

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

RESERVED ON : MAY 06, 2015

DECIDED ON : MAY 27, 2015

+ CRL.A. 763/2003

CHATTAR PAL Appellant
Through : Mr.Haneef Mohammad, Advocate
with Mr.Kamal Pal, Advocate.

VERSUS

STATE N.C.T. OF DELHI Respondent
Through : Ms.Kusum Dhalla, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The appellant-Chattar Pal was convicted under Section 366/376 IPC by a judgment dated 22.03.2003 in Sessions Case No.96/2001 arising out of FIR No.229/2001 registered at police station Lajpat Nagar.

2. Admitted position is that the prosecutrix 'X' (assumed name) was known to the appellant who was her Phufa's brother and it is a case of elopement with consent. 'X' aged around 15 years was enticed by the appellant and was taken out of lawful guardianship of her parents on
Crl.A.763/2003

27.04.2001. Thereafter, both stayed together at various places and even performed so-called 'marriage'. Finally both of them were recovered/apprehended on 05.06.2001. During this period, they established physical relations. After completion of investigation, the appellant was charged under Section 366/376 IPC. The prosecution examined eleven witnesses including 'X'. In 313 statement, the appellant denied his involvement in the crime and pleaded that marriage with 'X' was with her free consent.

3. Undisputedly, 'X' was a consenting party throughout. She had accompanied the appellant at various places with her free consent for sufficient long duration and at no stage, she raised any alarm. She did not suffer any external physical injury on the body to infer forcible rape. The Trial Court concluded that 'X' was below 16 years of age and her consent was inconsequential.

4. It is a matter of record that the prosecution did not collect any documentary proof to find out the exact age of the prosecutrix on the date of incident. No birth certificate from any competent authority was collected. 'X' did not attend any school; so there was no question of getting any school record for determination of her age. Ossification test was conducted and as per ossification report, age of the prosecutrix was

determined below 16 years. The prosecution, however, did not examine the doctor who had conducted the ossification test and had given the opinion. PW-11 (Dr.Achyut) merely identified his signatures on Ex.PW-11/A. Even if this report is taken at its face value, the Trial Court did not discuss at all if margin of any specific period was to be given while determining the exact age based upon ossification test. Considering the possibility of error on plus/minus two years in the opinion rendered by the radiological examination, it cannot be concluded with certainty that the prosecutrix was below 16 years of age on the date of incident. In *Jaya Mala vs.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. It is well settled that when two opinions are possible, the one favouring the accused has to be taken. Medical opinion that the prosecutrix was below 16 years only gives approximation of the age. It is not a sure test to determine the age of the prosecutrix; it only gives approximation of the age.

5. Witnesses have given different age of the prosecutrix at different stages of investigation/trial. None of the prosecution witness has given the exact date of birth or year of the prosecutrix. In Ex.PW-2/A 'X's father described her age 14 years while lodging report with the

police. This age also finds mention in MLC (Ex.PW-10/A). In her 164 statement recorded on 06.06.2001 'X' disclosed her age 16 years. When she appeared as PW-1 on 01.03.2002 before the Court, she gave her age 15 years. As per court observation from looks, she seemed to be a girl aged around 14-15 years. No exact date of birth has come on record. It cannot be ruled out that 'X' was not above 16 years of age on the day of incident specifically taking into consideration the ossification report with margin of error. Since the prosecutrix aged more than 16 years established physical relations with her consent, it did not amount to commission of rape. Conviction under Section 376 Cr.P.C. is unsustainable and is set aside.

6. Since the prosecutrix 'X' was below 18 years of age on the day of incident and she was taken out of the lawful guardianship of her parents without their consent or permission, the appellant is liable to be convicted under Section 366 IPC. Conviction on that score recorded by the Trial Court cannot be faulted and is upheld.

7. Nominal roll dated 12.01.2004 reveals that the appellant was in custody for two years, five months and nine days besides remission for two months and eleven days as on 07.01.2004. Order dated 04.10.2004 when the appellant was granted suspension of sentence records that he had

already undergone sentence of more than three and a half years including remission earned by him. The Trial Court has awarded sentence for three years with fine ₹ 1,000/- and to undergo default sentence of 15 days under Section 366 IPC. Since, the appellant has already undergone the sentence awarded to him under Section 366 IPC, he needs not to be taken into custody to serve out the sentence.

8. In the light of the above discussion, the appeal is partly allowed. The appellant is acquitted of the charge under Section 376 IPC while maintaining conviction under Section 366 IPC.

9. The appeal stands disposed of in the above terms. Trial court record be sent back with a copy of this order. The bail bonds and surety bonds stand discharged.

(S.P.GARG)
JUDGE

MAY 27, 2015

sa