also ingredients of offence 363 IPC would not be attracted in this case since the prosecutrix had accompanied appellant and had stayed with him voluntarily.

19. Result of the above discussion is that appellant is acquitted under Sections 363/376 IPC. He be released forthwith if not wanted in any other case.

20. Appeal is disposed of in the above terms.

21. Copy of this order be sent to Superintendent Jail for serving it upon the appellant as also for compliance

A.K. PATHAK, J.

JANUARY 21, 2011/ga