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

+ CRL.A.NO.43/2005

% *Judgment dated 07.10.2013*

SMT.SHEELA & ORS. Appellants
Through: Mr.Ghanshyam Sharma, Advocate

versus

STATE Respondent
Through: Mr.Firoz Khan Ghazi, Adv. for State

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (ORAL)

1. The present appeal is directed against the judgment passed by learned Additional Sessions Judge dated 17.11.2004 and the order on sentence dated 18.11.2004 by which the appellants have been held guilty for the offence under Sections 363/366/34 IPC. The case of the prosecution, as noticed by learned Additional Sessions Judge in the judgment is as under:

“Briefly stated facts of the present case as per the prosecution are that on 9/9/2000 complainant Shamsuddin went to police post Pul Prahlad Pur met HC Ghanshyam and made his statement Ex.PW 2/A with respect to missing of his daughter Reison w.e.f. 20.8.2000. In his statement he suspected that Jatish s/o.Dharampal Chauhan who was also missing from the same day may have enticed his daughter away. On the basis of the said statement the HC prepared rukka Ex.PW 5/A and sent the same to PS for registration of formal FIR for offence punishable U/s.363 of IPC which was duly registered. Investigation of this case was handed over to ASI Hansmukh Lal. Initially despite efforts the prosecutrix Reison could not be found out. Statements of witnesses

were recorded, un-scaled site plan in respect of the occurrence was prepared. After prosecutrix Reison returned on 1/12/2000 her statement Ex.PW 1/A was recorded. She was got medically examined and her statement Ex.PW-1/A under Section 164 of Cr.P.C. was got recorded by through Chandrashekhar MM. In her said statement she inter alia levelled allegations against accused Sheela for her having given Pajeb and haar to wear and burfi to eat at her house in the presence of Suresh, Prakash and Mukesh who carried her initially to Badar Pur in a TSR and from there to Aligarh where accused Jatish raped her against her wish and established physical relations with her and that later on one Udai @ Udai brought her to Delhi. On the basis of her aforesaid statement u/s 164 of Cr.P.C. sections 366, 376 and 120B of IPC were added. On 1/12/2000 accused Suresh and on 29/4/2001 accused Prakash were arrested. On account of directions given by Hon'ble Sh.H.R. Malhotra then ASJ now Hon'ble Mr.Justice H.R. Malhotra of Hon'ble High Court of Delhi, accused Sheela was not arrested on account of her pregnancy. Accused Jatish could not be arrested despite efforts made and was subsequently got declared a proclaimed offender. Due to incomplete particulars of accused Mukesh he could not be arrested. On completion of investigation the accused persons were charge sheeted for offence punishable U/s.363/366/376 and 120B of IPC with request to record evidence against accused Jatish U/s.299 of Cr.P.C. by sending the arrested accused persons to the Court to face trial.

2. Ld. MM summoned and released on bail accused Sheela who was not earlier arrested on account of directions of Hon'ble Sh. H.R. Malhotra the then ASJ now Hon'ble Mr.Justice H.R. Malhotra of Hon'ble High Court of Delhi. Since the major offence in this case was triable exclusively by Sessions Court the same had been committed to the Court of Sessions by the concerned MM which on allocation had been assigned to the Ld. Predecessor Court.

3. On hearing the Ld. APP for the State, Ld.defence counsel and on perusal of Judicial file, Sh.Yogesh Khanna, ASJ, Ld. Predecessor Court, had framed charge against the accused persons for offence punishable U/s.363 read with

Section 120-B of IPC and U/s.366 read with Section 120-B of IPC to which accused persons had pleaded not guilty and claimed trial and consequently the trial against the accused persons proceeded with.

4. In support of the prosecution case, the prosecution has in all examined ten witnesses.”

2. Counsel for the appellant submits that the judgment of the trial court is based on surmises and conjectures. The trial court has fallen in grave error by placing reliance on the testimony of PW-1, the prosecutrix. It is contended that the testimony of the prosecutrix is unreliable, there are material contradictions in her evidence and the statement recorded under section 164 Cr.P.C. before the Magistrate. It is contended that there is no other evidence to corroborate the testimony of PW-1. It is further contended that the testimony of the prosecutrix is unbelievable and improbable for the reason that in her testimony she has stated that at the time she was confined in a room food was being provided by a lady, who was residing at the first floor of the room where she was confined, but in all the months of her confinement she neither created any hue and cry nor did she try to escape and on the contrary she has stated that she managed to escape with the help of one boy by the name of Udai, and the said boy has not been cited as witness or produced for recording of his testimony.
3. It is further submitted by counsel for the appellants that as per the prosecutrix, she was taken from her house in a three wheeler scooter as stated by her in the statement under Section 164 Cr.P.C., whereas in the testimony before the Court she has stated that she was taken by bus. Another contradiction which has been pointed out is that she has given different dates as to when she was kidnapped and the manner in which she was removed. It is pointed out that in the statement recorded under

section 164 Cr.P.C. she has not mentioned that she was taken by Sheela on the pretext of celebrating the birthday of her daughter, whereas this improvement has been made in the statement before the Court. It is also the case of the appellant that the prosecutrix was a consenting party and she had gone with accused, Jatish, who has been declared as a Proclaimed Offender, out of her own pleasure and sweet will, without any coercion and any help from the appellants and the appellants have been falsely implicated in the present case, being the sister and brother-in-law of Jatish.

4. Counsel for the appellants has also argued that the appellants belong to a poor strata of society, they are illiterate persons and they have been implicated by the parents of the girl because she had decided to marry Jatish out of her own free will. It is submitted that the appellants are husband, wife and brother-in-law. They have four minor children and they have already spent more than 3 years in custody.
5. Counsel for the appellants further submits that there is no evidence on record to show that the prosecutrix was a minor at the time of incident. It is submitted that only PW-2 (step father of the prosecutrix) has testified that the prosecutrix was 15 years of age at the time of incident. It is submitted that this statement cannot be relied upon as neither PW-2 is the natural father of the prosecutrix nor he has placed any document in support of the statement so made.
6. Counsel also submits that as per the evidence of prosecutrix, PW-1, she was born in the year when late Prime Minister Indira Gandhi was assassinated, by which her age would be over 16 years. Hence, in the absence of any evidence with respect to the age of the prosecutrix the trial court could not have convicted the appellants. Counsel also submits that on the contrary, the trial court has placed reliance on the evidence of the

prosecutrix to reach a finding that she was taken away from the lawful guardian-ship of her parents from her house, and, therefore, it cannot be said that the prosecutrix was enticed by the appellants. Reliance is also placed on the case *Sunil Vs. State of Haryana* 2010(1) C.C. Cases (SC) 148 in support of his submission that the prosecution has failed to prove the age of the prosecutrix. In the absence of either any formal document, including school leaving certificate or birth certificate or ossification test, the trial court had no material to come to the conclusion that the prosecutrix was less than 18 years of age on the date of incident.

7. Mr.Sharma, counsel for the appellants submits that in the case *Sunil Vs. State of Haryana (Supra)* although the prosecutrix was examined by the doctor, who had suggested she be referred for verification of her age to the Dental Surgeon or the Radiologist, the court took notice of the fact that in the absence of prosecutrix being examined by either of the two, there was serious flaws in the version of the prosecution. The school leaving certificate produced in the case of *Sunil Vs. State of Haryana (Supra)* by the prosecution which was procured six (6) days after the incident and three (3) days after the arrest of the appellant was not also found to be reliable by the Court.
8. Counsel for the State submits that the evidence of the prosecution is trustworthy and reliable; and there are no contradictions which go to the core of the issue and the contradictions so pointed out are very minor in nature. Counsel for the State submits that the prosecutrix had identified the appellants as the persons who had kidnapped her and were instrumental in keeping her under confinement. He further submits that the prosecutrix could not raise any alarm on account of the threat meted out to her by Jatish that her brother would be killed. He also submits that the prosecution has been able to establish the case beyond any shadow of

doubt.

9. I have heard counsel for the parties, perused the evidence which has been placed on record and considered the rival submissions so made. PW-1, prosecutrix is the star witness and thus, I deem it appropriate to reproduce her evidence.

“PW-1, Ms.Resian Bano, D/o. Sh.Shamsuddin, age 15 years, R/o.H.No.B-335, Lal Kuan, Delhi.

On S.A.

I identify all the three accused persons today present in the court in this case. On 20.8.2002 at about 10 A.M. I was present at my house, accused Sheela W/o. accused Suresh came to my house and took me to her house on the ground of birthday of her daughter. Accused Sheela provided me pajeb and necklace. I was also given a saree to wear and she served me with sweets. After consuming sweets I lost my consciousness. And when I regained my consciousness I found myself in a bus. Accused Jatish (absconding), Sheela, Suresh, Prakash and Mukesh were with me in the bus. I asked them as to where they were taking me. But they did not give any reply to me. The above named persons took me to their village, I do not remember the name of the village. However, I remember it was in Haryana. Accd. persons today present in court alongwith their other associate named above confined me in a room. In that room Jatish was also present. Accused Jatish committed rape with me in the said room. I raised alarm hue and cry but nobody came there. I requested all the accused persons to leave me to my parents house. And then accused Sheela told me that they had not brought me to send back to my parents house and she further told me that my marriage will be solemnised with accused Jatish (absconding). After about 3/4 months one boy, resident of the same village rescued me from accused persons. He left me at Badarpur at a Bus Stop. I reached to my house. My father then took me to police post Pahlad Pur. My stt. was recorded by Police. I was got medically examined by Police. Thereafter my father took me to our house. My stt. was recorded by Magistrate also. A sealed envelop attached with the case file is ordered to be open, containing statement U/S.164 Cr.P.C. The witness states that

this is her statement, recorded by Magistrate and the same is Ex.PW-1/A bears the thumb impression of the witness at point 'A' and 'B'. I have nothing more to say in this case.

(At this stage, Ld. Addl. P.P. wants to cross-examine the witness on some points. Heard. Allowed).

xxxxxxx by Addl. P.P. for the State.

It is wrong to suggest that accused Sheela called me from my house on 7.8.2000. (Confronted with portion A to A of stt. Ex.PW-1/A where it is so recorded). It is correct at the house of Sheela accused Suresh, Prakash, Mukesh and Jatish were also present. It is correct I was taken to "KARHA" in a three wheeler scooter. It is correct accused Sheela and another lady Vimla also accompanied me upto Badarpur. It is correct that accused Suresh, Prakash and Mukesh also came back. It is correct only accused Jatish (Absconder) took me to "KARHA". It is wrong to suggest that the mother of Jatish was also with him. It is correct that I was kept at "Karha" for about 10 days till the time when police reached there. It is correct thereafter I was taken to Aligarh. It is correct when I objected and retaliate the acts of the accused of having sexual intercourse with me he used to beat me. It is correct that accused Jatish used to bolt me in a room and I had no occasion to run away. It is correct accused Jatish(Absconder) committed rape upon me daily till the time I remained under his custody. It is correct all the accused persons today present in the court had connived with Jatish and other accused persons in my kidnapping and rape. It is correct I succeeded in running from the custody of accused Jatish with the help of a boy namely Udai, who met me in Aligarh. It is wrong to suggest I am deliberately deposing a wrong date when I was taken by accused Sheela to her house. It is correct I was taken to U.P. by accused persons and the name of the village was Iglas. It is correct when police was tracing me and reached to the village then accused Prakash informed other accused persons about the arrival of police to village.

xxxxxx by Sh.Abhishek Sharma, Adv. on behalf of all the accused persons.

I was born in the year when our late Prime Minister Indira Gandhi assassinated. It is correct that I was kidnapped on 20.8.2002. When I returned from Aligarh after about 3/4 months I gave stt. to police immediately after my arrival in Delhi. I do not remember the date or month etc. when I reached Delhi. I stated to police that I was called by accd. Sheela at her house on the pretext

of birthday of her child. (Confronted with statement Ex.PW-1/DA where this fact is not mentioned). I had also stated to police that I took Burfi/ sweets and became unconscious and when I regained consciousness I was in a bus with accd. Persons. (confronted with statement Ex.PW-1/DA where the fact of losing consciousness is not mentioned). I had also stated to police that acc. Prakash, Mukesh and Sheela all were present in the Bus. (Confronted with statement Ex.PW-1/DA where it is not so recorded). I had also stated to police that all the accused persons namely Mukesh, Suresh, Prakash and Sheela kept me and locked in a room. (Con. with statement Ex.PW-1/DA where it is not recorded) and Ex.PW-1/A where the said fact is not recorded). The above facts are also confronted with statement Ex.PW-1/A where all the facts are not recorded. I stated the fact that accused Sheela told me that I was brought with them not to send me back. (Confronted with statement Ex.PW-1/A where it is not so recorded, though the said fact is mentioned in Ex.PW-1/DA). Police did not meet at "Karha". I was kept at Aligarh in a house comprised of only one room. There was one room constructed on the 1st floor also. I do not know who was residing in the first floor. However, someone was residing there. There were houses adjoining to the house where I was kept. The house was in a residential locality. Accused Jatish never used to go outside the room for the purchase of daily used items. And the room where I was kept only Jatish and I used to live. Accused Sheela used to visit in a room where I was kept by accused Jatish. The toilet was inside the said house. The lady who was residing at the 1st floor used to serve me food everyday. Neither the said lady ever asked anything about my staying there nor I explained her anything anytime. I do not know the name of the lady. No one used to visit that lady during the period of three months my stay there. I never visited market with Jatish during my stay of three months there. It is for the three months no one came outside the said house nor anybody went outside that room during the said period. I wanted to raise a hue and cry but accused Jatish used to threaten me saying that he will kill my younger brother in case I cry. A boy namely Udai came at the said house at Aligarh where I was kept and with him I came to Delhi. When Udai came to the room at that time Jatish was in the toilet. On other day also when accused Jatish used to go to toilet I used to be alone in the said house. It is wrong to suggest that prior to giving stt. in the present case I was sitting in the chamber of my counsel. I do not know any boy with the name of Dharamvir. It is wrong to suggest

that prior to this case I involved some one else in the offence of like nature. It is further wrong to suggest that I take money from the accd. persons in the said other case and gave my statement in the court. The stt. which I made that I was served with a burfi and I lost my consciousness and I regained the same in a bus is a correct statement. It is wrong to suggest that I am deposing falsely or that I wilfully ran away with accused Jatish. It is wrong to suggest that accused present in the court had no role in my absconding with accused Jatish. It is wrong to suggest I am deposing falsely.

10. While in the examination-in-chief, this witness has testified that on 20.8.2002 at about 10:00 a.m., appellant, Sheela took her to her house on the ground of birthday of her daughter; she provided her with Pajeb, necklace and had also given her Saari to wear; she was also served with sweets after which she lost her consciousness, on regaining her consciousness she found herself in a bus where Jatish (since declared as P.O.) and appellants were with her in a bus along with Sheela, Suresh, Prakash and Mukesh (since declared as P.O.). The prosecutrix further goes on to testify that she was taken to their village in Haryana where she was confined in one room with Jatish, who raped her in the said room despite her creating hue and cry. She requested the appellants to leave her to her parent's house, however, she was told that her marriage with Jatish would be performed. It is only after 3-4 months that a boy resident of the same village rescued her from the village and left her at Badarpur bus stop. The prosecutrix was cross-examined by the public prosecutor, as a wrong date was mentioned by her in the examination-in-chief, but this witness refuted the suggestion that she was called to the house of Sheela on 20.8.2002 although in his statement recorded that she has mentioned the date as 7.8.2000. The cross-examination by the P.P. also shows that in her earlier statement she had testified that she was taken to the village in a three wheeler scooter and the appellant, Sheela and another lady,

Vimla had accompanied her only up to Badarpur. Also the other accused persons, Suresh, Prakash and Mukesh had only travelled with her till Badarpur.

11. Counsel for the appellant rightly points out that in case the prosecutrix was taken to the village in a three wheeler scooter, six people could not have travelled in a three wheeler scooter and also there are material contradictions in the statement made under Section 164 and before the Court wherein she has stated that all the accused persons had taken her to the village and confined her in a room whereas in her cross-examination she has stated that all the accused persons, except Jatish, had accompanied her upto Badarpur in a three wheeler scooter, while in her examination-in-chief she has stated that she was confined in one room for 3-4 months by the accused Jatish, Sheela, Suresh, Prakash and Mukesh. During the cross-examination, she has stated that she was kept at village KARHA for about 10 days till the time police reached there. But in her examination-in-chief, she has deposed that she was rescued by a boy of her village, who dropped her at the Badarpur bus stop from where she reached her house. She has also testified in her cross-examination that since the room was bolted there was no occasion for her to run away and she remained in the custody of Jatish. In the later portion of her cross-examination she again testifies that she was taken to U.P. by the accused persons and the name of the village was Iglas.
12. While she was called by the appellant, Sheela to her house on the pretext of birth-day of her child, she was confronted with the statement Ex.PW-1/DA which fact was not mentioned. She deposed that she took Burfi / sweet and became unconscious and when she regained consciousness she was in a bus with the accused person. She was confronted with the statement Ex.PW-1/DA, where the fact of losing consciousness was not

mentioned. She further testified that she had stated to the police that accused, Prakash, Mukesh and Sheela were all present in the bus, she was confronted with the statement Ex.PW-1/DA, where this was not recorded. She was again confronted with the statement, as she testified that all the accused persons had kept her locked in a room, which was not mentioned in her statement under Section 164. She further testified during her cross-examination that she was confined to one room at the first floor of which some lady was residing, the house was in residential locality.

13. It is submitted that although the food was served to her by a lady, the lady never asked her anything about her status, neither she explained anything at any time to that lady. None visited the lady during three months of her stay. She did not raise hue and cry under the threat of Jatish. This witness has also testified that at the time Jatish used to visit toilet, she used to be alone in the said house. She denied the suggestion that she wilfully ran away with Jatish.
14. The evidence of the prosecutrix is not corroborated by the evidence of any other witness. There are material contradictions in the evidence of the prosecutrix with regard to the date of incident, the place of her confinement and as to whether she was taken in a bus or a three wheeler scooter. There is contradiction as to whether the appellants were present with her in the room where she was confined or they accompanied till Badarpur, although an explanation has been rendered by her that she did not raise any hue and cry as she was threatened by Jatish, but she has testified that Jatish would go to toilet and leave her in room and the door was simply bolted, but no explanation has been rendered as to why she did not leave the room and raise hue and cry and how she was finally rescued by a stranger, who has neither been made a witness nor his statement has been recorded by the prosecution.

15. In this case complaint was made to the Police on 9.9.2000, however, there is no explanation of any nature whatsoever for the delay in making complaint to the Police.
16. While relying on the evidence of the prosecutrix and her step-father, the trial court has reached to a conclusion that on account of her age being 15 years, she could not have been taken away from her lawful guardian without their consent. The judgment would show that the evidence of star witness, PW-1 has not been analyzed, however, the entire statement of the PW-2 has been treated as truthful. Paragraphs 18 to 20 of the judgment read as under:

“18. As per the testimony of prosecutrix she was born in the year in which our late Prime Minister Smt.Indira Gandhi was assassinated i.e. she was born in the year 1984 and was 14 years old on the date of occurrence and as per the testimony of PW-2 Shamsuddin step father of the prosecutrix she was aged 15 years on the date of occurrence. Hence, on the account of her lesser age she could not be taken away out of the keeping of her lawful guardians without their consent for any purpose whatsoever.

19. From the testimony of prosecutrix PW-1 Resion it is clear that she was taken away from the lawful guardianship of her parents from her house by accused Sheela to her house on the pretext of birthday of her daughter and that there co-accused persons were already present in whose presence the prosecutrix was given ornaments and Sari to wear and sweets to eat whereafter she became unconscious and that when she regained her consciousness she found herself away from her parents in company of all the accused persons. Thus no doubt is left with respect to the accused persons having committed an offence punishable U/s.363/34 of IPC as they had done the said act in furtherance of their common intention.

20. From further testimony of prosecutrix it is clear that she was kidnapped with an intention for compelling her to

marry Jatish and with knowledge that she would be forced or seduced to illicit intercourse at the hands of proclaimed offender accused Jatish and hence all the three accused persons facing trial have also committed offence punishable U/s.366/34 of IPC for their having done the said act in furtherance of their common intention.”

17. The trial court has considered the age of the prosecutrix to be 14 years of age, which also seems to be a mathematical error, as according to the prosecutrix she was born in the year 1984 and taking into consideration the date of incident to be 2000, the prosecutrix would have been 16 years of age. Even otherwise, no effort was made to prove the age of the prosecutrix on the basis of any document, neither any ossification test was conducted and based on the testimony of the prosecutrix that she was 14 years of age, the trial court has reached to a finding that she could not have been taken away from the lawful guardianship without their consent for any purpose whatsoever.
18. In the cross-examination carried out by the counsel for the appellants, this witness has testified that she was born in the year when the late Prime Minister, Mrs.Indira Gandhi was assassinated. She reiterated that she was kidnapped on 20.8.2002 and she returned from Aligarh after 3/4 months and gave her statement to the police immediately after arrival in Delhi.
19. The Supreme Court in the Case of **Sunil Vs. State of Haryana (Supra)** took note of the fact that in the absence of the prosecutrix being examined by a Dental Surgeon or the Radiologist or in the absence of her proof of age, the accused could not have been convicted. I find the trial court simply relied on the testimony of the prosecutrix and her step-father. There is contradiction between both the testimonies (the testimony of the prosecutrix and her step-father). According to the prosecutrix she was born in the year 1984, the year when former Prime Minister, Indira

Gandhi was assassinated. The prosecution did not lead any evidence to prove the age of the prosecutrix. Having regard to the material contradictions in the evidence of the prosecutrix, as discussed above and also in the absence of any proof of age of the prosecutrix, I find it would be highly unsafe to convict the appellants. Accordingly, the appeal is allowed. The appellants are already on bail. The bail bonds of the appellants stand cancelled and the sureties stand discharged.

G.S.SISTANI, J

OCTOBER 07, 2013

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