

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

RESERVED ON : 10th February, 2012
DECIDED ON : 16th March, 2012

+ CRL.L.P.NO.172/2008

STATE OF NCT OF DELHI Petitioner.
Through : Mr.Rajesh Mahajan, ASC for the State.

versus

SHIVA & ORS. ...Respondents.
Through: Mr.Ajit Nair, Advocate for R-1&2.
Mr.Suresh Singh, Advocate for R-3

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The State has preferred the present petition against the judgment dated 06.12.2007 of learned Additional Sessions Judge in Session Case No.109/2 by which the respondents Shiva and Pratap were acquitted of the charges for committing offences punishable under Sections 376 (2) (g), 372 read with Section 511 IPC, 506 (II) read with Section 34 IPC and respondent-Rakesh was acquitted of the charges levelled against him for committing offence punishable under Sections 353/366 and 376 IPC. They all were, however, convicted for committing offence punishable under Section 365/34 IPC.

2. On 15.02.2003 at about 08:15 P.M. complainant-Ram Iqbal Singh (PW-1) made statement to ASI Bal Kishan (PW-6), duty officer at

P.S.Uttam Nagar, disclosing that her daughter 'X' (assumed named) aged about 13 years had left the house on 13.02.2003 at about 12:00 noon without informing them and did not return thereafter. He suspected that someone had kidnapped her. On that statement, the police lodged FIR under Section 363 IPC and the investigation was assigned to ASI Lallan Prasad (PW-14). Efforts were made to find the whereabouts of missing girl 'X' but in vain.

3. On 16.02.2003 complainant-Ram Iqbal Singh received telephonic information from U.P.police (P.S.Nogohi) that they had apprehended 'X' along with two boys. He conveyed the information to ASI Lallan Prasad. On reaching at the concerned police station, the accused Shiva and Pratap were arrested and their disclosure statements were recorded. Documents prepared by the police of Nigohi were seized, Prosecutrix 'X' and accused Shiva and Pratap were brought to Delhi and medically examined. The IO recorded statements of the concerned witnesses conversant with the facts including that of the prosecutrix. PW-15 (ASI Vinod Sharma) on getting investigation of the case moved an application under Section 164 Cr.P.C. for recording statement of the prosecutrix which was rejected.

4. On 18.02.2003, the respondent-Rakesh was arrested and his disclosure statement was recorded. During the course of investigation, Ossification test for determination of the age of prosecutrix was conducted; her age was opined to be more than 14 years and less than 16 years. IO also collected the school leaving certificate produced by the complainant showing her date of birth as 05.05.1990. On completion of

the investigation, the accused were charged for committing the aforesaid offences.

5. To bring home the charges, the prosecution in all examined 18 witnesses. In their statements recorded under Section 313 Cr.P.C., to afford them an opportunity to explain the incriminating circumstances, the accused denied their complicity in the crime and pleaded that they were falsely implicated in the case.

6. After considering the evidence and the rival contentions of the parties, the learned Additional Sessions Judge acquitted the accused and convicted them only for offence punishable under Section 365/34 IPC. Aggrieved by the said order, the State has preferred the present Petition for leave to appeal.

7. Learned APP has assailed the findings of the Trial Court and urged that it did not appreciate the evidence in its true and proper perspective, and fell into grave error while rejecting the testimony of PW-2 ('X') without cogent reasons. In her deposition, the prosecutrix named all the accused to have committed her rape without her consent. The prosecutrix aged thirteen years was found in the custody of accused Shiva and Pratap in Shahjahanpur, PS Nigohi, U.P. and they failed to explain how and under what circumstances she accompanied so far away with them without informing her parents. The Trial Court did not give any reason to discard the medical evidence where the prosecutrix was found not to be a virgin. The Trial Court, contended learned APP, did not give reasons to disbelieve the prosecutrix who had no ulterior motive to falsely implicate the accused. The law is well-settled that prosecutrix's statement requires no corroboration and can be acted upon by the court for

conviction. Prosecutrix's consent (if any) was immaterial as she was below 16 years on the date of occurrence.

8. Respondents' counsel supported the impugned judgment and urged that there are no compelling and strong circumstances to reverse the judgment of acquittal. The judgment of the Trial Court is well reasoned whereby the prosecutrix's version regarding kidnapping (under Section 365 IPC) was believed while rejecting her claim for committing offence under Section 376 IPC. The prosecutrix remained in the company of the accused for sufficiently long duration and never raised any alarm. In the MLC, no external injuries were found on her person to infer that she ever resisted rape. The story propounded by the prosecutrix and her father is improbable. No cogent evidence was produced to ascertain the age of the prosecutrix.

9. We have considered the submissions of the parties and have scrutinized the Trial Court record.

10. Undoubtedly, the entire case of the prosecution hinges on the testimony of prosecutrix 'X' who was aged about thirteen years. The Court is conscious that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration and the Court may convict the accused on such sole testimony. A prosecutrix and victim of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the

evaluation of her evidence as in the case of an injured complainant or witness and no more. The Court is also conscious that in cases involving sexual harassment, molestation etc. the Court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. While evaluating evidence, the Court must remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour. At the same time, it is also settled position that if for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the Court of facts finds it difficult to accept the version of the prosecutrix at its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.

11. 'X' was found in the company of the accused Shiva and Pratap on 17.02.2003. PW-11 (Brij Pal Singh) lodged complaint with the police only on 15.02.2003 about her disappearance. He failed to explain the inordinate delay in lodging report with the police. At that time he did not suspect the accused for kidnapping his daughter 'X'. In FIR No.108/2003 (Ex.PW-6/A) he disclosed to the police that her daughter 'X' had left the house at 12:00 noon on 13.02.2003. In his statement before the court however, he gave an entirely different version and stated that 'X' used to go to school at about 8:00 A.M. and return at about 4:00 P.M. On 13.02.2003 'X' had not turned up after attending the school and he came

to know about that from his wife on getting telephonic call. The prosecution did not examine the prosecutrix's mother. 'X' contradicted PW-1 and deposed that on that day i.e.13.02.2003 she had gone to the market to purchase a pouch of 'Fair and Lovely' at about 10/11 A.M. The inconsistency in evidence of both the witnesses under what circumstances and in what manner, the prosecutrix went missing remained unexplained. Prior to her recovery, the prosecutrix had not attempted to contact her parents or any other relative. During her stay with the accused, throughout, the prosecutrix never raised any alarm. She did not complain to the family members of the accused or any police officials about her alleged kidnapping. At the time of her rescue (by the police at Shahjahanpur Road, U.P.), she was not found having any fear. At the time also, she did not complain to PW-11 (Brij Pal Singh) that the accused Shiva and Pratap had illegally confined her or they had established physical relations with her forcibly. Nothing abnormal was observed by him to infer that 'X' was victim of kidnapping and rape. Only in her statement before the court 'X' testified that the accused Shiva took her at the residence of Pratap's sister at Nigohi. On the next morning the accused Pratap also joined them and thereafter both committed sexual intercourse with her forcibly and threatened her not to disclose to anyone or else she would be sold to some brothel house. She also deposed that accused Rakesh also committed sexual intercourse with her at Wazirabad. 'X' did not give details or particulars about when and where, rape was committed on her. Nothing was revealed if she had put resistance to the attempts of the accused to establish physical relations with her or whether she had raised alarm at any time or had complained to Pratap's sister. It is

not certain that accused Shiva and Pratap had established physical relations at different times or at one time turn by turn. No weapon used to put the prosecutrix in fear was recovered from the possession of the accused at the time of their apprehension. Prior to her recovery, the prosecutrix had travelled a long distance in a bus with the accused. She is not expected to remain silent even after the alleged incident of 'rape' at Wazirabad by accused Rakesh. Had the police not apprehended the prosecutrix along with Shiva and Pratap, there was no certainty of her return to her parents. When she went to the market, on the day of her disappearance, she voluntarily accompanied the accused Rakesh to Wazirabad. From Wazirabad the prosecutrix was taken by accused Shiva at the residence of Pratap's sister at Nigohi. After the alleged rape by accused Rakesh at Wazirabad, the prosecutrix travelled with Shiva without any murmur. All these circumstances show that she did not present true facts to the court and her testimony cannot be taken at its face value. The police did not collect any evidence whatsoever to corroborate her version.

12. At the time of her medical examination, she did not disclose to the doctor that the accused committed rape on her person. No fresh external injuries/blood was found. It is improbable that a girl aged about thirteen years having been ravished by three accused, would not sustain some external or internal injuries. The doctor did not give any opinion if the prosecutrix was victim of rape. FSL report also does not support the prosecutrix. 'X' failed to identify her underwear seized by the police. In the FSL report (Ex. PX and PY) semen stains of 'A' group were deducted in Ex.4 (dirty underwear) and Ex.-7 (another dirty underwear). It is

unclear to whom this 'A' group belongs. The police did not inspect the places where allegedly 'X' was raped. Nothing incriminating was attempted to be recovered from those places. No person was examined from the adjoining house of these places.

13. All the circumstances discussed above show that the prosecutrix appeared to be a consenting party throughout and sexual relations, if any, with the accused were with her free consent. Age of the prosecutrix becomes relevant to ascertain the guilt of the accused. If the prosecution is able to establish her age below sixteen years, her consent for sexual intercourse becomes immaterial.

14. In the present case, the police did not collect any reliable and cogent document to ascertain the exact age of the prosecutrix. In the FIR No.108/2003 (Ex.PW-6/A), PW-1 did not reveal her date of birth and merely stated herself aged thirteen years. In the MLC (Ex.PW-5/A) prepared on 17.02.2003, her age was recorded as fourteen years. PW-1 (Ram Iqbal Singh) did not testify her date of birth in his deposition. He simply stated that on the date of his examination (i.e.12.05.2005) 'X' was about sixteen years of age. PW-2 ('X') also in her statement did not reveal her date of birth and merely stated that in the year 2003, she was studying in 7th class in Bihar. She further disclosed that she had to appear for examination for 7th class in Bihar and she used to take private coaching at Delhi. She, thus contradicted PW-1 who alleged that 'X' used to study in a school from 8:00 A.M. to 4:00 P.M. No school certificate at Delhi was produced regarding her admission in any particular class. Only in the course of investigation, PW-15 (ASI Vinod Sharma) seized one photocopy of the transfer certificate (mark PW-15/B)

where the date of birth was recorded 05.05.1990. She, however, did not verify during investigation on what basis the date of birth was recorded in the school record. PW-17 (Sh.Madan Thakur) was examined and he brought admission register pertaining to the year 1996. As per entry as Sr.No.136 dated 01.08.1996 'X' was admitted in the school in 1st standard and her date of birth was recorded as 05.05.1990. However, he did not explain on what basis that date of birth was recorded and who had disclosed it. It was also not clarified till which date the prosecutrix studied in the said school and if any school leaving certificate was issued to her. In the cross-examination, he admitted that at the time of admission of 'X', he was not serving in the school. Entry No.136 was in the handwriting of one Radhey Shyam Chaudhary, the then Principal in the school (since transferred to some other school). The prosecution did not summon Radhey Shyam to prove the entry bearing his signatures. The witness further admitted that the admission register brought by him was torn at many places and did not contain the name of the school. The prosecution failed to collect any document from the concerned authority where the birth of the prosecutrix 'X' was reported. PW-1 (Ram Iqbal Singh) and PW-2 ('X') in their deposition did not claim that 'X' had studied in that particular school and date of birth noted therein as 05.05.1990 was disclosed by them. No reliance can be placed upon school leaving certificate (Mark PW-15/B).

15. Ossification test was conducted to determine the age of the prosecutrix. Her age was opined between 14 to 16 years as per report Ex.PW-8/B. This report was prepared on 19.02.2003 by Dr.Rahul Garg. However, the prosecution did not produce him to prove his opinion and

only examined one M.D.Joshi, Record Clerk, DDU hospital, who merely identified his handwriting and signatures. The prosecution did not summon any other competent doctor to prove the opinion given by Dr.Rahul Garg. Even if the report Ex.PW-8/B is taken at its face value, considering the possibility of an error of plus minus two years in the opinion rendered by radiological examination, it cannot be concluded with certainty that the prosecutrix was below sixteen years on the date of incident. In Jaya Mala v.Home Secretary, Govt.of J&K (1982) SCC 1296, the Supreme Court held that there can be two years' margin either way in radiological examination.

16. It is well settled that when two opinions are possible, the one favouring the accused has to be taken. Since the prosecutrix was not below sixteen years, sexual relations (if any) with her consent did not establish commission of 'rape' on her person. There is no evidence whatsoever on record if at any time any accused attempted to sell the prosecutrix for any purpose.

17. The standards to be applied by the High Court while considering an appeal against acquittal is one where the prosecution establishes substantial and compelling reasons, which by and large are confined to serious or grave mis-appreciation of evidence, wrong application of law and an approach which would lead to complete miscarriage of justice. In the present case, the Trial Court listed various grounds on which it acquitted the respondent/accused. All of them, to our mind, are reasonable and none of them can be termed as misapplication of law or wrongful appreciation of the evidence placed before the Court by the prosecution.

18. The appeal against the acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of the acquittal of the accused under criminal jurisprudence. The Courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the Court.

19. Considering all the facts and the circumstances of the case, we find no infirmity in the impugned judgment. The petition is unmerited and is consequently dismissed.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MARCH 16, 2012

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