

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

% Judgment decided on: 4th July, 2012

versus

A.K. PATHAK, J. (Oral)

2. In brief, prosecution story as unfolded is that the appellant

took away with him the prosecutrix aged 14 years on 22nd July, 2008, after enticing her, to Bihar and had sexual intercourse with her against her wishes till 28th July, 2008 when he and the prosecutrix were recovered from a hotel by the officials of Police Station Roshra District, Samastipur, Bihar. During this period appellant even tried to marry the prosecutrix and had taken her to court for this purposes but their marriage could not be registered.

3. A close scrutiny of the testimony of prosecutrix (PW-4) clearly indicates that she was a consenting party and had accompanied the Appellant on her own volition. Though in her examination-in-chief she has stated that appellant had taken her to his village, in Bihar, kept her there with him and had sexual intercourse with her, against her wishes. However, her this statement does not inspire confidence in view of her deposition in cross-examination. Appellant was the neighbour of prosecutrix, which fact has been admitted by her. She has further admitted that the appellant was known to her for about 2-3 months prior to the incidence. According to her, on 22nd July, 2008 she was sleeping in her jhuggi when appellant came there at about 3/4 PM, woke her up and thereafter took her with him to the bus stand in a taxi. Thereafter, they travelled in two buses and subsequently in a train before they reached the village. They remained in the train for three

nights. In the village appellant introduced her to his father and sisters as his wife. She has admitted in her cross-examination that she did not tell the taxi driver or fellow passengers in the buses and train in which they travelled as also, the family members of appellant that she was kidnapped by the appellant or that appellant had forced her to accompany him, by extending threats. Prosecutrix has further admitted in her cross-examination that the appellant and his parents had taken her to court for the purpose of getting appellant and prosecutrix married. It may be noted that even in the court she did not raise any alarm nor made any attempt to draw attention of the lawyers, police or court staff or litigants present there that she was kidnapped by the appellant. Police had recovered the prosecutrix and Appellant from a hotel where she was living with the appellant. During her stay in the hotel, she neither raised any alarm nor complained to anyone that appellant had been forcibly keeping her with him by exercising force or extending threats. All this clearly indicates that she had willfully accompanied the appellant and had stayed with him at Bihar between 22nd July, 2008 till 28th July, 2008 on her own free will and was a consenting party.

4. In Mahabir vs. State, 55 (1994) DLT 428, the prosecutrix had travelled with the accused for long-long hours in a compartment

shared by other passengers, they went to a house on a Tonga which was hired from the Railway Station and shared by other passengers. All this while she did not make any protest or raised any alarm or made any attempt to flee. In these facts, it was concluded that she was a consenting party. In *Mohamad Imteaz Khan alias Sannu vs. The State of Haryana*, 1994 (2) Recent Criminal Reports 456, prosecutrix remained with the accused for number of days, travelled in the buses and passed through crowded places without raising any protest. In these facts, it was held that the prosecutrix was a consenting party.

5. Since this court has come to the conclusion that the prosecutrix was a consenting party, the age of prosecutrix assumes great importance. Section 375 IPC defines “Rape”. Clause sixthly of Section 375 IPC envisages that if a man has sexual intercourse with a woman with or without her consent when she is under 16 years of age, would amount to “rape”. Thus, now it has to be seen as to whether, as on the date of commission of crime, prosecutrix was less than 16 years of age before it can be held that the Appellant is guilty of committing offence of rape.

6. Father of the prosecutrix PW1 Narain Das has admitted in his cross-examination that the prosecutrix never attended any school nor her date of birth was registered with any authority. Similar is

the statement of mother of prosecutrix, that is, PW5 Babli. PW-5 has also deposed that her daughter had neither attended any school nor her birth was registered in any office. No other cogent material is available on record to indicate exact date of birth of the prosecutrix. PW-3 and 5 have also not given exact date of birth of prosecutrix, except that they have made a general statement that the prosecutrix was 14 years of age. Only medical evidence is available on record regarding age of the prosecutrix.

7. Age of the prosecutrix has been determined through radiological examination. PW11, Dr. J. Dayal has proved the report of Radiologist Dr. Sandeep in this regard, which reads as under:

“BONE AGE ESTIMATION”

1. X-ray Rt.Shoulder-AP view
Head of tumeours partially held-<16 yrs.
2. X-ray BK hand and lower end radius
Lower end radius unheld-<16-½ yrs
Lower end ultra unheld -<16 yrs
3. X-ray Rt.elbow-AP
Lower tumeral epilysis head -14 yrs
(medial epiccondyle)

Oleranon head – 15 yrs
4. X-ray B/L medial end chloride
B/L medial end chloride appeared but
unheld >14 years-<20 years

5. X-ray pelvis –AP
Iliac crest unheld but appeared ->14 yrs-
<19yrs

Ischial tuberosity appeared but unheld -
>14 yrs to <20 yrs

Estimated bone age is more than 15 years
(fifteen years) but less than 16 years (Sixteen
years).

Bone age >15 yrs-<16 yrs.”

8. Apart from this, no cogent evident has been adduced in respect of the age of prosecutrix. In my view, the opinion of medical expert based on ossification test cannot be regarded as conclusive. There can be no doubt that the evidence of age by ossification test is of considerable importance, but there is equally no doubt that too much reliance cannot be placed on such evidence alone. Such age determination is not infallible. In *Jyoti Prakash Rai @ Jyoti Prakash vs. State of Bihar*, AIR 2008 SC 1696, Supreme Court has observed thus, “this court in number of judgments has held that age determination by the doctors should be given flexibility of two years on either side. In *Jaya Mala vs. Home Secretary, Govt. of Jammu & Kashmir & Ors.* 1982 SCC 502, Supreme Court has 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 vs. State* 1988 CrL. L.J. 565,

Senior Radiologist had opined the age of prosecutrix between 14 to 16 years. In this context, 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. 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 upto 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.

9. In this case, in absence of any 'birth certificate' or 'school leaving certificate' the age of the prosecutrix can be taken approximately 18 years by giving the benefit of margin of two years. Accordingly, prosecutrix is taken to be major as on the date of incidence.

10. The prosecutrix being major, neither offence under Section 376 nor 363 IPC is made out. She having willfully accompanied the appellant to his village and stayed with him from 22nd July, 2008 to 28th July, 2008 is a consenting party. Above factors have not been considered by the trial court resulting in conviction of

appellant.

11. For the foregoing reasons, Appeal is allowed. Impugned judgment and order on sentence are set aside. Appellant be released forthwith if not wanted in any other case.

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

A.K. PATHAK, J.

JULY 04, 2012

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