

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

**RESERVED ON : 4th NOVEMBER, 2016
DECIDED ON : 15th NOVEMBER, 2016**

+ CRL.A. 209-10/2006

RAM KUMAR @ GOUDA & ANR.

..... Appellants

Through : Mr.Manoj Sharma, Advocate with
Ms.Kavita & Mr.Shahid Ali Roy,
Advocates.

versus

STATE OF NCT OF NEW DELHI

..... Respondent

Through : Ms.Meenakshi Dahiya, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present appeals have been preferred by the appellants – Ram Kumar @ Gouda (A-1) and Raj Kumar (A-2) to challenge the legality and correctness of a judgment dated 18.11.2005 of learned Addl. Sessions Judge in Sessions Case No.37/02 arising out of FIR No.180/01 PS Badarpur by which A-1 was held guilty for committing offences punishable under Sections 366/376 IPC whereas A-2 was convicted under Section 376 IPC. By an order dated 21.11.2005, the appellants were awarded various prison terms with fine.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 09.04.2001 the appellants in furtherance of common intention kidnapped the prosecutrix 'X' (Changed name) aged around 16 years from the lawful guardianship of her parents and was sexually assaulted from 09.04.2001 to 19.04.2001 against her wishes. The occurrence took

place on 09.04.2001 when PW-3 (Braham Pal), victim's father, had gone along with his wife away at night. On return, they found 'X' missing from the house. When they did not succeed to trace 'X', a 'missing' report was lodged with the police on 10.04.2001. FIR No. 180/01 under Section 363 IPC was registered. On 19.04.2001, the prosecutrix was recovered. She was medically examined. Statements of the witnesses conversant with the facts were recorded. The appellants and their associate were arrested and medically examined. Upon completion of investigation, a charge-sheet was filed against all of them in the Court. In order to establish its case, the prosecution examined nine witnesses. In 313 Cr.P.C. statements, the accused persons denied their involvement in the crime and pleaded false implication. The trial resulted in appellants' conviction as aforesaid. It is relevant to mention that co-accused Raju was acquitted of the charges and the State did not challenge his acquittal. Being aggrieved and dissatisfied, the instant appeal has been preferred by the appellants.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the prosecutrix was acquainted with the appellants before the incident as they all lived in the vicinity.

4. Appellants' conviction is primarily based upon the sole testimony of the prosecutrix 'X'. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case the court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

5. On scrutinising the statements of the prosecution witnesses on record, it reveals that vital infirmities and inconsistencies have emerged making it unsafe to base conviction on her solitary statement. On

09.04.2001, the prosecutrix had accompanied A-1 at night when her parents were away. She travelled with A-1 to Haridwar. At no stage, she raised alarm. She remained in the company of the appellants till 19.04.2001. When they came to know about lodging of the FIR by the victim's parents and the fact that the police was searching them, the prosecutrix was brought back to Delhi where A-1 was arrested.

6. When the prosecutrix was medically examined vide MLC (Ex.PW-7/DA), she categorically informed the examining doctor that she had accompanied A-1 with her consent and had sexual intercourse with him. She declined to get herself medically examined. As per MLC (Ex.PW-7/DA), no visible injuries whatsoever were noticed on any vital body parts of the prosecutrix including private parts. Absence of the injuries on the private parts indicated that the prosecutrix was a consenting and willing party as disclosed by her to the doctor.

7. In her Court statement as PW-2, the prosecutrix admitted that she was familiar with A-1 as he used to live with his brother in front of their house. In April, 2001, A-1 came in the house in the absence of her brothers and sister who were away to school and her parents had gone for their jobs, he committed rape upon her. A-1 used to come and tease her subsequent to that also. Finally, he started enticing her to run away and marry. She handed over ₹20,000/- meant for construction and other jewellery articles to A-1. At night time, she accompanied A-1 in a TSR and reached Haridwar. She was taken to in-laws of Ram Kumar's brother and they remained there for about 8 – 9 days. In the cross-examination, she admitted that certain documents along with photographs were prepared for solemnization of marriage at Muzaffarnagar. She further disclosed that in the house where

she was kept, Raj Kumar's father-in-law, mother-in-law, three brothers-in-laws and sister-in-law were present. She, however, did not raise alarm any time and did not complain to them about her kidnapping. She further admitted that in the bus, there was a large crowd but she did not raise noise due to fear.

8. From the whole testimony of the prosecutrix, it can be inferred that she was willing and consenting party throughout. It was a case of elopement with consent. At no stage, she attempted to contact her parents and to inform them about her whereabouts. She remained in the company of the appellants for about ten days. In the medical examination, no injuries whatsoever were found on her body to infer if she was physically tortured or harassed during her stay with A-1.

9. 'X's age becomes significant to ascertain the guilt of the appellants. It was the case of the prosecution that 'X' was below 16 years on the day of occurrence. The prosecution relied upon the testimony of PW-5 (Bhim Singh) who proved school records (Ex.PW-5/A and Ex.PW-5/B) showing the date of birth of the prosecutrix as 11.06.1985. This date of birth was recorded in the school records on the basis of an affidavit furnished by Mrs. Raj. She had assured to the school authorities to produce the X's birth certificate within a year. However, no such birth certificate has surfaced on record till date. It is not clear as to on what basis date of birth of the prosecutrix 11.06.1985 came to be recorded in the school records. Documents (Ex.PW-5/A and Ex.PW-5/B) reveal that the prosecutrix remained in the said school for around a year. Prior to that, she had also studied up to 3rd standard in some other school. The Investigating Agency did not collect any documentary record regarding date of birth registered in

the school first attended by the prosecutrix. Contrary to that, in the ossification report (Ex.PW-7/C), age of the prosecutrix was estimated to be in between 17.5 to 19 years on 19.04.2001. In her statement as PW-2, the prosecutrix did not claim that her date of birth was 11.06.1985. Even PW-3 (Braham Pal) was not categorically sure to claim the exact date of birth of the prosecutrix is to be 11.06.1985. The prosecution did not examine Mrs.Raj to ascertain as to on what basis she had disclosed the birth date to the school authorities. Apparently, genuineness and correctness of the age recorded in the school register is suspect and cannot be relied upon.

10. In 'Ram Murti Vs State of Haryana', 1970 CriLJ 991, the Court held that:

"The question of age of the prosecutrix in cases under Sections 366 and 376, I.P.C. is always of importance. It was particularly so in this case because according to the medical evidence the prosecutrix was found to have been used to sexual intercourse and the rupture of the hymen was old. The High Court having acquitted the appellant for an offence under Section 376 IPC, because the prosecutrix appeared to be a consenting party not only to the impugned acts of sexual intercourse in question but even on earlier occasions, it was, in our opinion, a fit case in which that court should have examined the question of her age more closely. On the evidence on the record we are far from satisfied that there is any trustworthy evidence on the record on which the conclusion that Satnam Kaur, prosecutrix,

*was under 18 years of age in March, 1965
can safely be founded."*

11. In 'Raunki Saroop Vs State', [MANU/PH/0068/1970](#), it has been held that the medical opinion based on X-ray report should be preferred to oral evidence.

12. On the same set of evidence co-accused Raju was acquitted. Obviously, the Trial Court did not consider the statement of the prosecutrix sufficient to base conviction qua Raju. No independent public witness was associated at any stage of investigation. ₹20,000/- and gold ornaments allegedly handed over by the victim were never recovered. The Investigating Agency did not examine any witness from Muzaffarnagar to ascertain as to under what circumstances documents (Ex.PW-2/DA and Ex.PW-2/DB) came to be executed.

13. Considering the inherent deficiencies and infirmities in the statements of the prosecution witnesses, X's statement alone cannot be accepted to base conviction.

14. Resultantly, the appeal filed by the appellants is accepted. The conviction and sentence are set aside. Bail bond(s) and surety bond(s) stand discharged.

15. Pending application (if any) also stands disposed of.

16. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent jail for information.

**(S.P.GARG)
JUDGE**

NOVEMBER 15, 2016 / tr