

\$~9 & 10

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

%

Date of Judgment: 5th June, 2017

+ **CRL.A. 270/2016**

STATE NCT OF DELHI

..... Appellant

Through : Ms. Aashaa Tiwari, APP for the State
alongwith Inspector Narender Kumar,
PS New Usmanpur

versus

MOHAN

..... Respondent

Through : Mr. Jivesh Tiwari, Advocate

+ **CRL.A. 1181/2016**

MOHAN

..... Appellant

Through : Mr. Jivesh Tiwari, Advocate

versus

STATE

..... Respondent

Through : Ms. Aashaa Tiwari, APP for the State
alongwith Inspector Narender Kumar,
PS New Usmanpur

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Trial court record has been received.
2. Both these appeals are being disposed of by a common judgment.
3. For ease of reference, the appellant in Crl.A. 1181/2016, i.e. Mohan, is being referred to as the 'appellant'.
4. Crl.A. 1181/2016 has been filed by the convict/appellant against the judgment dated 21.11.2015 and the order on sentence dated 24.11.2015 passed by the Trial Court in SC 109/2012, by which the

appellant has been convicted for the offence punishable under Sections 376/366/363 of the Indian Penal Code, 1860 ('IPC') and the appellant has been sentenced to undergo rigorous imprisonment for a period of five years for the offence punishable under Section 376 IPC and is also directed to pay a fine of Rs. 5000/-, failing which he shall undergo SI for one month; rigorous imprisonment for a period of five years for the offence punishable under section 366 IPC and is also directed to pay a fine of Rs. 5000/-, failing which he shall undergo SI for one month; rigorous imprisonment for a period of one year for the offence punishable under section 363 IPC and was also directed to pay a fine of Rs. 1,000/- for the said offence, failing which he shall undergo SI for two weeks.

5. Criminal Appeal 270/2016 has been instituted by the State aggrieved by the order on sentence dated 24.11.2015 contending that the Trial Court has erred in sentencing the appellant for a period less than the minimum sentence prescribed by the statute.

Crl. A. 1181/2016

6. The case of the prosecution, as noticed by the Trial Court, is as under:

"1. On 10.07.2012, Sh. Shyam Kumar Verma, uncle of the victim, lodged a missing report at PS New Usmanpur that her niece, aged about 13 years had been missing since 12.30pm of 28.06.2012. On the basis of the said information, the present case was inititally registered under Section 363 IPC. On 14.07.2012, the complainant again approached the police with the father of the victim and raised suspicion that one Mohan had enticed and taken away the victim and as such, Section 366 IPC was added.

2. On 07.08.2012, the victim was recovered from the house of accused Mohan at village Karasaia, District

Motihari, Bihar and the accused was also arrested from there. After due formalities both were brought back to Delhi and their medical examination was got conducted. After that Section 376 IPC was also added. It also came in evidence that the accused entered into marriage with the victim and committed sexual intercourse with her.”

7. After completion of the investigation, charge sheet was filed against the appellant for the offences punishable under Sections 376/366/363 IPC. A charge was framed against the appellant under the foregoing sections, to which the appellant pleaded not guilty and claimed trial. To establish the guilt of the accused/appellant herein, the prosecution had examined 14 witnesses in all. The defence did not lead any evidence.
8. Learned counsel for the appellant Mohan submits that the judgment and order on sentence passed by the Trial Court is based on conjectures and surmises and unsustainable in the eyes of law. Mr. Jivesh Tiwari contends that the State has failed to prove its case beyond reasonable doubt. The appellant is innocent and has been falsely implicated in the case. It is contended that evidence of the prosecutrix clearly establishes that no sexual intercourse, as alleged by the prosecution, had taken place. It is contended that prosecutrix had denied that the appellant had made physical relations with her. Counsel has highlighted the Court question put to the prosecutrix which reads as under:

“Question: I put to you that when your father had come to Motihari after about one month, can you tell us to why the accused could not make physical relation with you?

Ans. (witness mum)

Court Question: What do you mean by wrong act?

Ans. Accused had attempted to commit wrong act with me

but he had not done wrong act with me....”

(Emphasis Supplied)

9. Learned counsel also submits that the trial court has failed to appreciate that there was a long gap between the date of the alleged incident and the time of reporting and the delay in registration of the FIR has not been satisfactorily explained. Counsel submits that the story of the prosecution cannot be believed inasmuch that it is not possible that the victim was taken from Delhi to District Motihari, Bihar and throughout the journey she did not make any attempt to escape or protest when there were co-passengers and even at the time she was staying in the village with the appellant. It is further submitted that medical examination also does not support the case of prosecution. Counsel submits that the age of prosecutrix has not been proved in accordance with law and thus, the appellant should be given the benefit of doubt especially when leaving of the house and staying with the appellant was consensual in nature.
10. Counsel for the State submits that there was no infirmity as far as judgment and conviction is concerned. She submits that the age of the prosecutrix has been duly established on the basis of the statement made by her father which stands duly corroborated by the certificate produced from the school. It is further established by the statement made by the prosecutrix at the time of preparation of the MLC. Counsel submits that the prosecutrix was a minor girl of 12 years and 4 months on the date of the offence, her consent would be meaningless as at that age it is not acceptable that the victim was aware of the implication. Counsel further submits that the medical evidence also supports the case of the prosecution. Reliance is placed

on Para 20 of the judgment and also DNA report which conclusively establishes the guilt of the appellant.

11. Before the rival submissions can be considered, we deem it appropriate to discuss in detail the testimony of some of the prime witnesses, being the prosecutrix (PW-2) and her father (PW-1) and Dr.Nikita (PW-14).
12. The prosecutrix (PW-2) deposed before the Trial Court that in the month of June or July and probably in the year 2012, she had gone to the house of her uncle Shyam (PW-3) in the area of 3rd Pusta, in Trans Yamuna, Delhi. She called up the appellant on his mobile phone and met the appellant at a Bus Stand. The appellant enticed the prosecutrix by saying that he would keep her in a good condition and asked her to accompany him. PW-2 then accompanied the appellant to his native village in Motihari, Bihar. At Motihari, the appellant asked the prosecutrix to marry him, to which the prosecutrix refused; but later attempted to forcibly marry and the marriage was performed in a Mandir. Prosecutrix (PW-2) further deposed that after marriage, the appellant forced her for physical relations, but had not made physical relations with her as her father (PW-1) had come there. The prosecutrix remained with the appellant for about one month. The prosecutrix made a phone call to her parents and her father had come after about one month. PW-2 was then put a question by the Trial Court that when the father of the prosecutrix had come to Motihari after one month, why the accused could not make physical relations with her? The prosecutrix remained mum and proceeded to depose that her father had come with the police and the police had apprehended them.

13. As the prosecutrix was resiling from her statement made to the police under Section 161 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), she was cross-examined by the Add. PP. During her cross-examination, she stated that the appellant was known to her for about 8-9 months and she used to talk to her. She affirmed that whenever the appellant used to meet her, he used to promise getting a car and a lot of money. She further stated that after marriage, she and the appellant used to reside in a room at Motihari in the house of the appellant. At this stage, the prosecutrix affirmed that she had stated to the magistrate and the police in her statements that the appellant could not make physical relations with her and denied the suggestion that she had stated that the appellant had committed rape with her. On both the occasions, the prosecutrix was confronted with her previous statements (Ex.PW-2/A and Ex.PW-2/B), where it was recorded to the contrary. She further stated in her cross-examination that the appellant had committed rape with her and due to this reason, she had called her father. She explained that the fact was not previously deposed as she had forgotten the same.
14. The prosecutrix (PW-2) was then cross-examined by the *amicus* for the appellant/accused wherein she stated that her parents were aware about the affair of the appellant and the prosecutrix. The appellant had done wrong act with her prior to the incident. A question was put by the Trial Court as to what was meant by a wrong act; to which, prosecutrix replied that the appellant had attempted to commit wrong act with her, but had not done a wrong act with her. She further stated that she was in an affair with the appellant two-three days prior to her summer vacations. PW-2 stated that when being taken to Motihari,

she had not informed any police official or public person that she was being taken forcibly, nor did she inform the persons present at the time of her marriage that she was enticed. At the same time, she denied the suggestion that the appellant had not abducted her, or she had accompanied the appellant from her free will, or was willing to marry him as having a love affair.

15. Jitender Kumar Verma (PW-1), father of the prosecutrix, deposed that in summer vacations of June, 2012, the victim/prosecutrix had gone to the house of his brother Shyam Kumar Verma (PW-3) and went missing from there. After 8-10 days, the brother of PW-1 had lodged a missing report of the victim at PS New Usmanpur. He deposed that the appellant had kidnapped the victim. The appellant was residing in his neighbourhood at Kapashera. He was unable to inform as to how he had come to know that the appellant had kidnapped the prosecutrix.
16. Again, as he was resiling from his previous statement, PW-1 was cross-examined by the Addl. PP. In his cross-examination, PW-1 stated that he had searched for the prosecutrix in the area of Brahanpuri in the neighbourhood of his brother. The appellant was residing in Kapashera village on rent in the same premises of the witness. He further stated that on the day of the incident, both the prosecutrix and the appellant had gone missing and thus, he had concluded that the appellant had kidnapped his daughter. He affirmed the suggestion that the prosecutrix had been recovered from the custody of the appellant at Motihari, Bihar. He also stated that the prosecutrix was studying in 7th standard in Govt. Sarvodaya Kanya Vidyalaya, Samalkha, Delhi when she had gone missing and that her

date of birth was 27.02.2000.

17. In his cross-examination by the *amicus* for the appellant, PW-1 stated that prior to the incident, he had become aware of the affair of the prosecutrix and the appellant, though he did not disclose it to anyone.
18. Dr.Nikita (PW-14) deposed that she had conducted the MLC (Ex.PW-11/B) of the prosecutrix and found that there was no injury, there was old tear of hymen, no evidence of semen and white discharge positive. She had sealed the sample and handed them over to the police. We may also note that PW-14 had deposed the prosecutrix had given the history of physical assault by the appellant with consent, but there was no history of recent sexual activity.
19. We may also note that Shyam Kumar (PW-3) (brother of PW-1) has deposed that on 28.06.2012, the prosecutrix had gone outside his house to take household items from nearby market, but she never returned. PW-3 searched for the prosecutrix/victim to no avail and then informed his brother Jitender (PW-1). Both PW-1 and PW-3 searched for her for several days, but could not find her. Thereafter, they went to PS Usmanpur and made a statement regarding the missing of the victim.
20. In the present case, the forensic evidence is of great significance. The FSL in its report [Ex.C-1 (Colly)] states that the alleges from the source of the exhibit '3a' (blood sample of the appellant/accused) were accounted in the source of exhibits '1m' (washing from vagina of the prosecutrix) and '2a' (underwear of the prosecutrix). The conclusion is as under:

“DNA profiling (STR analysis) performed on exhibits is sufficient to conclude that DNA profile generated from the source of exhibit ‘3a’ is matching with DNA profile

generated from the source of exhibits '1m' & '2a'. A female DNA profile was generated from the source of exhibit '1pl'"

(Emphasis Supplied)

21. We have heard the learned counsel for the parties and examined the impugned judgment and the Trial Court record.
22. It is settled law that the testimony of a hostile witness need not be disregarded *in toto* and the part of the testimony inspiring confidence may be relied upon. We need not burden this opinion with judicial pronouncements in this regard, suffice to mention that one may usefully refer to ***Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P.***, (2006) 2 SCC 450 (paragraph 7); ***Jodhraj Singh v. State of Rajasthan***, (2007) 15 SCC 294 (paragraphs 11 - 14); ***Paramjeet Singh v. State of Uttarakhand***, (2010) 10 SCC 439 (paragraph 15 - 20); ***Raja v. State of Karnataka***, (2016) 10 SCC 506 (paragraph 32); and ***Arjun v. State of Chhattisgarh***, (2017) 3 SCC 247 (paragraph 15).
23. The prosecutrix (PW-2) has deposed that she was in a love affair with the appellant and had gone to Motihari with him and lived with him. She continuously stated that the appellant did not commit any wrong act with her, but in her cross-examination by the Addl. PP, she stated that the appellant had committed rape with her. The factum of sexual intercourse between the appellant and the prosecutrix also finds mentioned in the statements of the prosecutrix to the police (Ex.PW-2/B) and before the Metropolitan Magistrate (Ex.PW-2/A). She had also stated that same to Dr.Nikita (PW-14) during her medico legal examination. We may also add that the Trial Court had, after noticing the demeanour of the prosecutrix, concluded in paragraph 19 that the

prosecutrix was attempting to hide the fact that the appellant was trying to have sexual relations with her. The same is further corroborated by the medical and forensic evidence on record.

24. Hence, it can be safely concluded that the appellant had sexual intercourse with the prosecutrix. As the evidence has the overtures of consensual sexual intercourse, the age of the prosecutrix becomes relevant. This very bench in the case of ***State (Govt. of NCT of Delhi) v. Charan Singh & Ors., 2017 SCC OnLine Del 8186*** had in respect of ascertaining the age of a child, who is a victim of a crime, observed as under:

“15. Under Section 361 IPC, the taking of a minor under 18 years of age in case of a female out of the keeping of the lawful guardian without the consent of the guardian amounts to kidnapping punishable under Section 363 IPC. For this purpose the age of the prosecutrix is relevant.

16. The Apex Court in Jarnail Singh v. State of Haryana, (2013) 7 SCC 263 it has been held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is applicable for ascertaining the age of the child who is a victim of a crime. The relevant portion reads as under:

“20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). ... Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. ...”

17. To avoid prolixity, one may also refer to the judgments in *Mahadeo v. State of Maharashtra*, (2013) 14 SCC 637; *State of M.P. v. Anoop Singh*, (2015) 7 SCC 773; and *Santosh Sonar @ Santosh Verma v. State of Bihar*, 2014 (4) PLJR 192.

18. Therefore, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is applicable for ascertaining the age of a child who has been a victim of a crime as well. Sub-rule(3) of Rule 12 reads as under:

“12. Procedure to be followed in determination of Age.-

...

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause(a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either

of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence, whereof, clause(b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

(Emphasis Supplied)

25. In the present case, the prosecution has produced the certificate of the school of the prosecutrix (Govt. Sarvodaya Kanya Vidyalaya), exhibited as Ex.P-1 (Colly), stating the date of birth of the prosecutrix to be 27.02.2000, which is inturn based upon the School Leaving Certificate of Nagar Nigam Prarthmik Vidyalaya, Kapashera and the Admission and Withdrawal Register. In view of this evidence, the Trial Court was correct in concluding that the date of birth of the prosecutrix was 27.02.2000 meaning that she was about 12 years 4 months at the time of the incident. Thus, the consent of the prosecutrix, being a minor, was inconsequential.
26. The only other ground urged by Mr.Jivesh Tiwari is regarding the delay in lodging the missing complaint. The prosecutrix/victim went missing on 28.06.2012 and the missing report was lodged on 10.07.2012, i.e. after a delay of 12 days. The only explanation forthcoming is contained in the testimony of PW-3 to the effect that they were searching for the prosecutrix on their own volition, which can by no means be a sufficient explanation. However, the same merely raises a doubt on the conduct of the parents/guardians of the minor, throwing open room for doubt in respect of the offences under Sections 363 and 366 IPC and not under Section 376 IPC as once the factum of sexual intercourse is established, the consent of either the parents or the minor is immaterial. Since the appellant has already

undergone his period of incarceration for the sentences under Sections 363 and 366 IPC, the submission of learned counsel for the appellant is to no effect.

27. Having regard to the evidence of the prosecution, the FSL Report [Ex.C-1 (Colly)], the DNA profiling and the tender age of the victim, i.e. 12 years 4 months, we find no merit in the appeal. Thus, the appeal deserves to be dismissed.

Crl. A. 270/2016

28. This appeal has been preferred by the State against the order on sentence by which the respondent has been sentenced to rigorous imprisonment for 5 years which is below the minimum sentence provided under Section 376 IPC.
29. Learned counsel for the State submits that having regard to the nature of the offence and the age of the prosecutrix, , i.e. 12 years 4 months, the special circumstances which have been recorded by the Trial Court cannot be accepted.
30. While counsel for the respondent submits that the age of the prosecutrix was not established. He further submits that the Trial Court has taken a view which is based on the two decisions of this Court itself where the facts were almost similar in nature and the age of prosecutrix was approximately the same. In one case, the age was 12 years and in another case it was less than 13-14 years. In ***Sanjay v. State*, ILR (2013) III Delhi 2389: MANU/DE/2595/2013**, the victim was found to be 15 years of age.
31. It is clear that sentencing vests great discretion in the hands of the judge, which is to be exercised in a sound manner while balancing the

aggravating and mitigating circumstances of a case. There cannot be any uniform policy which may be resorted to as sentencing involves a comprehensive view of both the crime and the criminal allowing for a myriad situations or questions which may fall for the Court. All the while the doctrine of proportionality must be adhered as both deficient and excessive punishments undermine the criminal justice system. [***Ramjee Lal v. State (Govt. of NCT) Delhi, 2017 SCC OnLine Del 8581*** (paragraphs 16 - 22)]

32. The Trial Court has in its order on sentence dated 24.11.2015 granted punishment less than the statutory minimum under Section 376 as (1) the victim was a consenting party, (2) conduct of the convict was satisfactory, (3) the appellant was a first time offender and (4) he is to maintain his aged mother. Primarily, it was reason (1) which bore in the mind of the Trial Court to award imprisonment of only five years. Trial Court had placed reliance on ***Manish Singh v. State Govt of NCT and Ors., 126 (2006) DLT 28; AIR 2006 Del 37; Bholu Khan v. State of NCT of Delhi, 2013 (134) DRJ 241; Sanjay (Supra); and Rattan Mandal v. The State of NCT of Delhi, 2015 (3) JCC 1513.***
33. In ***Manish Singh (Supra)***, a coordinate bench of this Court was disposing two *habeas corpus* petitions. The one relevant for our purpose is W.P. (Crl) 1196/2003 wherein the petitioner had sought production of his daughter alleged to be 14 years old. The daughter claimed to be 19 years old and as per the medico legal report furnished, she was 16-18 years old. This was a case of a 'run away marriage' wherein all the parties including the petitioner had reconciled and this Court quashed the FIR under Section 363 IPC. The case had nothing to do with sentencing in a criminal case nor can

lay any precedent as the age of consent remained 16 years and the girl was found to be older.

34. **Bholu Khan (Supra)** is again a *habeas corpus* petition seeking production of one Shama Parveen, whose age was doubtful and had married under Muslim Law. Ms.Parveen claimed to be 18 years old, while the ossification test report said that she was 16 years old plus/minus one year. In this background, this Court observed that a muslim girl was free to get married once she has attained the age of puberty; the marriage was not null and void; and an underage (below 18 years) can be allowed to stay and reside at a place of her choice or can be directed to live with her parents. In this background, this Court passed directions, *inter alia*, enabling Ms.Parveen to live in her matrimonial home.
35. A Single Judge of this Court in **Sanjay (Supra)** had modified the punishment under Section 366 and 376 IPC to rigorous imprisonment for four years, observing as under:

“4. The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. I have before me the prosecutrix's testimony. It goes without saying that the prosecutrix merrily proceeded with the Appellant most willingly. She travelled with him in a bus and then in a train to Lucknow. The prosecutrix was brought back to Delhi by the Appellant himself where the Appellant and the prosecutrix were apprehended at New Delhi Railway Station by the police. Thus, although the Appellant does not want to contest the Appeal on merits, it is borne out from the record that it was a case of consensual intercourse with the prosecutrix. While awarding punishment, the Court has to take into consideration the mitigating and aggravating circumstances. The prosecutrix was aged 15 years and 08

months and she was incapable of giving the consent for sexual intercourse. I have seen numerous cases where the girls sometimes less than 16 years of age take a lead in eloping with a boy, enters into a marriage with the boy and have sexual intercourse with him. ...”

(Emphasis Supplied)

36. However, in the case the girl was aged 15 years 8 months and there were no signs of non-consensual intercourse on the part of the appellant.
37. Another Single Judge of this Court in ***Rattan Mandal (Supra)*** had after observing that the prosecutrix was “*on the verge of attaining the age of 16 years*” and that she was a “*consenting party and it was a case of elopement with consent*” had modified the sentence to one undergone (about 4 years 9 months).
38. We may also notice another judgment of a Single Judge of this Court in ***Brij Pal @ Baiju v. State, 2011 [3] JCC 1733: MANU/DE/2188/2011***, wherein the age of the victim was between 14 to 16 years old and noticing consent on the part of the prosecutrix, this Court had modified the sentence under Sections 376/366 IPC to the period undergone (more than 4 years).
39. From the foregoing discussion, it is clear that neither ***Manish Singh (Supra)*** nor ***Bholu Khan (Supra)*** deal with sentencing in a rape case, but are *habeas corpus* petitions highlighting the predicament of the Court in ‘run away marriages’. In ***Sanjay (Supra)***, ***Brij Pal @ Baiju (Supra)*** and ***Rattan Mandal (Supra)***, the prosecutrix was on the verge of attaining the erstwhile age of consent, i.e. 16 years [prior to the Criminal Law (Amendment) Act, 2013 (13 of 2013)], which is not the case in the present matter. Before us, the prosecutrix/victim was

merely 12 year 4 months on the date of the incident and cannot by any means be said to be on the verge of attaining the age of consent. Further, there are vestiges of non-consensual intercourse as well as enticement in the testimony of the prosecutrix (PW-2). Hence, we are of the view that the present case is not a fit case for granting less than the statutory minimum as there are no adequate and special reasons for doing so.

40. Accordingly, having regard to the facts and circumstances of the case and the fact that minor's consent is meaningless, we uphold the conviction dated 21.11.2015 and modify the order on sentence dated 24.11.2015 to the extent that the appellant Mohan shall undergo rigorous imprisonment for a period of seven years for the offence under Section 376 IPC. Order on payment on fine shall remain unchanged.
41. Thus, Crl.A. 1181/2016 is dismissed, while Crl.A. 270/2016 filed by the State is allowed. Both the appeals as well as pending applications are disposed of.
42. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action.
43. Trial Court record be returned along with copy of this judgment.

G.S.SISTANI, J.
(VACATION JUDGE)

VINOD GOEL, J.
(VACATION JUDGE)

JUNE 05, 2017 // /cd