

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

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Reserved on: January 04, 2017

Decided on: May 02, 2017

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CRL.A. 178/2001

DHARAMBIR

..... Appellant

Represented by: Mr. Suresh Sharma, Advocate.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr. Ashok K.Garg, APP for the
State with SI Omveer Singh, PS
Nand Nagri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, Dharambir challenges the impugned judgment dated 23rd January, 2001 convicting him for the offences punishable under Sections 363/366A/506(II)/342/376 IPC in FIR No. 884/1997 registered at PS Nandnagri and the order on sentence of the even date directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹1,000/- for the offence punishable under Section 366A IPC, rigorous imprisonment for a period of one year for the offence punishable under Section 506(II) IPC, rigorous imprisonment for a period of six months for the offence punishable under Section 342 IPC and rigorous imprisonment for a period of seven years and to pay a fine of ₹1,000/- for the offence punishable under Section 376 IPC.

2. Assailing the conviction, learned counsel for Dharambir contends that the age of the prosecutrix has not been duly proved. No bone x-ray was conducted despite the specific advise by PW-3 Dr. Manjusha. The knives

used during the incident have not been recovered. The prosecutrix stated that the appellant and the other assailants were not known to her prior to the incident. The prosecution had failed to prove how the parents of the prosecutrix knew the names of the accused persons and had told her to take their names. No test identification parade was conducted and the accused were shown to the prosecutrix in the police station.

3. Per contra, learned APP for State states that the age of the prosecutrix was proved by the school leaving certificate which mentions the date of birth as 15th May, 1983. As per the FSL report, semen was detected on the salwar of the prosecutrix which corroborates the version of the prosecutrix. Furthermore, the consent of the prosecutrix was immaterial since her age was below 16 years.

4. The brief facts of prosecution case are that on 25th December, 1997 at 8:50 P.M., PW-4 father of the prosecutrix came to the police station and stated that his daughter (PW-1 prosecutrix herein) went somewhere in the evening around 6:00 P.M. without informing anyone and had not come back home. They could not find her despite searching her. On the basis of this complaint, DD No. 61B was recorded by PW-15 Constable Dinesh. However, on 27th December, 1997, the prosecutrix along with her parents came to the police station and gave her statement wherein she stated that on 25th December, 1997, around 7:00 P.M., when she was going to the house of her elder brother, she met Dharambir, Subhash and Raju who had covered their faces. They all took out knives from their pockets, held her, gagged her mouth and threatened her that if she raised alarm, they would kill her. She further stated that since it was evening time and it was cold, there wasn't anyone else on the road. Thereafter, three of them took her to C-2 Block,

Nandnagri, which was the house of maternal uncle of Raju and locked her with Dharambir in a room on the upper portion. Dharambir committed rape upon her without her consent on that night and also in the morning of the next day. However, on 26th December, 1997, in the evening when it was dark, Dharambir dropped her at the corner of the lane in which her house is situated and ran away. He had also threatened her that he will kill her parents if she disclosed about the incident to anyone. Later on, when she reached home, she narrated the entire incident to her parents. On the basis of statement Ex. PW-1/A, FIR was registered for offences punishable under Sections 363/342/376/506/34 IPC. Prosecutrix was taken to GTB Hospital for her medical examination. Site plan Ex. PW-18/A was prepared. Dharambir and Subhash were arrested by PW-18 SI Narinder Singh. On 28th December, 1997, Rajesh @ Raju was also arrested. Statements of the witnesses were recorded. By the impugned judgment Subhash and Rajesh @ Raju were acquitted, however, Dharambir was convicted for offences punishable under Sections 363/366A/506(II)/342/376 IPC.

5. The prosecutrix deposed before the Court in sync with her statement made before the police. During her cross-examination, she stated that when Dharambir dropped her back to her house, a quarrel took place between Dharambir and her family members because of which her shawl was taken away by Dharambir. She also stated that she did not know the names of Subhash and Raju earlier. She stated that before leaving for her brother's house she had informed her family members. She stated that Dharambir had removed her clothes after which he removed his clothes and committed rape upon her due to which she felt pain. She denied the suggestion that she was a consenting party to the "galat kaam". She also denied the suggestion that at

the time of incident, her age was more than 18 years.

6. PW-4 father of the prosecutrix, and PW-7 mother of the prosecutrix, corroborated the testimony of the prosecutrix.

7. PW-14, Principal Incharge, MCD Primary School, Nand Nagri stated that according to the entry in school register Ex.PW-14/C, prosecutrix got admitted in the school on 20th November, 1988. He exhibited the copy of admission form Ex.PW-14/A and affidavit given at the time of admission Ex. PW-14/B and stated that date of birth of the prosecutrix as per school records was 15th May, 1983. He stated that the prosecutrix studied till class 5th after which a School Leaving Certificate was issued vide Ex.PW-14/D.

8. PW-3 Dr. Manjusha, Gynae, GTB Hospital, who had examined the prosecutrix and prepared the MLC Ex.PW-3/A, stated that there were no signs of injury, labia minora was spread apart and the hymen was intact. Hiatus was relatively larger and admitted one finger. She also stated that in case of intercourse or incomplete forcible intercourse, the hymen can remain intact and that the hymen can remain intact even after two such attempts.

9. PW-12 Dr. A.K. Shrivastava, Sr. Scientific Officer, FSL prepared biological report Ex.PW-12/A and serological report Ex.PW-12/B. As per the report, human semen was detected on the salwar (Ex. 3A) of the prosecutrix.

10. Though as per the suggestions given to the prosecutrix, the stand of Dharambir was of consent but no such explanation was rendered in his statement under Section 313 Cr.P.C. As noted above the prosecutrix was less than 16 years of age at the time of incident, thus her consent, if any, is immaterial. The contention of learned counsel for Dharambir that the age of the prosecutrix was not properly proved as no ossification test of the

prosecutrix was done deserves to be rejected as her date of birth was proved by the prosecution by exhibiting the school record. As per Rule 12 of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 precedence has to be given to the age noted in the school first attended and the last resort is to ossification test. The version of the prosecutrix is duly corroborated by the presence of semen on the salwar of the prosecutrix. The name of Dharambir has been mentioned in the ruqqa itself. Thus there is no improvement in the version of the prosecutrix and there was no need for getting test identification done.

11. Considering the evidence on record, it can be safely held that the prosecution has proved its case against Dharambir beyond reasonable doubt. The appeal is accordingly dismissed. Dharambir who is on bail will surrender to custody. His bail bond and the surety bond are cancelled.

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

13. Trial court record be returned.

(MUKTA GUPTA)
JUDGE

MAY 02, 2017
‘vkm’