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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A. 1418/2011

SHAMBHU NATH PANDEY Appellant

Through: Mr. Rupesh Tyagi with Mr. Saurabh
Kocher, Advocates

versus

STATE OF NCT OF DELHI Respondent

Through: Mr. Manoj Ohri, APP for State.

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Date of Decision: 17th 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(2) Cr.P.C. challenging the judgment dated 8th August, 2011 and order on sentence dated 17th August, 2011 passed by learned Additional Sessions Judge-04, Saket Courts, New Delhi whereby the appellant has been convicted for offence punishable under Sections 366/376 IPC and sentenced to seven years rigorous imprisonment with a fine of ₹ 6,000/-.

2. The relevant facts of the present case are that on 27th June, 2004, Mr. Akbar Ali lodged a complaint with police station Okhla Industrial Area stating that his daughter who had gone to school to appear in her compartment examination on 22nd June, 2004 had not returned home. Accordingly, police registered an FIR under Section 363 IPC.
3. Subsequently, during investigation police apprehended both prosecutrix and appellant-accused at the instance of mother of the prosecutrix. The prosecutrix was produced for medical examination and her statement was recorded under Section 164 Cr.P.C. It is pertinent to mention that the prosecutrix in her statement to the police as well as to the doctor and the Metropolitan Magistrate under Section 164 Cr.P.C. stated that she had married the accused-appellant in a temple and thereafter she had willingly had sexual intercourse with the appellant-accused. Since there was a dispute with regard to the age of the prosecutrix, an ossification test was conducted which opined that her age at the time of incident was between 14.9 and 15.8 years.
4. By the aforesaid impugned judgment and order, the appellant-accused was convicted under Sections 363/376 IPC. The relevant portion of the impugned judgment is reproduced hereinbelow:-

“16. Defence had taken the only plea that the accused and the prosecutrix surrendered in the police post. The prosecutrix remained out of the lawful guardianship of her parents for almost eighteen days. Therefore, it is proved that prosecutrix was taken/enticed away. Now the next question arises about the age of the prosecution. Court has to determine the age of the prosecutrix at the time of commission of offence. There are three version of her age. First is school record. She was class eighth student. As per school record, the prosecutrix’s date of birth was 01.01.1991, meaning thereby, she was below 14 years of age on the day of incident. Doctor, who had examined the prosecutrix, has given the history stating her age as 15 years in MLC Ex.PW7/A. The prosecutrix in her statement under section 164 Cr.P.C. has given her age as 15 1/2 years. Doctor who examined the X-Ray plate for determination of age of the prosecutrix had opined the age of the prosecutrix between 14.09 to 15.8 years. Under no circumstances, age of the prosecutrix was above 16 years. The fact cited in Kulwant Singh (supra) is different. There, the prosecutrix has given her age to doctor as 17 years. In the radiological examination, the age given by the doctor is 14 to 16 years. In Raja Ram (supra), parents of the prosecutrix were not examined on the fact of age of the prosecutrix though they were best witnesses. But here in the present case, both PW-4 and 5 deposed to the fact that the age of the prosecutrix was 14 years, though they did not give her actual date of birth. PW-4 deposed in his examination that his elder son was aged 17 year and his mustache has not come and Roshni was his second child. He denied that his daughter is more than 17 years of age. Same has been deposed by PW-5 that her daughter was aged about 14 years when the incident of kidnapping took place. Dr. Harsh has given bone age of the prosecutrix after ascertaining the metacarpal and lower head fused.

17. In view of the above discussion, I am of the considered opinion that the prosecution has established that the age of the prosecutrix was not more than 16 years at the time of commission of offence. Considering the fact about the standard in which the prosecutrix studying coupled with the abovesaid

facts, the age of the prosecutrix cannot be said to be more than 16 years. From the evidence on record, the prosecution has also proved the fact that the prosecutrix and the accused were found recovered at Harkesh Nagar.

18. PW-3 has categorically deposed that the accused had made physical relation with her against her will. In the statement under section 164 Cr.PC. Ex.PW12/B, the prosecutrix stated before the Magistrate that on 25.06.2004 she got married to accused in a temple. That said statement almost remained unchallenged. So far so, sexual intercourse with the prosecutrix is concerned, that fact also remained unchallenged.

19. Considering the age of the prosecutrix and the fact that sexual intercourse was done by the accused with the prosecutrix, as depose by the prosecutrix, remained unchallenged, the prosecution has proved the case under section 366 IPC against the accused that the accused had kidnapped the minor girl aged below sixteen years without the consent of her natural guardian and kept her for eighteen days and made sexual intercourse with her. The prosecution has also proved its case under section 376 IPC. The consent of the prosecutrix is immaterial when the prosecutrix, the victim of crime, is below sixteen years of age. Therefore, the defence that it was a love affair and the sexual intercourse has been made with the consent of the prosecutrix is of no consequences.

20. In view of the above detailed discussion, I am of the view that the prosecution has proved its case under sections 366/376 IPC against the accused. I hold the accused Shambhu Nath Pandey guilty of the abovesaid offences. The accused is convicted accordingly.”

5. Mr. Rupesh Tyagi, learned counsel for the appellant submitted that the trial court’s finding that the age of prosecutrix was below 16 years at the time of alleged offence was erroneous because parents of prosecutrix were

illiterate. He drew attention of this Court to the cross-examination of PW-4, father of the prosecutrix wherein he had admitted to not knowing the exact age of prosecutrix. Mr. Tyagi also contended that the school leaving certificate Ex.PW10/A was wholly unreliable since it was based upon a rough and arbitrary estimate given by the parents at the time of admission of prosecutrix in her previous school. In this connection, he relied upon a judgment of the Supreme Court in ***Babloo Pasi Vs. State of Jharkhand and Anr., (2008) 13 SCC 133*** wherein it has been held as under :-

“28. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely : (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. “

6. Mr. Tyagi further submitted that the medical evidence/opinion was not conclusive proof with regard to the age of the prosecutrix since the margin of error in age ascertained by bone age examination was two years on either side. In this connection, he relied upon the observations of the

Supreme Court in *Jaya Mala Vs. Home Secy., Govt. of J&K & Ors., 1982 Cri.L.J. 1777* wherein it has been held that “*However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.....*”

7. Mr. Tyagi further submitted that the trial court failed to appreciate that the prosecutrix had remained with the appellant-accused for eighteen days but she had never raised an alarm. He pointed out that though prosecutrix had accompanied the appellant-accused from Okhla to Nangloi and also travelled by bus and train to Mumbai, yet she had never raised an alarm. He contended that from the evidence on record it would be apparent that the appellant-accused had simply and passively allowed the prosecutrix to accompany him which did not amount to offence of enticing away.

8. On the other hand, Mr. Manoj Ohri, learned APP for State stated that the prosecutrix had appeared as PW3 and denied the appellant-accused’s version that the prosecutrix had married him voluntarily.

9. Mr. Ohri submitted that the Apex Court had held that the statement of prosecutrix could be the sole basis of conviction if it was found reliable. In this connection, he relied upon the judgments of the Supreme Court in *Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191* and *Rajinder @*

Raju Vs. State of H.P., AIR 2009 SC 3022.

10. Mr. Ohri further submitted that as the age of the prosecutrix was less than 16 years on the date of offence and hence her consent, even for the sake of argument, was immaterial.

11. Mr. Ohri also submitted that the medical opinion was advisory and not conclusive. In this regard, he drew attention of this Court to a judgment of Supreme Court in ***Vishnu Vs. State of Maharashtra, 2006 Cri. L. J. 303 (SC)*** wherein it has been held as under:-

“21. It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reason that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact.”

12. With regard to the proportionality of the sentence, Mr. Ohri drew attention of this Court to a judgment of Supreme Court in ***State of M.P. Vs. Munna Choubey and Anr., (2005) 2 SCC 710*** wherein it has been held as under:-

“11. The criminal law adheres in general to the principle of proportionality in prescribing liability according to

the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice, sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

12. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise

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15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order,

and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.”

13. In rejoinder, Mr. Rupesh Tyagi submitted that the trial court had failed to appreciate that the prosecutrix who had completely exonerated the appellant-accused in her statement under Section 164 Cr.P.C., had inexplicably made improvements in her statement before the trial court during her examination in chief and cross-examination. He contended that the evidence of the prosecutrix was completely unreliable and story put forward by her as to enticing and administering sedative material was absolutely false. He stated that the impugned story was very usual and unique to Delhi Police as held by this Court in ***Kulwant Singh Vs. State (Govt. of NCT of Delhi), 2010 (4) JCC 2510***. Mr. Tyagi lastly but strangely submitted that the school leaving certificate produced by the prosecution before the trial Court did not belong to the school where the prosecutrix was studying.

14. Having heard the parties, this Court is of the view that the allegation of rape stands proved by the MLC which was exhibited as Ex.PW7/A by

PW7 Dr. Priti Gupta. As per the medical evidence, hymen of the prosecutrix was torn.

15. The prosecutrix in her evidence under oath has fully supported the case of the prosecution. She has stated in her evidence that she had not only been enticed by the accused but had also been administered sedative material. The Supreme Court in ***Kamalanantha vs. State of T.N. , (2005) 5 SCC 194*** has held that *“It is trite law that the prosecutrix is not an accomplice. The evidence of a victim of sexual assault, if inspires confidence, conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration. Her evidence is more reliable than that of an injured witness. In a case of sexual assault corroboration as a condition for judicial reliance is not a requirement of law but a guidance of produce.”*

16. In the present instance, the prosecutrix in her statement before Metropolitan Magistrate recorded under Section 164 Cr.P.C. and also in her cross examination has stated that on the date of incident she was below sixteen years. The mother and father of the prosecutrix in their evidence have also stated her age to be less than sixteen years. The relevant portion of cross-examination of the prosecutrix’s father is reproduced hereinbelow:-

“... I do not know the exact age of my daughter. I am illiterate. I do not remember the exact date of birth of my daughter. But her date of birth is mentioned in the school register. The age of my eldest son is 17 years. Roshni is my second child. The beard and moustaches have not come to my eldest son. It is incorrect that my daughter is more than 17 years or that she was not recovered from the possession of accused or that I am deposing falsely to implicate the accused in this false case.”

17. Even in the MLC record (Ex.PW7/A) as well as the school leaving certificate (Ex.PW10/A) the age of prosecutrix on the date of offence is shown as less than sixteen years. The evidence of the teacher who produced the school leaving certificate is reproduced hereinbelow:

“I have brought the school record. As per our school record, her date of birth of Kumari Roshni is 01.01.1991. Kumari Roshni joined the school in class VI on 11.4.2001. Kumari Roshni has left the study in class VIII. School leaving certificate in this respect was issued on 26.7.2004. Photocopy of the school leaving certificate on record is Ex. PW-10/A bearing the signature of the principal.

XXXXXXXXXX by Sh. Rupesh Tyagi.

We admit the student in class VI basis of previous record. If no birth certificate is available with the parents of the student for verification of age we ask the parents/father to furnish an affidavit in this regard”

18. It is pertinent to mention that no suggestion was given to the aforesaid teacher that the prosecutrix had not studied in her school. In fact, that is not

even the ground in the present petition. The ossification test has also opined that the age of prosecutrix is between 14.9 and 15.8 years.

19. Undoubtedly, if two views are possible with regard to the age of prosecutrix, then this Court would have to accept the view that is more favourable to the accused as in criminal jurisprudence the benefit of doubt has to be given to the accused. However, in the present case, there is no evidence on record to suggest that the age of prosecutrix was more than sixteen years on the date of the offence. In fact, the evidence on record with regard to the age of prosecutrix tallies with the ossification test.

20. The Apex Court in similar facts in ***State of Maharashtra Vs. Gajanan Hemant Janardhan Wankhede, (2008) 8 SCC 38*** has held as under:-

“13. On the basis of the evidence of the Headmaster and the original school leaving certificate and the school register which were produced the High Court came to abrupt conclusion that normally for various reasons the guardians do understate the age of their children at the time of admission in the school. There was no material or basis for coming to this conclusion. The High Court in the absence of any evidence to the contrary should not have come to hold that the date of birth of the prosecutrix was not established and the school leaving certificate and the school register are not conclusive.

14. Interestingly, no question was put to the victim in cross examination about the date of birth. The High Court also noted that no document was produced at the time of admission and a horoscope was purportedly

produced. There is no requirement that at the time of admission documents are to be produced as regards the age of the student.....”

21. Consequently, this Court reaffirms the finding of the trial court that the prosecutrix on the date of offence was less than sixteen years.

22. The Sixth Clause of Section 375 IPC which defines rape clearly stipulates that if prosecutrix is below sixteen years then her consent is immaterial. The relevant portion of Sixth Clause of Section 375 IPC is reproduced hereinbelow:-

375. Rape.—*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:—*

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

23. Accordingly, consent of prosecutrix, even if presumed, is irrelevant. Consequently, no interference is called for with the impugned order and the present appeal is dismissed but with no order as to costs.

MANMOHAN, J

SEPTEMBER 17, 2012

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