



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

%

Reserved on: December 20, 2021

Decided on: January 07, 2022

+

CRL.A. 274/2020

MOHD. AFSAR

.....Appellant

Represented by: Ms.Sunita Arora, Advocate.

versus

STATE

..... Respondent

Represented by: Mr.Ravi Nayak, APP for the State
with SI Pradeep Sharma, P.S. Jamia
Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

CRL.A. 274/2020

1. By this appeal, the appellant challenges the impugned judgment dated 9th January 2020 whereby he has been convicted for offences punishable under Section 376 IPC read with Section 4 of the POCSO Act and the order on sentence dated 15th January 2020 whereby the appellant has been directed to undergo rigorous imprisonment for a period of 10 years and pay a fine of ₹10,000/-, in default whereof to undergo simple imprisonment for a period of six months.

2. Learned counsel for the appellant contends that the findings of the learned trial Court that the prosecutrix was a minor is incorrect and not born out from the record and thus, the consent of the prosecutrix was not immaterial. As per the father of the prosecutrix, PW-10, he was married in



the year 1987 and had nine children in all, out of which, the youngest child had expired. He deposed that his first child was born after about two years of marriage and there was a gap of 2 to 2½ years between each child. As per the prosecutrix who appeared in the witness box as PW-6, she had six sisters and one brother and two sisters were elder to PW-6 and that she was the third child in the family. Thus, considering the age gap between first child and thereafter, the prosecutrix was born in the year 1993 and as on the date of alleged incident i.e. 13th May 2013, she was approximately 20 years old and hence, major. Even given the margin of 2½ years gap between two children, she was still above 18 years of age at the time of alleged incident. Further, even the father of the prosecutrix stated that his second daughter was born somewhere around 1991 to 1992 and thus, in the year 2013, she was 21 to 22 years old. According to the father, after the second daughter, one more child was born who subsequently expired and thereafter, the victim was born. Even taking this gap into consideration, the prosecutrix was a major at the time of incident. Further, this version of PW-10 is contrary to the version of the prosecutrix who stated that the child who expired was the youngest boy born in Delhi. The learned Trial Court also failed to note that no birth certificate or hospital record or any municipal record was furnished at the time of the admission of the victim in the school and thus, date of birth recorded in the school record cannot be treated as the correct date of birth. Further, the school certificate exhibited by PW-5 was not from the school first attended as PW-10 himself stated that his four children were born in the village and had gone to school in the village itself, the name of the school being Tajvidul Quraan situated in village Seda District, Bijnaur, Uttar Pradesh. Thus, the school certificate not being from the school first



attended, cannot be relied upon as per Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules 2007 (in short, the 'J.J. Rules').

3. Learned counsel for the appellant further contends that there are material contradictions and inconsistencies in the testimony of Woman Constable Sunni Devi who was examined as PW-8, SI Shiv Kumar (PW-11) and the Investigating Officer SI Rishi Sharma (PW-12) in comparison to what is stated by the father of the prosecutrix (PW-10). PW-8 Woman Constable Sunni Devi in her testimony deposed that PW-10 reached the police station on 8th June 2013 along with the prosecutrix and produced her before PW-12 the Investigating Officer, whereas, PW-10 in his testimony deposed that PW-12 found the appellant and the prosecutrix. PW-10 further stated that at the time of rescue of the prosecutrix from a room at Maujpur, two other police personnel namely Bani Singh and SI Shiv Kumar were also present, however, they have not been examined as witnesses by the prosecution. PW-11 did not depose that they went to Maujpur to rescue the prosecutrix and PW-12 the Investigating Officer stated that in the first week of June 2013, PW-10 had produced the prosecutrix and the appellant in the police station and told him that the appellant had kidnapped the prosecutrix.

4. The prosecutrix in her statement under Section 164 CrPC admitted that the appellant married her and a Nikaah was performed. Once Nikaah has been performed and Nikaahnama has been prepared, the prosecutrix being the wife of the appellant, the appellant could not have been convicted for offence punishable under Section 376 IPC in view of the exception to Section 375 IPC, for the reason, even as per the prosecution case, the prosecutrix was at least 16 years of age at the time of alleged incident. It is submitted that since the prosecutrix had married the appellant willingly, she



being a major, was a consenting party to the relationship and thus, the conviction under Section 376 IPC and Section 4 of the POCSO Act be set aside. It is further contended that even if from the evidence, two views are possible, the view which goes in favour of the appellant is required to be adopted.

5. Learned APP for the State refuting the contentions of learned counsel for the appellant states that PW-5 who appeared as the Principal of the school clearly deposed that the prosecutrix was admitted in class 1st on 14th July 2005 and as per the record, the date of birth of the prosecutrix in the school first attended was 10th January 2001. The said proof of age having been proved by the prosecution in accordance with law will hold primacy in terms of Rule 12(3) of the J.J.Rules. Since prosecution has proved the date of birth of the prosecutrix as 10th January 2001 and the alleged incident took place on 13th May 2013 when the prosecutrix went missing and was recovered on 8th June 2013, the prosecutrix was less than 13 years of age at the time of alleged offence and thus, a 'child' within the meaning of POCSO Act and therefore, her consent, if any, is of no consequence. As per the MLC, the prosecutrix was found pregnant when she was recovered and her MTP was subsequently done on 1st July 2013. In view of the statement of the prosecutrix, even if the DNA profiling could not be generated from the product of conception as per the FSL report, there is sufficient evidence to convict the appellant for the offence for which he has been convicted. It is submitted that despite minor contradictions in the testimonies of the prosecutrix and her father, it is not evident that the prosecutrix was more than 18 years of age at the time of alleged incident, hence, there is no error in the impugned judgment of conviction. In his statement under Section 313



CrPC, the appellant admitted that he was married to cousin sister of the prosecutrix and that he also got married to the prosecutrix and established relationship with her as husband and wife. Thus, the entire case against the appellant hinges on whether the prosecutrix was minor at the time of alleged incident which has been proved beyond reasonable doubt by the prosecution and thus, the appeal be dismissed.

6. FIR No. 232/2013 was registered at P.S. Jamia Nagar under Section 363 IPC when the father of the prosecutrix complained about the kidnapping of his minor daughter aged 16 years on 13th May 2013 at 6 pm from Abul Fazal Enclave, Jamia Nagar. He stated that his daughter had gone to the school and used to come back at around 2 pm from the school, however, on that date, she did not come back and when he enquired from the school, it was informed that his daughter had not come to the school. He expressed his suspicion on Shahzad @ Afsar, son of Abdul Khalik who was residing in his house on rent and that Shahzad @ Afsar was also not at home since morning and their mobile phones were switched off. On recovery of the prosecutrix, her statement was recorded wherein, she stated that on 13th May 2013 while she was going to School at 7 am, Afsar came in his Maruti Van, forcibly put her in the same and took her to Maujpur. He also threatened her that in case she does not accompany him, he would kill her father. He took her to a Masjid in Seelampur where he forcibly performed Nikaah and thereafter, locked her in a house. In view of the statement of the prosecutrix which was also recorded under Section 164 CrPC and her MLC conducted which showed that she had conceived, Sections 366, 343, 506 and 376 IPC as also Section 4 of the POCSO Act were also added.



7. In her deposition before the Court, the prosecutrix reiterated that on 13th May 2013 while she was walking to her school, a Van passed through her. The same was being driven by one Shahzad @ Afsar and two other persons were sitting in the Van who both were muffled, however, Shahzad @ Afsar was unmuffled. They pulled her inside the Van and took her to Maujpur. Shahzad @ Afsar confined her in a room which had only a door and no window. Afsar used to remain in the room and committed rape upon her. Whenever, he used to leave the room, he would lock the same. Shahzad @ Afsar also threatened her to perform marriage with him, otherwise, he would kill her family members and forcibly took her to a Masjid and performed the marriage. He threatened her that in case she does not put her signatures on the Nikaahnama, he would kill her parents and thus, under the said threat, she signed the Nikaahnama. Shahzad kept her with him for around 25/26 days during which period, he committed forcible rape with her due to which, she became pregnant. After 25/26 days, the police reached at the room and rescued her. Her father was accompanying the police. Thereafter, the police recorded her statement and lodged her in children home. Her MLC was also prepared in the hospital and she identified her signatures and thumb impression on the same. She stated that her statement was also recorded before the Magistrate under Section 164 CrPC.

8. The prosecutrix has been extensively cross examined and the main thrust of the cross examination was to prove that she was not a minor at the time of the alleged incident. She admitted her signatures on the Nikaahnama, however, stated that though she was asked about her consent for marriage, however, her consent was taken forcibly. At the time of marriage, the Maulvi Sahab had come along with the two witnesses. She



stated that there were three persons present at that time i.e. the appellant, his acquaintance Bhura and the third one she did not know besides Maulvi ji and the witnesses. She clarified that the room in which she was kept was a single room and the appellant seldom went outside the room. She denied the suggestion that she was having any affair with the appellant or that she had voluntarily accompanied the appellant on 13th May 2013 and performed the Nikaah with him. She also denied the suggestion that on 5th June 2013, she was brought by the appellant to her house for meeting her parents when the police arrested him. Thus, the categorical statement of the prosecutrix which was tested on extensive cross examination falsifies the claim of the appellant in his statement made under Section 313 CrPC that the prosecutrix had gone with him of her own free will and performed the Nikaah, hence, proving the commission of offence punishable under Section 376 IPC.

9. As regards the contention of the appellant in respect to Section 4 of the POCSO Act is concerned, the appellant took the plea based on the cross-examination of the prosecutrix and her father that prosecutrix was a major at the time of alleged incident. Rule 12(3) of the J.J.Rules which is required to be followed to determine the age of a minor reads as under:-

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

xxx

xxx

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....”*

10. A perusal of Rule 12(3) of the J.J.Rules itself reveals that the first priority has to be given to the Matriculation or equivalent certificate and in the absence thereof, to the date of birth certificate from the school first attended other than a play school. PW-5 who appeared with the record of the school stated that the prosecutrix was admitted in her school in Class 1st on 14th July 2005 through an open test and at the time of her admission, her date of birth was mentioned as 10th January 2001. Thus, even if she had attended any play school or a Madarsa at the village, the same was irrelevant, for the reason, the school first attended other than the play school was the one where the prosecutrix was admitted in the 1st standard and her date of birth was mentioned as 10th January 2001. As per the record, prosecutrix further left the school on 1st May 2013 while studying in 8th standard. Thus, she had no matriculation certificate. Therefore, as per the date of birth recorded in the school first attended, the prosecutrix was a child in terms of Section 2(1)(d) of the POCSO Act as she was below the age of 18 years. Even if in the cross examination, the father of the prosecutrix stated that this was the third child and there was a gap of two years in each child and the first child was born after two years of marriage, the same cannot be taken as an exact estimation of the date of birth of the prosecutrix. If this version of PW-10 is accepted, according to him, he got married in the year 1987 and resided at his native place till 2002 and thus, he stayed there for five years only.



According to him, his first child was born after two years of marriage and that his one child died and he had eight children alive. According to him, his four children who were born at his native place, were born in his house and in 2002, he shifted all alone to Delhi and his family shifted in the year 2003, thus, his version that his family shifted in the year 2003, there was a gap of 2 to 2½ years with one child having died in between, deserves to be ignored, for the reason, this is all rough estimation based on his memory and he categorically stated that he could not tell exact difference of age between his other daughters and the prosecutrix and the age difference between the prosecutrix and the youngest child. The testimony of this witness cannot be used to rebut the documentary evidence giving the age of the prosecutrix who got admitted in the school in the year 2001 in Delhi at the school first attended.

11. Learned counsel for the appellant has further sought to raise the contradictions in the testimonies of the witnesses with regard to the recovery of the prosecutrix. SI Shiv Kumar (PW-11) is the witness who had gone with the father of the prosecutrix to rescue her who stated that on 18th May 2013, as per the instructions of SI Rishi Sharma (PW-12), he along with parents of the prosecutrix went to Bijnaur, Uttar Pradesh in her search, however, no clue was found and they returned to Delhi on 20th May 2013. On 1st July 2013, the case file was marked to him for investigation as the main IO SI Shashi Dixit was busy in another official duty. PW-10, the father of the prosecutrix has clarified that after the prosecutrix was kidnapped and he got lodged the FIR, effort was made by him to trace her daughter and he went to the police station and that he tried to search the accused and his daughter. During the next 24 days, no clue was found and he met the DCP



of the area as well. He stated that while he was going to Maujpur, he saw the Maruti Van belonging to the appellant near Seelampur Red light and when enquiry was made, he came to know that the said car was parked with a dealer for sale. The said dealer called the appellant on the pretext of finding a good buyer for the car, whereafter, the appellant was recovered with his daughter at Maujpur along with the Investigating Officer. It is thus evident that after his daughter was recovered, she was produced before the Investigating Officer PW-12 as also stated by PW-8 Woman Constable Sunni Devi and hence, there is no contradiction in the testimony of the witnesses on this count.

12. In view of the discussion aforesaid and as the prosecution has proved beyond the reasonable doubt that the prosecutrix was a 'child' at the time of alleged incident and that she was forcibly taken away from the lawful guardianship of her parents and offence of sexual intercourse was committed on her repeatedly and forcibly, this Court does not find any error in the impugned judgment of conviction and order on sentence.

13. Appeal is dismissed.

14. Copy of the judgment be uploaded on the website of this Court and be sent to the Superintendent, Tihar Jail for updation of record and intimation to the appellant.

CRL.M.(BAIL) 1532/2021 (suspension of sentence)

In view of the order passed in the appeal, the application is disposed of as infructuous.

**(MUKTA GUPTA)
JUDGE**

JANUARY 07, 2022

akb