

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

Judgment Reserved on: May 18, 2016

% *Judgment Delivered on: May 30, 2016*

+ **CRL.A. 730/2015**

NARENDER Appellant
Represented by: Mr.R.N.Sharma and Mr.Ajay Satija,
Advocates.

versus

THE STATE (GOVT OF NCT OF DELHI) Respondent
Represented by: Mr.Ravi Nayak, APP for the State.

+ **CRL.A. 794/2015**

VIKRAM @ AMAN Appellant
Represented by: Mr.A.S.Malik, Advocate.

versus

STATE Respondent
Represented by: Mr.Ravi Nayak, APP for the State.

+ **CRL.A. 803/2015 and Crl.M.A. No.12928/2015**

TEKRAM Appellant
Represented by: Mr.Yogesh Swaroop, Mr.Dushyant
Swaroop and Mr.B.K.Roy, Advocates.

versus

STATE (GOVT OF NCT OF DELHI) Respondent
Represented by: Mr.Ravi Nayak, APP for the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Narender, Vikram and Tekram have been convicted for offences punishable under Sections 363/34, 366/34 and 376(2)(g) IPC vide the

impugned judgment dated May 22, 2015 and directed to undergo rigorous imprisonment for a period of 10 years each and a fine of ₹20,000/- for offence punishable under Section 376(2)(g) IPC and rigorous imprisonment for a period of 7 years each and a fine of ₹10,000/- each for both offences punishable under Sections 363/34 and 366/34 IPC vide the order on sentence dated May 25, 2015.

2. Challenging the impugned judgment learned counsel for Narender contends that Narender has neither been named in the FIR nor was any description given nor was he arrested at the instance of the prosecutrix. In the Test Identification Parade Ex.PX-2, the prosecutrix failed to identify Narender as the third accomplice. Rohtas PW-10, the father of the prosecutrix has turned hostile and has not supported the prosecution case. There being no evidence against Narender, he is liable to be acquitted.

3. Learned counsel for Tekram contends that the witnesses in cross-examination have admitted that ₹1,20,000/- was due to the father of the prosecutrix from Tekram which was taken at the time of the marriage of the elder sister of the prosecutrix and it is for this reason Tekram has been falsely implicated. FIR was registered after 30 hours pursuant to due deliberations. Though the case of the mother of the prosecutrix PW-12 is that one boy dropped the prosecutrix on the motorcycle, however she does not identify any of the appellants nor was anyone arrested in her presence nor were the names disclosed to her by her daughter. There are serious contradictions in the testimony of the prosecutrix who refers to Tekram as Aman in the rukka but in the Court identifies Vikram as Aman. As per the mother, the daughter never went to identify the accused in jail, however the TIP proceedings of Narender are on record. There are material

improvements in the testimony of the prosecutrix. Prosecutrix in her cross-examination admits that she only knew Vikram as Aman, neither Tekram nor Narender. The friend of the prosecutrix in whose presence it is alleged that the prosecutrix was kidnapped has not been examined. No statement of the prosecutrix was recorded under Section 164 Cr.P.C. The learned Trial Court convicted the appellants by merely looking at the examination-in-chief of the witnesses and not going to the contradictions and exaggerations made.

4. Learned counsel for Vikram at the outset takes the plea of juvenility. He states that Vikram was held to be a juvenile as per the matriculation certificate and the ossification test, however the Juvenile Justice Board erroneously reviewed its order and declared Vikram as an adult vide order dated May 06, 2011. Referring to the decision in the case of Jarnail Singh Vs. State of Haryana 2013 VII A.D. SC 313 it is contended that the principles applied for determining the juvenility of the prosecutrix ought to have been applied to the appellant as well. To give preference to the date of birth mentioned in the school first attended, the learned Trial Court relied upon the rules framed by the Delhi Government which could not prevail over the rules framed by the Central Government under the Juvenile Justice (Care and Protection) Act 2000 (in short 'the JJ Act'). Vikram being a juvenile at the time of alleged incident, his trial as an adult is vitiated and thus liable to be set aside. Reiterating the submissions made by learned counsel for Tekram on merits learned counsel further states that the version of the prosecutrix in the FIR has been totally contradicted by the witnesses when they appeared in the witness box. The learned Trial Court without going into the cross-examination and appreciating the evidence in its totality

convicted the appellants on the basis of examination-in-chief. In the rukka the Prosecutrix named Tekram thus, Vikram be acquitted of the charge framed.

5. Learned APP on the other hand contends that no doubt the prosecutrix did not identify Narender in the Test Identification Parade, however before the Court she identified him and thus having identified in the dock there was sufficient substantive evidence to prove that Narender acted in a group with the other two appellants. Though Narender and Vikram were neither mentioned in the FIR nor in the statement under Section 164 Cr.P.C., they were arrested on the identification of the prosecutrix and hence TIP was meaningless. As per the FSL report semen was detected on the underwear of the prosecutrix thereby corroborating her version. As regards declaring Vikram as an adult is concerned, the order passed by the Juvenile Justice Board was set aside by the learned ASJ on an appeal filed by the victim, thus Juvenile Justice Board did not review its order. As per Rule 12 of the Delhi Juvenile Justice (Care and protection of children) Rules 2009 (Delhi JJ Rules 2009), the date of birth mentioned in the certificate issued by the school first attended except the play school has to be given preference. Thus on the learned ASJ setting aside the order of the Juvenile Justice Board, age of Vikram was rightly redetermined and Vikram was held to be an adult. Reliance is placed on the decision of the Division Bench of this Court reported as (2015) 225 DLT 339 R.K.Tarun Vs. Union of India.

6. Process of law was set into motion when the prosecutrix PW-16 lodged the complaint resulting in registration of FIR No.21/2010 under Section 376(2)(g) IPC at PS Narela. Prosecutrix stated that on January 15, 2010 at around 1.45 PM when she came out of the school to go to her house

she met Aman @ Tekram, S/o Hari Om, R/o Gali No.15, H.No.D-842, Gautam Colony, Narela, Delhi. Tekram took her on his motorcycle to the red flats of DDA stating that it was his birthday. There was another motorcycle along with motorcycle of Tekram on which two boys were riding, whom she could recognize on seeing. Contrary to her wishes Aman @ Tekram and one out of the two boys raped her in one of the flats and the third boy kept standing outside. Thereafter Aman @ Tekram dropped her at a short distance from her house on his motorcycle. She knew Aman @ Tekram prior to the incident who used to often meet her while going to the school. Due to fear she did not state anything, the day prior to the lodging of the FIR and on that day she disclosed all the facts to her mother who along with her father brought her to the Police Station. Thus, the incident which occurred around 2.00 O'clock on January 15, 2010 was reported at 7.00 PM on January 16, 2010.

7. Before Court, the prosecutrix deposed that 2-3 days prior to January 15, 2010 she had noticed one boy following her while she was going to school. She came to know the name of the boy as Aman and she identified Vikram present in the Court as Aman. She further deposed that on January 15, 2010 at about 1.30 PM Vikram @ Aman met her at the gate of the school and informed her that it was his birthday and asked her to accompany him. At that time her friend was also with her but Vikram caught hold of her hand and made her forcibly sit on his motorcycle. She further stated pointing out towards Tekram, that he also sat on their motorcycle. Thus, as per the prosecutrix Vikram who was riding the motorcycle, made her sit and Tekram also sat on the same motorcycle. Prosecutrix further deposed that Vikram @ Aman and Tekram took her to DDA flats which were at a

distance of around 25 minutes. On the way one more boy on a red motorcycle followed them whom she later came to know as Narender and identified Narender present in the Court. The three boys including Narender took her to DDA flats on the third floor and locked her there. Narender stayed outside and the other two boys i.e. Tekram and Vikram came inside and committed rape on her one by one 2-3 times. Thereafter Vikram brought her back on the motorcycle and dropped her at a distance from her house, when her parents were coming from somewhere. Vikram ran away after dropping her and her parents could not apprehend him. Her parents asked her about the boy but she did not tell them anything. In the evening when her mother asked her she disclosed the facts. Next day morning she along with her parents went to the school but the Principal did not allow her to attend the classes, where after she along with her parents went to the Police Station when she was medically examined and her statement was recorded. She admitted that during investigation she was confused and could not identify the exact place where the incident took place. On January 17, 2010 Narender was arrested by the Police on her pointing out, on January 18, 2010 Vikram @ Aman was arrested from Mata Wali gali, later the Police called her at Police Station and she identified both Narender and Vikram. On January 20, 2010 she went to the Police Station and identified the third accused Tekram and Police arrested him.

8. In cross-examination by learned APP she denied that in the FIR she had told the Police that the person who took her was Tekram @ Aman and not Vikram @ Aman. She denied that Tekram was arrested in her presence from Gautam Colony. In cross-examination on behalf of the appellants, she admitted that she did not disclose to either her friend or the teachers in the

school that one boy was following her. She further admitted that on the day next to the alleged incident her parents had gone to the Principal and there was a quarrel because the School authorities objected to the boys meeting her outside the school. Though she denied the suggestion that she used to frequently call the accused, however she admitted that she made a call to Vikram @ Aman once on the same day from the public booth because he had threatened her that in case she did not call he will keep following her. She admitted that she did not disclose these facts to the Police when her statement was being recorded. She reiterated that after Vikram @ Aman took her forcibly, three of them sat together on the motorcycle which Vikram was driving. In further cross-examination she admitted that her phone conversation with Vikram took place two days prior to the incident and she did not disclose it to the parents. She also admitted that she did not try to jump from the motorcycle when she was taken to red colour flats nor did she make any noise. She admitted that she could not identify the exact flat where the alleged incident took place and that there was a boundary wall around the flats. In cross-examination she admitted that she had become friendly to Aman @ Vikram and that she had an affair with him, however she denied the suggestion that when her parents came to know about it, on legal advice she framed Narender, Vikram @ Aman and Tekram in the present case. She also admitted that she could not identify Narender at Rohini jail when TIP proceedings were conducted and that Narender was not apprehended at her pointing out.

9. Before dealing further with the testimony of parents, medical evidence and the investigation carried out, it would be appropriate to deal with the case of appellant Narender at this stage itself. The role of Narender

as per the prosecutrix is that he followed them on the other motorcycle and stood outside. Indubitably, standing outside and guarding is a participative role in a case of gang rape, however the moot question is whether the identification of Narender by the prosecutrix for the first time in the Court can be relied upon. Prosecutrix did not know Narender prior to the incident. He was not named in the FIR and at best she could identify him. Narender was not arrested at her instance though she stated so in examination-in-chief but resiled in the cross-examination. In the Test Identification Parade carried out by the learned Metropolitan Magistrate on February 24, 2010, the prosecutrix failed to identify Narender as the third person who accompanied them on the second motorcycle and stood outside. In view of the vacillating stand of the prosecutrix and having failed to identify Narender immediately after the incident it would be unsafe to rely upon her identification for the first time in the Court on December 25, 2012 after nearly three years of the incident. Thus, Narender is entitled to the benefit of doubt.

10. Before dealing with the appeals filed by Tekram and Vikram further it would be appropriate to note the testimonies of the parents of the prosecutrix. The mother of the prosecutrix deposed in her examination-in-chief that on January 15, 2010 her daughter did not return at the normal time i.e. 2.00 PM While she left the house and just reached Gautam Colony after about 5 minutes, she saw one boy drop her daughter from a motorcycle behind the police station situated at Gautam Colony. She had not seen that boy previously and could not recognise him as she had seen him from a distance. At that time her daughter did not tell her anything. When in the evening she asked about the boy, initially her daughter did not tell her anything but when she slapped her she disclosed that one boy had picked her

up from outside her school on a motorcycle on the allurement of celebrating his birthday and thereafter he took her to red and yellow quarters where she was locked in a room and against her wishes, they compelled to make physical relations. While two boys made physical relations with her, one boy stood outside the room. She further stated that one boy brought her back on the motorcycle and left her near the house when she saw him. Undoubtedly, most of the deposition of this witness is hearsay as objected to by learned defence counsel and cannot be read in evidence, however part of the testimony where she deposes that she went to look for her daughter at 2.30 PM and within 5 minutes found her being dropped by a boy on a motorcycle behind police station and in the evening only after she slapped her daughter, she disclosed the entire incident, can be read in evidence. This witness in the cross-examination stated that her daughter was perturbed when she came home and on seeing her while being dropped her daughter was shocked. She further stated that she was married in the year 1994 i.e. on 21st June, 1994 at Delhi and her daughter was born after 1½ years at Sonipat, Haryana. This witness denied the suggestion of Tekram that her husband had taken loan of ₹1.2 lakhs from Tekram's father in February-March, 2009.

11. Similarly, father of the prosecutrix also deposed in sync with that of his wife. However, he did not support the prosecution case in its entirety and thus learned APP cross-examined him and in cross-examination he denied the suggestions made. Even the father of the prosecutrix was suggested that he had taken a sum of ₹1.2 lakhs from the father of Tekram and had become dishonest and got son of Hari Om i.e. Tekram implicated as he did not want to return the money, which suggestion he denied.

12. The explanation of Tekram in his statement under Section 313 Cr.PC which is in consonance to the suggestion put to the witnesses is as under:-

“I am innocent and I have nothing to do with the alleged incident. The allegations are incorrect. The father of the prosecutrix had taken a loan for a sum of Rs.1,20,000/- from my father in the month of February – March 2009 and when we demanded and pressurized them for our money and that is why they have falsely implicated me in this case. My father is a bank employee working in OBC Bank, Libaspur, Delhi. I belong to a good reputed family.”

13. The contradictions in naming Tekram as Aman in the rukka and Vikram as Aman in the Court have already been noted. Besides in the rukka she stated that only Tekram accompanied her on the motorcycle whereas two others followed on the other motorcycle, however in the Court she stated that Vikram and Tekram along with her sat on the same motorcycle. From the cross-examination of the prosecutrix, it is further evident that prosecutrix raised no alarm when she was taken on the motorcycle and she drove with them for a distance of 25 minutes. In the evening when she was dropped by Vikram near her house she did not reveal anything to her parents, however later revealed the facts. On the next day she was not permitted to join the classes in the school due to the objection of the Principal with regard to the boys coming to meet her where after the FIR was lodged. Prosecutrix admitted that she was having an affair with Vikram. All these facts lead to one inference that the prosecutrix willingly went with the occupant of the motorcycle Vikram.

14. Though nothing could be revealed from the MLC of the prosecutrix, however the FSL report Ex.PW-13/A establishes that semen was detected on the underwear of the prosecutrix which was of 'A' group. Besides semen was detected on her shirt, salwar and the slides prepared from the vaginal smears and vaginal wash. The blood samples of the appellants were putrefied and thus whether they were connected to Vikram or Tekram could not be opined. The date of birth of the prosecutrix recorded in the school leaving certificate and birth certificate exhibited as Ex.PW-6/B and Ex.PW-9/A respectively was noted as December 12, 1995. Thus, the prosecutrix was below 16 years of age when the incident took place. Therefore, her consent was immaterial.

15. The question would still remain whether Tekram or Vikram or both committed rape on the prosecutrix. Though the prosecutrix stated Tekram as Aman in the rukka and in the Court identified Vikram as Aman and admitted that she was having an affair with Vikram, her testimony is consistent on the point that Tekram and Vikram committed rape on her. It is clear that Vikram took the prosecutrix on allurement of celebrating his birthday whereafter both Vikram and Tekram confined her in a flat and ravished her. Her testimony is corroborated by the presence of semen on her underwear, shirt, salwar and the slides prepared from the vaginal smears and vaginal wash. Though Tekram has taken a plea that it is a case of false implication as the father of the prosecutrix had taken a loan of ₹1.2 lakhs from his father which he was not returning however Tekram led no evidence to prove the same and the suggestion given to the witnesses has been denied.

16. Learned counsel for Vikram has also pressed that he was declared a juvenile by the Juvenile Justice Board vide order dated May 18, 2010

however the Juvenile Justice Board reviewed its order which it had no jurisdiction to do and vide order dated May 06, 2011 held Vikram to be an adult. Thus the proceedings qua him are vitiated.

17. From the Trial Court Record it is evident that after the order dated May 18, 2010 was passed by the Juvenile Justice Board declaring Vikram as a juvenile, the same was challenged before the learned ASJ in a revision petition filed by the prosecutrix and vide order dated April 05, 2011 the learned ASJ directed the Juvenile Justice Board to conduct enquiry afresh. The Juvenile Justice Board vide order dated May 06, 2011 held Vikram to be an adult as his date of birth was found to be October 17, 1991 in the certificate issued from the School first attended.

18. The Division Bench of this Court in R.K. Tarun (supra) upheld the primacy of Rule 12(3) as framed under the Delhi Juvenile Justice (Care and Protection of Children) Rules 2009 (in short 'Delhi JJ Rules, 2009') over Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 i.e. the model rules framed by the Central Government. Section 68 of the Juvenile Justice Act empowers the State Governments to make Rules and by the proviso to Section 68(1) which was inserted by the Amendment Act 33 of 2006 w.e.f. August 22, 2006, the Central Government was required to frame model rules and such model rules were to apply until the rules in the said respect were framed by the State Governments. Thus, on the coming into force of Delhi JJ Rules, 2009, preference in terms of Rule 12(3) Delhi JJ Rules, 2009 has to be given to the age of child or juvenile in conflict with law as noted in the school first attended (not being a play school) whereafter second preference was to be given to the certificate issued by local bodies and third preference to the matriculation or equivalent

certificate. Thus the Juvenile Justice Board rightly declined to rely upon the matriculation certificate or the ossification test. On the date of commission of the offence i.e. February 15, 2010, Vikram was above 18 years of age and declared an adult rightly by the Juvenile Justice Board.

19. In view of the aforesaid discussion, Narender is acquitted of the charged framed. The impugned judgment of conviction and order on sentence qua Narender are set aside while the same are upheld qua Tekram and Vikram. Crl. A. No.730/2015 is allowed while Crl.A. Nos. 794/2015 and 803/2015 and Crl.M.A. 12928/2015 are dismissed. Vikram and Tekram will undergo the remaining sentence. Superintendent, Central Jail, Tihar is directed to release Narender forthwith, if not required in any other case.

20. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

21. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 30, 2016
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