

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

Judgment Reserved on: August 22, 2016

% *Judgment Delivered on: October 18, 2016*

+ **CRL.A.128/2016 & Crl. M.A. No.2039/2016**

MOHIT PAUL

..... Appellant

Represented by: Mr. Subodh Kumar Pathak, Mr.
Sanjay Kumar and Mr. Rohit
Agarwal, Advocates.

versus

STATE

..... Respondent

Represented by: Mr. Hirein Sharma, APP with
Insp. Asha Sinha CAW Cell
Nanakpura.

+ **CRL.A.1179/2015**

SHARAD KUMAR @ MONTY

..... Appellant

Represented by: Mr. V.K. Khurana, Advocate.

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Represented by: Mr. Hirein Sharma, APP with
Insp. Asha Sinha CAW Cell
Nanakpura.

+ **CRL.A.64/2016**

AMIT YADAV

..... Appellant

Represented by: Mr. Krishan Kumar, Ms. Sunita
Arora, Advocates

versus

STATE

..... Respondent

Represented by: Mr. Hirein Sharma, APP with
Insp. Asha Sinha CAW Cell
Nanakpura.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Vide the impugned judgment dated September 11, 2015, Mohit Paul, the appellant in Crl. A.128/2016 was convicted for offences punishable under Sections 376(2)(g)/323/363 IPC, Sharad Kumar, the appellant in Crl. A.1179/2015 and Amit Yadav the appellant in Crl. A.64/2016 were convicted for offences punishable under Sections 376(2)(g)/323 read with Section 34 IPC. Vide order on sentence dated September 30, 2015 they were sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹1,00,000/- each for offence punishable under Section 376(2)(g) IPC and rigorous imprisonment for period of six months and to pay a fine of ₹1,000/- each for offence punishable under Section 323 IPC. Mohit Paul was also directed to undergo rigorous imprisonment for five years and to pay a fine of ₹25,000/- for the offence punishable under Section 363 IPC.

2. Learned counsels for Mohit Paul and Sharad Kumar contend that the version of the prosecutrix, PW-12 is highly illogical and improbable regarding her kidnapping by Mohit Paul. PW-12 had herself admitted that she was taken from R.K. Puram to Mohammadpur when she had all the time to raise loud noise for help as the area is crowded during the evening hours. Furthermore, the prosecutrix had ample opportunity to run away but she did not do so. There are material contradictions in the testimony of PW-12. The FSL report and the serology report Ex. PW-18/A and Ex. PW-18/B respectively also do not support the prosecution case as the results were

inconclusive. Learned Trial Court failed to deal with the aspect of 'common intention' and without there being any overt act, Sharad Kumar has been convicted.

3. Learned counsel for Amit Yadav contends that the prosecutrix is not a trustworthy and reliable witness. Thus conviction of the appellant or other accused persons could not be based on her solitary testimony. It was further contended that it is incomprehensible that Mohit Paul kidnapped the prosecutrix and made her sit as a pillion rider on his motorcycle by holding her hands with one of his hand and riding the bike with another hand. Furthermore, neither there were any injury marks on the body of the prosecutrix nor her clothes were torn though the prosecutrix alleged that she was dragged to the second floor of the house where the incident took place and the same is fortified by the MLC Ex. PW- 14/A.

4. Per contra learned APP for the State contends that PW-5 had lodged the FIR Ex. PW-3/A for the missing of the prosecutrix. PW-13 Vandana, who recovered the prosecutrix, is an independent witness and corroborated the version of PW-5. The testimony of PW-13 also supported the testimony of PW-12, the prosecutrix. Furthermore, as per the medical examination of the prosecutrix, there were bite marks on the neck which were 1-2 days old, hymen was torn and there was bleeding. Further injury marks were found on the body of Sharad and Amit who were examined by PW-1, Dr. Hari Prasad and also on the body of Mohit Paul who was examined by PW-2, Dr. Rajanikanta Swain. The age of injuries were stated to be less than two days.

5. The sequence of events as per the prosecution version are that on February 3, 2011, PW-5 father of the prosecutrix visited PS R.K. Puram and informed SI Narendra PW-11 that on February 2, 2011, around 5:00 P.M.,

he along with his wife PW-4 had gone to the hospital and the prosecutrix was alone at home. When they reached home at 6:00 P.M., they found that the prosecutrix was not at home. They tried to search her but when they could not find her, they came to the police station and on the basis of this information DD No. 4A was recorded. Consequently, FIR No. 25/2011 under Sections 363 IPC Ex. PW-3/A was registered. In the evening on February 3, 2011, the prosecutrix came home. She was accompanied by Vivek and PW-13 Vandana. Thereafter, PW-4 and PW-5 took her to the police station after which she was taken to Safdarjung Hospital for medical examination. On February 4, 2011, the statement of the prosecutrix was recorded by the Learned Metropolitan Magistrate under Section 164 Cr. P. C vide Ex.PW-12/F.

6. The prosecutrix stated that she was aged 16 years. Mohit Paul who also resided in Sector 6, R. K. Puram was harassing her from past some days and also following her. On February 2, 2011, when her parents were not at home at around 5:00 P.M. she went to the market of Sector 5 to buy maggi. Mohit was trying to stop her but when she did not stop so he forcefully pulled her hand, made her sit on his bike and took her to Mohammadpur. Mohit took her to a quarter on second floor and locked the door from inside. Thereafter, he made her lay down on the bed and removed her clothes. In the meantime, somebody called him, he went towards the gate and opened the door and two boys came inside whom she did not know. Then, Mohit and those two boys committed rape upon her. Mohit pushed her on the bed in such a way that her head hit the bed side. He also pulled her hair and beat her. While she was on bed, one person was holding her hands, other pulled her head and all three of them committed rape upon her one after another.

After raping her, they forced her to wear the clothes. She came downstairs and Mohit told her that he will drop her home. However, the prosecutrix rescued her hand and started walking. In the meantime, all three boys went away on the bike. The prosecutrix sat on the way. A lady, who was going with her daughter, asked the prosecutrix about her address. Since she was not in a condition to speak, the lady took the prosecutrix to her house. The lady provided her medicine and food and she then slept there only. When the prosecutrix was better, the lady asked the name and number of her father after which the prosecutrix was dropped at home.

7. The prosecutrix who was examined as PW-12 deposed in sync with her statement under Section 164 Cr. P.C. She also stated that when one out of the three appellants was having sex with her; the other two were forcing her to have oral sex with them. During her cross examination, she denied the suggestion that she had asked for the mobile number of Mohit and she used to call him on his mobile. She also denied the suggestion that she used to send SMSs at the number 9911331303 from her father's number. She also denied that on February 2, 2011 around 2-2:30 P.M., she met Mohit near Dominic Church.

8. PW-4 mother of the prosecutrix and PW-5 father of the prosecutrix corroborated the testimony of the prosecutrix. During the cross examination, PW-4 stated that the date of birth of prosecutrix was November 7, 1994. She denied the suggestion that the prosecutrix herself ran away after leaving the house.

9. PW-6 Sundar Lal stated that he lived on the ground floor at house no. D-128, Mohammadpur which was his ancestral house. Tenants resided on all the floors except the ground floor. The second floor was let out to Sharad

Kumar who was residing there with his wife. In February 2011, when the wife of Sharad Kumar was pregnant, she started residing with the parents of Sharad at Sector 6, R.K. Puram. During his cross examination, he stated that when he returned in the morning on February 2, 2011, Sharad and his wife were not there in the tenanted room. He also did not visit the tenanted room of Sharad on that day.

10. Gibi Joy, Coordinator, Carmel Convent School, who was examined as PW-8 and PW-16 stated that the date of birth of the prosecutrix was November 7, 1994 as per the records maintained in the school. When recalled and examined as PW-16 Gibi Joy produced copy of birth certificate issued by the Bangalore Mahanagara Palika as Ex. PW-16/A on the basis of which the date of birth was mentioned in the admission form Ex. PW-16/B, registration card Ex. PW-16/C and comprehensive evaluation of Class X by CBSE Ex. PW-16/D. Thus, this witness proved that the prosecutrix was aged 16 years 2 month and 26 days old on the date of incident.

11. PW-13 Vandana stated that on February 2, 2011 when she was coming back along with her mother from Vasant Vihar at 8.45 PM, they noticed the prosecutrix sitting on the footpath. The prosecutrix was semi conscious and was speaking with difficulty. PW-13 tried to pacify her but the prosecutrix was not able to express. They took her to their house and gave her food and medicine. Next day, when the prosecutrix woke up at 4:00 P.M., she was in a better condition and PW-13 enquired about the address and number of her father and dropped her home. During her cross examination, she stated that the prosecutrix did not tell her anything about the incident even after she woke up. The prosecutrix kept on crying.

12. PW-14 Dr. Pooja Goel, Sr. Resident, Safdarjung Hospital had

examined the prosecutrix and prepared the MLC which is Ex. PW-14/A and medical examination report for sexual exploitation which is Ex. PW-14/B. On examination, it was found that there were two bite marks present on the right side of the neck. There were no other injury marks or bruise over the body. The hymen was torn with scarring. No rectal examination was done as there was no alleged history of anal sex. During her cross examination, she denied the suggestion that the bite marks could be possible by sucking or kissing.

13. PW-18 Indresh Kumar Mishra, Sr. Scientific Officer (Biology) FSL conducted the requisite examination on the exhibits and prepared the detailed report Ex. PW-18/A and serology report Ex. PW-18/B. Semen was found on Ex. 2d (Underwear), Ex. 4 (bed sheet), Ex. 6 (underwear), Ex. 11 (underwear) and Ex. 16 (pants). The blood grouping on Ex. 2d and Ex. 4 was inconclusive. Even if the blood grouping was inconclusive which would have connected to the accused, however, the very presence of human semen on the underwear of the prosecutrix proves beyond doubt that she was subjected to sexual intercourse.

14. The main thrust of the arguments of learned counsels for the appellants has been that the relationship developed was consensual, though as per the statement of the appellants recorded under Section 313 Cr.P.C. it was a case of false implication and there was no sexual intercourse with the prosecutrix. Further Sharad Kumar admitted that he was a tenant in the flat where the incident took place. Even accepting that it was not possible for Mohit Paul to have made the prosecutrix sit on the motorcycle as a pillion rider by catching her with one hand and driving the motorcycle with another, from the evidence on record, it is evident that she was enticed away as

Mohit Paul was following her. Her implied consent on enticement by Mohit Paul would not absolve him of offence punishable under Section 363 IPC as the prosecutrix was a minor. Further there was no consent for sexual intercourse which is evident from the perplexed condition in which she was found on the road by a public witness PW-13 Vandana.

15. Considering the cogent and convincing testimony of the prosecutrix, duly corroborated by her parents, testimony of independent witness PW-13, Vandana, MLC Ex. PW-14/A and the FSL report Ex.PW-18/A opining presence of semen on the underwear of the prosecutrix merely because she did not suffer any injury upon being dragged to the IInd floor house of Sharad Kumar, the prosecution case would not fail. Overt acts having been attributed to all the appellants, Section 34 IPC was rightly invoked by the learned Trial Court.

16. Thus, on the basis of the evidence on record, I find no infirmity in the conviction of the appellants for offences punishable under Section 376(2)(g)/323/34 IPC and that of Mohit Paul for offence punishable under Section 363 IPC also and the order on sentence. Appeals and the application are accordingly dismissed.

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

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

OCTOBER 18, 2016
‘vn’