

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

RESERVED ON : 7th MARCH, 2017

DECIDED ON : 20th MARCH, 2017

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CRL.A.364/2016

ABODH

..... Appellant

Through : Ms.Sunita Arora, Advocate with
Mr.Krishan Kumar, Advocate.

VERSUS

THE STATE (NCT OF DELHI)

..... Respondent

Through : Ms.Meenakshi Dahiya APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 30.01.2016 of learned Addl. Sessions Judge in Sessions Case No.80/2012 arising out of FIR No.251/2012 PS S.P. Badli by which the appellant – Abodh was held guilty for committing offences punishable under Sections 376/318 IPC, instant appeal has been preferred by him. By an order dated 03.02.2016, he was sentenced to undergo RI for seven years with fine ₹10,000/- under Section 376 IPC and RI for two years with fine ₹10,000/- under Section 318 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that the prosecutrix 'X' (changed name) aged around 15 years was resident of A-354, Raja Vihar, S.P.Badli. The appellant, a married man, lived in the said premises in an adjacent room. In 2011, he established physical relations with the victim and threatened her not to disclose it to anyone; he continued to ravish her for about a year. Due to fear, 'X' did not reveal anything and eventually became pregnant. After carrying baby for 5

– 6 months, on 20.07.2012 she felt pain in her abdomen and the baby got aborted. She threw the foetus in the dumping area nearby; some passerby noticed it. Information was conveyed to the police and DD No.16A (Ex.PW-4/A) came into existence on 21.07.2012 at around 09.00 a.m. Finally, it was found that the foetus belonged to the prosecutrix 'X'. The Investigating Officer after recording victim's statement (Ex.PW-2/A) lodged First Information Report. 'X' was medically examined; she recorded 164 Cr.P.C. statement. The appellant was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. To prove its case, the prosecution examined fourteen witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error to base conviction on the sole testimony of the prosecutrix. No independent public witness was associated at any stage of investigation. The prosecutrix has given divergent statements at different stages of investigation / trial and she cannot be relied upon. The prosecution was unable to establish as to what was the exact age of the prosecutrix on the day of crime. Learned APP urged that no valid reasons exist to disbelieve the prosecutrix who was a child aged around 15 years prior to the commission of offence.

4. Police machinery came into motion on 21.07.2012 after receipt of information recorded vide DD No.16A (Ex.PW-4/A). The investigation

was assigned to SI Bhupesh who along with Const.Sandeep reached the spot and found a foetus lying there. Upon investigation, it revealed that the prosecutrix had thrown the said foetus. In her complaint (Ex.PW-2/A), forming basis of the FIR, the victim implicated the appellant to have committed rape upon her. She further disclosed that due to fear she maintained silence and did not apprise her parents. She became pregnant and at the appellant's instance had thrown the foetus in the garbage. The appellant was named in the FIR to be the individual who had defiled her.

5. In her 164 Cr.P.C. statement (Ex.PW-2/B) recorded on 23.07.2012, 'X' deviating from her previous statement (Ex.PW-2/A), introduced a new version and stated that she loved the appellant and had physical relations with him with her free consent. In her Court statement as PW-2, 'X' gave wavering statement about her relationship with the appellant. In examination-in-chief, she testified that the accused committed rape in his room in the absence of her mother and threatened to kill her parents if she narrated the incident to them. Subsequent to that, the accused used to call her in his room in the absence of her parents and establish physical relation with her; it continued for around a year. She became pregnant and when she apprised the accused about it, he brought medicine on consumption of which, the foetus came out and she threw it in the garbage on 20.07.2012 at around 02.30 a.m. In the cross-examination, she admitted to have friendly relations with the appellant as both of them considered themselves 'friends'. She further volunteered to add that physical relationship with the appellant for the first time was with her consent. She was, however, not a willing party to the subsequent acts.

6. On perusal of the statement of the prosecutrix and other materials on record, it can well be inferred that 'X' was willing and consenting party throughout. At no stage, she raised any alarm or hue and cry. In her 164 Cr.P.C. statement, she categorically claimed to have established physical relations with the accused with her free consent. After lodging of the FIR, she declined to go with her parents and preferred to be lodged at an Orphanage Home. She was specific to state before the learned Presiding Officer that she did not want any action against the appellant. The prosecutrix and the appellant were in physical relationship for about a year and at no stage, the prosecutrix brought it to the notice of her parents. There was no real apprehension in X's mind to remain mum as the accused lived in the neighbourhood and was not armed with any weapon. Even after she became pregnant, she suppressed it from her parents and clandestinely consumed medicine to get the foetus aborted endangering her own life. Even after the foetus came out, she without informing her parents went to throw it alone in the garbage at odd hours. She did not lodge any complaint with the police against the accused for violating her body. Only when the police came into motion on getting information about a foetus being thrown in a garbage-bin, they came to know the appellant's involvement in the crime. Apparently, 'X' never wanted to implicate the appellant for the crime.

7. Victim's age to infer the appellant's guilt is crucial. Throughout, the prosecution case was that 'X' was aged around 15 years on the day of occurrence. In the complaint (Ex.PW-2/A) the prosecutrix claimed herself to be aged around 15 years. She reiterated this age at the time of her medical examination vide MLC (Ex.PW-3/A). In her 164

Cr.P.C. statement, she disclosed her age as 15 years. In her testimony before the Court as PW-2 recorded on 26.08.2013, she gave her age 16 years. She was born in Bihar where she had studied up to 2nd class. She was admitted in class 2nd by her father in Delhi. She denied that her age was under-mentioned by her father at the time of her admission. PW-8 (Meena Devi) – victim's mother also claimed that 'X' was aged around 15 – 16 years at the time of recording her statement on 30.01.2014 and was a student of class 7th. She denied if 'X' was above 18 years of age. PW-9 (Julahi Singh) – victim's father also informed that the age of the prosecutrix was 15 years. It remained unchallenged in the cross-examination.

8. Material testimony is that of PW-13 (Raj Kumar), Lab Assistant, Govt. Girls Senior Secondary School, who brought the requisite school record and proved various documents (Ex.PW-13/A, Ex.PW-13/B, Ex.PW-13/C & Ex.PW-11/K). He deposed that 'X' was admitted in their school in 6th class on the basis of admission form and school leaving certificate of the primary school and date of birth recorded therein was 03.01.2001. He brought the original pasting file containing the original admission form as well as SLC of the primary school (Ex.PW-13/A & Ex.PW-13/B). He also brought the original admission register containing relevant entry pertaining to the child at Sl.No.9461; photocopy of which was Ex.PW-13/C. On seeing the original certificate (Ex.PW-11/K) issued by school, giving details of the date of birth of the child, he deposed that it was issued by Smt.Chander Prabha Bajaj, Principal and he could identify her handwriting and signatures. This Court has no sound reasons to disbelieve the date of birth recorded in the school register long back when the victim's parents had not anticipated any such unfortunate incident to happen in future

to manipulate her age. The appellant did not suggest any other specific date of birth of the prosecutrix. Merely because, no birth certificate came to be collected during investigation, date of birth recorded in the school certificate in the absence of any evidence to the contrary cannot be discarded. It is relevant to note that the victim was born in Bihar. The Investigating Officer did not make sincere efforts to collect any such record from the native place of the victim or from the school where she had studied first. For negligence of the investigating agency, the date of birth claimed by the victim and her parents cannot be discredited. The appellant did not ask for ossification test during trial. He did not summon any witness in defence to prove that the child was aged above 16 years of age on the day of occurrence. The Court has no plausible reasons to disbelieve the prosecutrix regarding her age given in her complaint (Ex.PW-2/A) and in her statement recorded under Section 164 Cr.P.C. as she herself did not desire any action against the accused. She was fair to admit that physical relationship with the accused was with her consent.

9. Since the prosecutrix was below 16 years of age at the time of commission of offence, her consent to have physical relationship with the appellant is of no consequence. 'X' being an immature girl of tender age was incapable to take informed decision and submitted herself to sexual intercourse without understanding its consequence. She was unaware even of her pregnancy. Conviction under Section 376 IPC cannot be faulted.

10. Regarding Section 318 IPC since the prosecutrix has given divergent versions at various stages of investigation, I am of the view that the prosecution has failed to establish beyond reasonable doubt that the appellant was instrumental in getting the pregnancy terminated or that he

had brought the medicine for its consumption by the prosecutrix. Nothing has come on record to show from where the medicine / pill was arranged, and if so, by whom. Conviction under Section 318 IPC, thus, cannot be sustained and is set aside.

11. Regarding sentence, the punishment awarded by the Trial Court cannot be modified / altered as the victim was a minor child aged around 15 years. The appellant was a married man aged around 26 years. He exploited the innocence of the child and allured her to have physical relationship for about a year. She even became pregnant and had aborted the child. The appellant had put the victim's life in danger by his nefarious activities. The Court can well understand the trauma of victim's parents who had to suffer humiliation in society due to an unmarried child, student of 7th standard, becoming pregnant. The appellant betrayed the trust of victim's parents who used to provide him food in the absence of his wife.

12. The appellant shall undergo RI for seven years with fine ₹10,000/- for commission of offence under Section 376 IPC; default sentence being SI for one month. Conviction and sentence recorded under Section 318 IPC is set aside.

13. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

MARCH 20, 2017 / tr