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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 291/2011

ABBAS HUSSAIN @ MUNIM Appellant
Through: Mr. Shaad Anwar, Advocate.

versus

GOVT. OF NCT OF DELHI Respondent
Through: Mr. Manoj Ohri, APP for State.

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Date of Decision: 5th September, 2012

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J : (Oral)

1. Present appeal has been filed under Section 374 Cr.P.C. against the conviction order dated 22nd January, 2011 and sentencing order dated 05th February, 2011 passed by Additional Sessions Judge, Karkardooma Courts, Delhi in Sessions Case No. 57/2009 whereby the appellant has been convicted under Sections 376 and 366 IPC and sentenced to rigorous imprisonment of eight years with fine of ₹10,000/-.

2. The relevant portion of the trial Court's order is reproduced hereinbelow:-

".....The main contention of the Ld. Counsel for the accused is that the prosecutrix was more than 16 years and she married Abbas of her own sweet will. It was also submission of the Ld. Counsel for the accused that the prosecutrix accompanied the accused of her own will and went to Muradabad with her own consent.

The first thing that is to be seen is that whether the prosecutrix was more than 16 years of age at the time of the incident. The contention of the Ld. Defence Counsel was that the prosecutrix more than sixteen (16) years of age at the time of incident. But the accused did not lead any evidence in support of this plea.

In this regard I refer to the testimony of PW-12 Satish Kumar Sub Registrar (Births and Deaths) and he proved on record the date of birth Zeba as 24.9.1995 on the basis of the entry in their Register. IO ASI Raj Kumar stated that he verified the MCD birth certificate of the prosecutrix from the office of Sub Registrar and found the birth certificate to be correct. Nothing could come out in the cross-examination of this witness which could shake his credibility.

It was contended by Ld. Counsel for the accused that the school certificate has not been produced. In this regard, it is pertinent to mention here that when the prosecution has produced on record the birth certificate of the MCD, then the school leaving certificate does not hold much value as in my view, birth certificate issued by the MCD is more authentic as entries in the relevant register are made at the time of the birth of the child.

Hence, it is proved that the prosecutrix was 12½ years at the time of the incident.

So far as, the contention of Ld. Defence Counsel that prosecutrix went to Muradabad along with the accused, where they resided as husband and wife after the performance of Nikah by them is concerned, when it is proved that the prosecutrix was 12½ years at the time of the incident, then the consent of the prosecutrix does not matter.

Therefore, the contention of the Ld. Counsel that prosecutrix was major at the time of the incident and accompanied the accused of her own free will, does not stand any where and is to be ignored.

The other contention of the Ld. Counsel that the prosecutrix had given her consent for marriage. In the light of the fact that prosecutrix was a minor at the time of the incident, the consent of the prosecutrix for giving her consent does not matter. When a girl is minor, as per Muslim law, then father of the girl gives the consent. Even otherwise no suggestion was put to the prosecutrix that she had married the accused.

In his statement under section 313 Cr.P.C. accused stated that on 14.2.2008 in the presence of witnesses, his Nikah was performed by Qazi Sayeed Ali Hussain. However, in his defence accused examined DW-1 Ummed Ali, who stated that he had performed the Nikah of Abbas with prosecutrix Zeba.

Therefore the accused has himself contradicted his own defence as to who had performed his Nikah.

Even if, for the sake of arguments it is believed that Nikah had taken place, considering the fact that prosecutrix was 12½ years and admittedly at the time of alleged Nikah the father of the prosecutrix Zeba was not present. In the present case the prosecutrix was 12½

years so, her father was required to give his consent for the Nikah of Zeba. Therefore, the accused has failed to prove that he had Nikah with the prosecutrix.

The other contention of the Ld. Counsel was that the prosecutrix did not raise any noise, nor did she tell anybody the fact that accused had taken her forcibly, nor did the prosecutrix tell anybody during her stay with the accused at Muradabad that she has been kidnapped by the accused is concerned, in my view is without any merits as the prosecutrix was aged only 12½ years and a girl at that time was in her tender age. The prosecutrix has stated that accused has threatened to kill her if she made any noise. The accused kept the prosecutrix at a new place, therefore it would not have been possible for the prosecutrix to talk to anybody freely.

All the prosecution witnesses are consistent and corroborative. There are no infirmities in their statements. Nothing could come out in the cross-examination of the prosecution witnesses, hence there is no reason to dis-believe their statements.

Hence, from the statements of the prosecution witnesses, it is proved that on 15.03.2008, the accused kidnapped Zeba, a girl of 12½ years with the intention to force her to illicit intercourse. He took Zeba to Muradabad and kept her there for several days and during his stay at Muradabad, he committed rape with Zeba several times.

Hence, in my view the prosecution has been to prove its case against the accused for the offences punishable under section 366/376 IPC.

In the present case, the charge against the accused was framed for the offences punishable under section 363/368/376 IPC.

Now the question is that whether the accused persons can be convicted under section 366 IPC as no charge has been framed under the said section.

In my considered opinion, the accused can be convicted for the offences punishable under section 366 IPC as no prejudice would be caused to the accused in his defence. In this regard I am supported by a recent judgment of Hon'ble Delhi High Court passed on 30.09.2010 in Crl. Appeal No. 95/2010 in the case of Shahid Riza @ Raju Vs. State wherein the reliance was placed upon Willie (William) Slaney Versus State of M.P. AIR 1956 SC-116.

The Counsel for the accused has relied upon 2001 (2) Crimes 88 (Kerla), 2004 Criminal Law Journal 539 (Gujrat), 2005 (4) RCR (Criminal) 696 Punjab and Haryana and 2006(1) RCR Criminal 41 Delhi.

I have perused the all the Judgments relied upon by the Ld. Defence Counsel but the same are not applicable to the facts and circumstances of the present case.

Therefore the accused is held guilty for the offences punishable under sections 366/376 IPC and is convicted thereunder."

(emphasis supplied)

3. Learned counsel for appellant states that on the date of incident, the prosecutrix was more than sixteen years old and she had accompanied the appellant out of her own free will and subsequently married the appellant. Learned counsel for appellant places reliance

upon the evidence of the mother and grandmother of the prosecutrix in which they have stated that prosecutrix was sixteen years on the date of incident.

4. However, a perusal of the trial Court record reveals that the prosecutrix has vehemently denied that she had married the appellant. In her evidence, she has stated that the appellant had sex with her forcibly. She has further stated that though the appellant asked her to marry him, she had refused the said offer. The relevant portion of the evidence of the prosecutrix is reproduced hereinbelow:-

“ On 15.03.2008 I was going to take examination at Faizan Public School. I took the examination and thereafter when I was coming back from school, the accused met me in the way and asked me to accompany him. I refused to accompany the accused. On this the accused forcibly took me to bus stand after giving me threats that if I dare to raise alarm, he will kill me. The accused then took me to Muradabad in a bus. The accused took me to Karola colony. I do not know for how long I stayed at Karola Colony at Muradabad. I stayed in a house in Karola Mohalla. The other tenants were also residing in that house. Accused also resided with me in that house. The accused used to say that he will reside with me as husband and wife. I had not married the accused however. The accused used to abuse me. He also had sex with me against my consent and forcibly and whenever I used to refuse for the same, he used to beat me. Accused had sex with me several times forcibly.

The accused was having some money with me however later the accused opened a biriyani thela and for that he took me ear-ring and nose pin and sold them. The accused run his biriyani-thela for one day and earned Rs.75/-. I stayed at Muradabad for about two months. When the accused spend all his money, he brought me to Delhi and left me at traffic signal of Seelampur on 12.05.2008. My house is situated nearby that traffic signal light. On 13.05.2008 my parents called the police and my statement was recorded by the police. The accused asked me to marry him during my stay at Muradabad but I refused for marrying the accused. During my stay at Muradabad I used to remember my parents and my home and I was feeling home sickness. The accused did not allow me to talk to my parents on phone or to allow me to go outside. The accused also used to keep me hungry at times. My statement was recorded in the police station and once in the court by Madam Naya Bindu.....”

(emphasis supplied)

5. The Sub-Registrar (Birth and Death) Shahdara North Zone, MCD, produced the Birth Certificate of the prosecutrix under Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. The said Birth Certificate marked as Ex.PW11/H shows the age of prosecutrix as 12½ years on the date of incident. Even the parents of the prosecutrix in the examination-in-chief have stated the age of prosecutrix as 12½-13 years.

6. Though it is true that the mother and grandmother of the prosecutrix have stated in their cross-examination that the age of prosecutrix was 16 years on the date of incident, but this Court is of the view that the Certificate of Birth issued under the Registration of Births and Deaths Act, 1969 is conclusive proof of the prosecutrix's age and the Courts are bound by the same.

7. Sections 12 and 17(2) of the Registration of Births and Deaths Act, 1969 are reproduced hereinbelow:-

“12. Extracts of registration entries to be given to informant.—The Registrar shall, as soon as the registration of a birth or death has been completed, give, free of charge, to the person who gives information under Section 8 or Section 9 as extract of the prescribed particulars under his hand from the register relating to such birth or death.

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17. Search of births and deaths register.—

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(2) All extracts given under this section shall be certified by the Registrar or any other officer authorised by the State Government to give such extracts as provided in Section 76 of the Indian Evidence Act, 1872 and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.”

8. Sections 76 and 77 of the Indian Evidence Act, 1872 are reproduced hereinbelow:-

“76. Certified copies of public documents—Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.—Any officer, who by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

77. Proof of documents by production of certified copies—Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.”

9. In the opinion of this Court, the object of the introduction of the Registration of Births and Deaths Act, 1969 is to give legal status to the official machinery for registration of births and deaths. In ***Km. Para vs. Director, Central Board of Secondary Education 111 (2004) DLT 573***, this Court has held that in case of conflict between the dates of birth, the document which has been issued under Section

17 of the Registration of Births and Deaths Act, 1969 has to be given effect to.

10. Consequently, this Court is of the view that the trial Court has rightly concluded the date of birth of the prosecutrix as 24th September, 1995 that means she was 12½ years on the date of incident. As per mandate of Section 376 IPC, if the prosecutrix is below 16 years of age, her consent, as pleaded to be the case by appellant, is of no value.

11. The counsel for appellant has argued that appellant and prosecutrix got married to each other, though prosecutrix has denied the factum of marriage.

12. The statement of prosecutrix that accused committed rape upon her is corroborated by MLC, Ex.PW 9/A proved by Dr. Rashmi Varshney who appeared as PW-9 as per which hymen of the prosecutrix was found ruptured.

13. As per ocular as well as medical evidence, the offence of rape stand duly proved against the appellant. In view of evidence on record, this Court concurs with the finding of conviction recorded by the trial court. The trial court has granted sentence of eight years

rigorous imprisonment with fine of ₹10,000/-. This Court finds no ground to interfere with the orders of conviction and sentence. The conviction and sentence are maintained.

14. Accordingly, the present appeal is dismissed.

MANMOHAN, J

SEPTEMBER 05, 2012

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