

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

% Reserved on: 15th November, 2016
Decided on: 10th January, 2017

+ CRL.A. 923/2015

MOHIT

..... Appellant

Represented by: Mr. R.S. Sharma and Mr.
Manish Kumar, Advocate.

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Represented by: Mr. Hiren Sharma, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Convicted for offences punishable under Section 365/366/376 IPC, Mohit challenges the impugned judgment dated July 22, 2015 and the order on sentence dated July 28, 2015 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹10,000/- each for offences punishable under Sections 365 and 366 IPC and rigorous imprisonment for a period of ten years and to pay a fine of ₹20,000/- for offence punishable under Section 376 IPC.

2. Assailing the conviction, learned counsel for Mohit contends that the age of the prosecutrix has not been proved. Neither Sarju Devi nor the person issuing the certificate with respect to the date of birth of the prosecutrix was examined. The report of ossification test was withheld by the prosecution thus adverse inference is required to be drawn. There is no scientific evidence to prove that the prosecutrix was raped. The prosecutrix

only alleged that she was forcibly abducted. No evidence has been produced by the prosecution to corroborate the version of the prosecutrix. No site plan of the place where alleged rape was committed has been prepared. Only the site plan of the place where alleged incident of abduction took place has been prepared vide Ex. PW-19/B. The prosecutrix was under duress when her statement was recorded in the Trial Court on 2nd September, 2011 and the learned Trial Court also recorded that she was reluctant in speaking. Thereafter, on 7th October, 2011, she deposed as per the prosecution case. The love affair between the appellant and the prosecutrix has been admitted by the parents of the prosecutrix. Lastly, it was submitted that when the prosecutrix was allegedly taken away from her school, no alarm was raised by her, which proves that there was no enticement.

3. Per contra learned APP for the State submits that as per the MLC Ex. PW-5/A, there was swelling over labia majora with slight bleeding. Further, as per the testimony of PW-12 Dr. Nilanchali Singh, the hymen was deflorate and during her cross examination she stated that the possibility of recent coitus could not be ruled out. With respect to the age of the prosecutrix, as per the Juvenile Justice (Care and Protection of Children) Rules, the age is to be considered as per the certificate from the school first attended. Thus, ossification test was not required to be conducted. The prosecutrix being a minor, her consent, if any, was immaterial. The appellant in his statement under Section 313 Cr.P.C. admitted that he had love affair with the prosecutrix. The prosecutrix has categorically stated that she was enticed and raped.

4. The sequence of events leading to the prosecution case are that on 9th February, 2011, PW-3 father of the prosecutrix visited PS Alipur and

informed PW-19 SI Dinesh that he had two sons and one daughter. The prosecutrix PW-2, aged approximately 15-16 years, who studied in 10th standard in a Government school, had left for school around 7:30 A.M. but did not return home in the afternoon. When he tried to search, he got to know that the prosecutrix was seen with the appellant Mohit in an Alto car bearing number DL – 8 CH – 8402. Mohit had followed the prosecutrix about 5-6 months back also for some days and the same was reported to his family. After the missing of his daughter, when he went to Mohit's house, he was not found present there and his Alto car was also not there. On 8th February, 2011, Mohit had taken the prosecutrix after luring her. Thus, action be taken against him. Pursuant to his statement Ex. PW-3/A, FIR no. 39/2011 was registered under Section 363 IPC at PS Alipur vide Ex. PW-15/A.

5. During the course of investigation, SI Dinesh received the information that the prosecutrix was seen with Mohit near G3S Cinema Hall, Sector-11, Rohini. He along with the complainant and other police officials went to the said cinema hall and found the prosecutrix standing near the hall in her school uniform who started crying on seeing her father. When SI Dinesh rushed towards Mohit, he fled away in his Alto car. The statement of the prosecutrix was recorded under Section 161 Cr. P.C., after which she was taken to SRHC Hospital for medical examination. On 10th February, 2011, Mohit was apprehended by SI Dinesh. On inspection of the car, one hair was found on the back seat of the car and one school bag containing books, note books and tiffin was also found lying on the front seat of the car. Statement of the prosecutrix was recorded under Section 164 Cr. P.C. by PW-13 Shunali Gupta, Civil Judge, Tis Hazari vide Ex. PW-2/A.

6. During the course of trial, PW-6 Vinod Rana, Principal, MCD School,

Hirankiboyas, furnished the copy of admission form Ex. PW-6/C, copy of entry in admission register Ex. PW-6/A and copy of affidavit of prosecutrix's grandmother Smt. Sarjo Devi Ex. PW-6/D and stated that the date of birth of the prosecutrix, as per the school record, was 12th April, 1995.

7. PW-2, prosecutrix deposed that in February 2010, when she was studying in class 10th in a school at village Bakhtawarpur, Mohit used to follow her around the school. She informed about it to her family members who in turn complained to the family members of Mohit. Despite this, Mohit did not mend his ways. On 8th February 2010, when she was waiting outside the school for her friend, Mohit came and started talking to her sweetly. Thereafter, he offered to take her for a ride in his Alto car. When they reached a lonely place, he stopped the car, came on the back seat of the car, kissed her on her face and pressed her breasts. When she protested, he again went to the front seat of the car and drove the car. He drove the car here and there till night. He stopped the car and asked the prosecutrix to lay down on the back seat. He also sat on the back seat and started molesting her again and took off her salwar. She raised alarm but there was no one to hear. Thereafter, Mohit also removed his clothes and committed rape upon her. Thereafter he again sat on the front seat and slept. In the morning, Mohit took her to Rohini where PW-3 and police officials were also present. During her cross examination, she stated that Mohit took her in his car in February 2011. She denied the suggestion that she was waiting for Mohit outside the school and not for her friend Pooja.

8. PW-3, father of the prosecutrix, deposed in sync with his statement made to the police. During his cross- examination, he denied the suggestion

that the prosecutrix used to roam around with Mohit in his car and did not attend the school. PW-5, mother of the prosecutrix, corroborated the version of the prosecutrix and PW-3.

9. PW-11, Dr. Anita, Medical Officer, SHRC Hospital, who was deputed on behalf of Dr. Kavita who had prepared the MLC exhibited the same as Ex. PW-5/A. Though she could not identify her handwriting, however, identified her signatures. As per the MLC Ex. PW-5/A, there was swelling present over labia majora and there was slight bleeding.

10. PW-12 Dr. Nilanchali Singh, SR, LNJP Hospital had examined the prosecutrix on 10th February, 2011. On local examination, she found the hymen to be deflorate. During her cross examination she could not say whether there was any recent sexual intercourse as the prosecutrix was menstruating but the possibility of recent coitus could not be ruled out.

11. PW-16, Jaipal, registered owner of Alto car bearing number DL 8CH 8402 of black car, stated that on 8th February, 2011, the said car was driven by his son Mohit.

12. Section 12 of Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 which deals with the procedure to be followed in determination of age reads as under-

“12. Procedure to be followed in determination of Age. (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile 10 11 or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose. (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if

available, and send him to the observation home or in jail. (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 date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

iii. the matriculation or equivalent certificates, if available;

(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.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the parent/ guardian/ person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

13. Insofar as the submission of the learned counsel for the appellant with respect to the age of the prosecutrix is concerned, as per the Delhi Juvenile Justice (Care and Protection of Children) Rules noted above, the age has to be determined as per the certificate from the school first attended. As per the certificate from the school first attended Ex. PW-6/C, the date of birth of the prosecutrix was 12th April, 1995. Thus, the prosecutrix was 15 years and 9 months old at the time of alleged incident and was thus a minor.

14. Reliance of leaned counsel for the appellant on the decision of Supreme Court reported as 2011 (1) JCC 239 Alamelu & Anr. Vs. State Rep. by Inspector of Police is misconceived. The Hon’ble Supreme Court was dealing with the case where the age was proved by the transfer certificate and the ossification test. Considering the fact that no cogent evidence was led to prove the basis on which the age was recorded in the transfer certificate, the Hon’ble Supreme Court held that though the certificate was admissible in evidence under Section 35 of the Indian Evidence Act, however such a document even though admissible would not be of much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. Further in that case additionally the Supreme Court noted that PW-1 in his evidence made no reference to the transfer certificate. The Supreme Court further noted that these documents came on record after the petition was filed by the complainant under Section

311 Cr.P.C. seeking permission to produce the transfer certificate and recalling of PW-2 which was allowed. PW-2 in her cross-examination merely stated that she had signed the transfer certificate and that the same was signed by the father as well as the Headmaster. As noted above, in the present case PW-6 Vinod Rana, Principal of the school first attended by the prosecutrix was examined, who furnished the admission form Ex.PW6/C, copy of entry in admission register Ex.PW-6/A and copy of the affidavit of the prosecutrix's grandmother Smt. Sarjo Devi Ex.PW-6/D showing the basis on which the age was entered. Further both the parents of the prosecutrix entered the witness box who were cross-examined as to the age of the prosecutrix however nothing material could be elicited.

15. Considering the cogent and convincing testimony of the prosecutrix, duly corroborated by the medical evidence, I find no infirmity in the conviction of the appellant for offence punishable under Section 365/366/376 IPC and the order on sentence. Appeal is accordingly dismissed.

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

17. TCR be returned.

(MUKTA GUPTA)
JUDGE

JANUARY 10, 2017
'v mittal'