

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL NO. 846/2009

% Judgment decided on: 16th March, 2011

BUNTY APPELLANT

Through: Mr. Sumit Verma, Amicus
Curiae

Versus

STATE (G.N.C.T.) OF DELHI RESPONDENT

Through: Mr. M.P. Singh, APP

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? | Yes |

A.K. PATHAK, J. (Oral)

1. Vide judgment dated 8th April, 2009, appellant has been convicted under Sections 363/366/376 IPC; sentenced to undergo rigorous imprisonment for three years with fine of ₹500 and in default of payment of fine to undergo simple imprisonment for three months under Section 363 IPC; sentenced to undergo rigorous imprisonment for five years with fine of ₹1000/- and in default of payment of fine to undergo simple imprisonment for five months under Section 366 IPC; sentenced to undergo rigorous imprisonment for seven years

with fine of ₹5000/- and in default of payment of fine to undergo simple imprisonment for six months under Section 376 IPC. All the sentences have been directed to run concurrently. Benefit of Section 428 Cr.P.C. has also been given.

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

3. As per the prosecution, on 25th February, 2005 appellant had taken away with him the prosecutrix aged about 13 years. He kept her with him for about four and a half months at different places. Initially they stayed at Etta in U.P., thereafter they lived for some time at Rajkot in Gujrat and lastly they stayed at Aligarh in U.P. During this period, he had sexual intercourse with the prosecutrix without her consent and despite her resistance. Appellant brought the prosecutrix back to Delhi on 8th July, 2005 when he was arrested at Sarai Rohilla Railway Station. She was medically examined in Din Dayal Upadhyay Hospital. No injuries were found on her person; hymen was found torn; doctor opined that no definite opinion about rape could be given since victim was habitual to sexual intercourse. Statement of prosecutrix under Section 161 Cr.P.C. was recorded. Later her statement under 164 Cr.P.C. was recorded by a Metropolitan Magistrate. Appellant was also medically examined. Doctor opined that there was nothing to suggest that he was incapable of performing sexual intercourse.

5. Prosecutrix has been examined as PW5. She has supported the prosecution story. However, careful examination of her testimony shows that she had willingly accompanied the appellant from one place to the other and stayed with him for about four and half months without lodging any protest. She has deposed that on 25th February, 2005 she left her house for going to school at about 7:30 AM; when she reached near the crossing, appellant asked her to join him for a joy ride on Metro Rail. Thereafter, they boarded a Metro train at Shastri Nagar and went to Shahdara Station. Thereafter, he took her with him to Etta in some other train; he kept her there at his jija's house. Thereafter, appellant and his jija took her to Rajkot in Gujrat. In Rajkot, appellant took up a job in a factory on monthly remuneration of ₹2,000/-. There he had sexual intercourse with her against her wishes and when she opposed it saying that they were unmarried, appellant had put vermilion on her head. They stayed in Rajkot for about three days. Thereafter, they went to Aligarh in U.P. Appellant kept her there for about two and a half months. During this period he raped her. Father of the appellant came to Aligarh in search of appellant and he informed them that police had been looking for them. Thereafter, they came back to Delhi. Her father was present at Sarai Rohilla Railway Station along with the police officials. Appellant was apprehended. In her cross-

examination, she has admitted that all this while she did not raise alarm nor made any effort to escape; she did not complain to any fellow passenger that appellant had been taking her by force and against her wishes. She has stated that she did not raise any alarm since appellant had been assuring her that he would take her back to Delhi. From her testimony it is also evident that appellant had not been keeping surveillance on the prosecutrix round the clock. She has admitted that appellant had taken up a job in a factory. This shows that he had been going out for work leaving behind prosecutrix. She had sufficient opportunity to escape. She had also ample opportunity to raise alarm to attract the attention of co-passengers, neighbours etc. It is not the case that appellant was armed with any weapon and had threatened to kill her by using such weapon. Overall testimony of the prosecutrix clearly shows that she had accompanied the appellant voluntarily and at her own free will and was a consenting party.

6. Since prosecutrix was less than 16 years of age as on the date of incident her consent is meaningless. Trial Court has returned a definite finding that prosecutrix was less than 16 years of age on the basis of evidence adduced by the prosecution in this regard. Prosecutrix had given her age as 13 years to the doctor, Metropolitan Magistrate and also while deposing in court. As per her father also she was about 13

years of age at the time of incident. School leaving certificate of the prosecutrix issued by the Principal, Primary School, Municipal Corporation of Delhi was proved as Ex. PW6/B. As per this document, prosecutrix was about 10 years of age at the time of incident. However, the fact remains that age as given by the prosecutrix and her father during the investigation as also while deposing in court is approximate to the age as can be deduced from the school leaving certificate Ex. PW6/B. Age of the prosecutrix was not got determined during the investigation by radiological examination. No other evidence is available on record except ocular version of the prosecutrix and her father coupled with the documentary evidence in the shape of school leaving certificate. In absence of any other evidence to the contrary, the age of the prosecutrix can be taken as less than 16 years in view of the ocular version of the witnesses coupled with Ex. PW6/B. In ***State of Chattisgarh vs. Lekhram, AIR 2006 SC 1746***, Supreme Court has held that it may be true that an entry in the school register is not conclusive but it has evidentiary value. Such evidentiary value of a school register is corroborated by oral evidence as the same was recorded on the basis of statement of the mother of the prosecutrix. Supreme Court on the basis of ocular testimonies of the witnesses coupled with entry in the school register concluded that prosecutrix was less than 16 years of age. In my view, Trial

Court was right in holding that prosecutrix was less than 16 years of age.

7. Section 375 IPC reads as under:-

“A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -

First: - Against her will.

Secondly: -without her consent.

Thirdly: - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: - With or without her consent, when she is under sixteen years of age.”

8. Clause Sixthly of Section 375 IPC clearly envisages that consent by a girl who is less than 16 years of age is immaterial.

In other words, even if a person has sexual intercourse with a woman below the age of sixteen years with her consent he

would be liable for punishment under Section 376 IPC. Thus,

prosecutrix in this case being consenting party does not extend any benefit to the appellant. Conviction of the appellant under Section 376 IPC is maintained.

9. In this case, prosecutrix had accompanied the appellant voluntarily without any use of force exercised by him. It is not a case wherein he had taken the prosecutrix after enticing her. Prosecutrix had travelled with the accused to different places outside Delhi without raising any alarm or complaining to fellow passengers that she had been taken away by force. If a minor accompanies accused voluntarily without any offer or allurement then offence under Section 363 IPC is not made out.

In ***S. Varadarajan vs. State of Madras, AIR 1965 SC 942***, Supreme Court has held that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361. Where the minor leaves her father’s protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the

formation of the intention of the minor to leave the house of the guardian. Accordingly, in my view Trial Court was not right in convicting the appellant under Section 363 IPC. Thus, conviction of the appellant under Section 363 IPC is set aside.

10. Learned Amicus Curiae has not assailed conviction of the appellant under Section 366 IPC. Therefore, I need not to delve on this point. The result of the above discussion is that conviction of the appellant under Sections 376/366 IPC is upheld.

11. Learned Amicus Curiae has next contended that prosecutrix had willingly accompanied the appellant and had stayed with him for about four and a half months. At the time of incident, appellant was also a young man of 24 years of age; he has no previous criminal record; appellant and prosecutrix were young in age at the time of incident; both of them were in love; appellant has remained in incarceration for more than six years; his old parents are solely dependent upon him. Thus, he may be released on the period already undergone by him.

12. In ***Babloo vs. The State, reported in 2011 (1) JCC 359***, a Single Judge of this Court keeping in view the conduct of prosecutrix that she had willingly accompanied the appellant and stayed with him, has taken a lenient view while awarding the sentence less than the minimum prescribed under Section 376 IPC to the appellant. Keeping in mind that appellant had

remained in incarceration for about five years and eight months, accused was handed down sentence equivalent to the period he had remained in jail. It was also observed that quantum of sentence has to be decided after giving due consideration to the facts and circumstances of each case. For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of relevant circumstances in a dispassionate manner by the court. In order to exercise the discretion of reducing the sentence below the statutory minimum, the requirement is that the court has to record “adequate and special reasons”. The fact that prosecutrix had voluntarily accompanied the appellant was taken as “adequate and special reasons” for reducing the sentence less than the sentence minimum prescribed. Similar view has been taken by a Single Judge of this court in ***Mohd. Imran Khan and Jamal Ahmed vs. State. 2010 CrLJ 1756*** wherein the main circumstance to take lenient view in the matter of sentence and awarding less than the minimum prescribed sentence was the consent on the part of the prosecutrix to accompany the appellants which was more than evident from the facts and circumstances of the case.

13. In the peculiar facts of this case, sentence of the appellant under Section 376 IPC is reduced to the period already undergone by him. As regards sentence under Section 366 IPC is concerned, appellant has already served the same. Appellant be released forthwith if not required in any other case.

14. Appeal is disposed of in the above terms. A copy of this order be sent to Superintendent Jail for serving it on the appellant as also for due compliance.

A.K. PATHAK, J.

MARCH 16, 2011

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