

\$~R-7 & R-7A

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

+ **CRL.A.1190/2015**

SALEEM Appellant
Through: Mr. Kanhaiya Singhal, Advocate.

versus

STATE Respondent
Through: Mr. Kewal Singh Ahuja, APP

+ **CRL.A.1290/2015**

AKASH Appellant
Through: Mr. Sumeet Verma, Advocate with
Ms. Preeti Jakhar, Advocate.

versus

STATE Respondent
Through: Mr. Kewal Singh Ahuja, APP

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL

JUDGMENT
16.07.2018

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1. These are two appeals directed against the impugned judgment dated 20th August 2015 passed by the learned Additional Sessions Judge (ASJ)-01, North, Rohini in Sessions Case No.11/2013 arising out of FIR No.163/2012 registered at Police Station ('PS') Shahbad Dairy convicting the Appellants for the offence punishable under Section 376 (2) (g) of the Indian Penal Code (IPC) and the order on sentence dated 25th August 2015 whereby the Appellant Saleem (Accused No.1; A-1) was sentenced to undergo rigorous

imprisonment (RI) for life with a fine of Rs.5,000/-, and in default of payment of fine to undergo simple imprisonment (SI) for one month. Akash (Appellant in CrI.A.1290/2015) (A-2) was sentenced to undergo RI for 12 years with a fine of Rs.5,000/-, and in default of payment of fine to undergo SI for one month.

2. The trial Court also ordered compensation of Rs.1 lakh to be paid to the victim and gave directions to the Secretary of Delhi State Legal Services Authority, North District for that purpose.

3. The charge against both the accused was that on 17th May 2012, between 8 and 9 pm in the open fields near C-Block, Metro Vihar Phase-1, Holambi Kalan, Delhi, both of them committed gang rape on the prosecutrix (PW-1) aged 9 years and further that A-1 was continuously committing rape on PW-1 for two months prior to 17th May 2012 at his house.

4. It must be noticed that a second charge against both the accused was that they forcibly administered a certain stupefying substance to PW-1 thereby committing the offence under Section 328/34 IPC. The trial Court has acquitted both the accused for the said offence.

5. Mr. Sumeet Verma, the learned counsel appearing for the Appellant Akash (A-2) has drawn the attention of the Court to the aspect of juvenility of the said Appellant at the time of the commission of the offence. In this context, he referred to the evidence of Smt. Savitri (CW-1), the mother of Akash who in her deposition placed on record her own Aadhaar Card (Ex.CW-1/A), her ration card (Ex.CW-1/B), the election I-card and UIDAI

of her eldest son, Jitender (Ex.CW-1/C and Ex.CW-1/D respectively), which showed his year of birth to be 1990; and the Aadhaar Card of her second son Arjun (Ex.CW-1/E) showing his year of birth as 1993.

6. According to CW-1, her second son Arjun was two and a half years younger to Jitender and the Appellant Akash was stated to be two and half years younger to Arjun. She deposed that A-2 had studied for 2-3 years in an Anath Ashram, situated at Village Mungeshpur. There was no cross-examination whatsoever of CW-1.

7. Shri Naresh Kumar , the Principal of MCD School, Mungeshpur where A-2 studied, was examined as CW-3. He brought the record of his school which showed that A-2 had taken admission in that school on 3rd April 2006 in the 1st standard. As per the admission and withdrawal register of the school, his date of birth was recorded as 25th December 1999. A photocopy of the said register was exhibited as Ex.CW-3/A. The trial Court noted “original seen and returned”. The application given by the guardian Suraj Bhan at the time of admission of A-2 was also exhibited (Ex.CW-3/B), which again showed the date of birth of Akash as 25th December 1999. The affidavit of the guardian (Ex.CW-3/C) was also exhibited. Here again, the trial Court noted ‘original seen and returned’. While admitting in his cross-examination that the school authorities had not verified the age of A-2 and that the affidavit was given only by the guardian of A-2 and not his parents, CW-3 denied that the date of birth of A-2 had been wrongly mentioned by the guardian.

8. Mr. Sumeet Verma referred to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007 and, in particular, Rule 12 (3) which reads as under:

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

1. xxx
2. xxx

(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

conclusive proof of the age as regards such child or the juvenile in conflict with law.”

9. Mr. Verma submitted that unless there was no school certificate or birth certificate available, there was no occasion for the trial Judge to have ordered an ossification test to determine the age of A-2 in the present case. He also pointed out that the trial Judge only went by the ossification test and did not refer to any other evidence led in the matter. He submitted that the trial Court erred in not even discussing the evidence of CW-1 i.e. the mother of A-2 and CW-3 the Principal of the school despite the fact that both were examined as Court witnesses.

10. Countering the above submissions, Mr. Kewal Singh Ahuja, the learned APP submitted that the evidence of Dr. Jitender Singh (PW-6) was categorical that the bone age of A-2 was more than 20 years. That report was exhibited as Ex.CW-2/A. He submitted that there could not be such a huge gap between the school record which showed A-2's age to be 13 years at the time of commission of the offence and his bone age which was around 20 years.

11. The above submissions have been considered. Mr. Verma is right in his submission that in terms of Rule 12 (3) (b) of the Juvenile Justice Rules, resort may be made as to the determination of age by a medical board only where there is no matriculation or equivalent certificate, or a date of birth certificate or a municipal corporation birth certificate. However, in the present case, with the school certificate having been produced, and its authenticity not having been questioned, there was no occasion for the trial

Court to refer the issue to a medical board for an ossification test.

12. It was then submitted by Mr. Ahuja that at the time that A-2 was sent for medical examination, it is possible that the school certificates might not have been available. Be that as it may, when the mother of A-2 was herself examined as CW-1, and the school Principal as CW-3, the trial Court ought to have dealt with the evidence brought on record by them. Unfortunately, in the entire impugned judgment, there is no discussion whatsoever of the evidence brought on record by CWs 1 and 3. In a single paragraph, i.e., para 8, the trial Court simply notes that PW-6 had opined the age of A-2 to be more than 20 years. The trial Court erred in ignoring the evidence of CWs 1 and 3 that were favourable to A-2.

13. In the circumstances, the Court is of the view that the trial Court gravely erred in not addressing the issue concerning the juvenility of A-2 on the date of commission of the offence. If one went by the evidence of CW-1, which incidentally was not challenged, A-2 was two and a half years younger than his elder brother Arjun, whose year of birth is 1993. Even going by this yardstick, A-2 was a juvenile on the date of commission of the offence, i.e., he was less than 18 years of age.

14. The Court finds from the nominal roll filed in respect of A-2 way back in 2015 that he had already served more than 3 years of imprisonment as of that date. He has served more than 6 years of imprisonment as of date. Therefore, no purpose is going to be served by sending his case to the Juvenile Justice Board for a trial at this stage. Consequently, the conviction

of A-2 ordered by the trial Court for the offence under Section 376 (2) (g) IPC and the consequent order on sentence as far A-2 is concerned are hereby set aside.

15. Coming now to the culpability of A-1, it is clear that the evidence of the prosecutrix, PW-1, has remained unshaken despite intensive cross-examination. She has clearly spoken about her own father, i.e., A-1 repeatedly committing rape on her. The statement recorded of the prosecutrix under Section 164 Cr PC has not been contradicted by her deposition in Court. This too clearly points to A-1 having committed rape on her not only on the date of the incident but even earlier. The narration by the victim of her horrible experience to the NGO worker of Navshrishti (PW-4) further corroborates her version.

16. Although the FSL report could not confirm that the DNA of the semen found in her vaginal swab matched the DNA of A-1, this was because no DNA profile could be generated therefrom as a result of putrefaction of the sample. Nevertheless, the MLC (Ex.PW-5/A) prepared by Dr. Shilpi Bhatnagar, whose hand writing was recognized by Dr. Saroj Agarwal (PW-5) showed her hymen to be ruptured.

17. In the considered view of the Court, the testimony of PW-1 is by itself reliable and truthful and can safely form the basis for the conviction of A-1. The trial Court has, therefore, correctly determined the guilt of A-1 for the offence of rape. In light of the acquittal of A-2, the conviction of A-1 is altered to one under Section 376 IPC.

18. Considering that the victim was as young as 9 years and was the daughter of A-1, the Court finds no reason to interfere with the sentence awarded to A-1 by the trial Court.

19. Accordingly, CrI.A.1190/2015 filed by A-1 is dismissed. CrI.A.1290/2015 filed by A-2 stands allowed. A-2 Akash will be released forthwith unless wanted in some other case. A-2 will fulfil the requirements of Section 437-A Cr PC to the satisfaction of the trial Court. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 16, 2018

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