



\$~23

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

Judgment reserved on: 11.01.2023

Judgment delivered on: 19.01.2023

Name redacted judgment signed on 29.05.2023

+ **CRL.A. 485/2020 & CRL.M.(BAIL) 264/2022**

SURJEET KUMAR

..... Appellant

Through: Mr. M.L. Yadav, Mr. Anshul Yadav,
Advs.

versus

STATE

..... Respondent

Through: Mr Ajay Vikram Singh, APP for State
SI Anu Punder, PS-Shahdara
Ms. Anu Narula, Adv. DHCLSC for
prosecutrix.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. This is an appeal for setting aside the judgement dated 21.11.2019 and the order on sentence dated 28.11.2019 passed by the Ld. Trial Court, ASJ-06, (POCSO), Shahdara District, Karkardooma Courts, Delhi in SC No. 123/2017 arising out of FIR No. 26/2017, under section 363/366/376 IPC and section 6 of POCSO Act, registered at PS Shahdara. After trial and examination of the witnesses, the Trial Court was pleased to hold the appellant guilty of offences u/s 363/366/ 376 IPC & 6 of POCSO Act and vide order of sentence dated 28.11.2019, the appellant was sentenced to 10 years rigorous imprisonment and fine.



2. Brief facts of the case are that on 23.01.2017, a complaint was filed by the father of the victim alleging that on the said date, he went to drop his daughter at the school, however, she did not return home and he has apprehension that his daughter has been kidnapped. On this basis, FIR bearing no. 26/2017 was registered against the appellant on 23.01.2017. During investigation, the IO obtained CDR of the victim, upon which the location of mobile phone of the appellant was seen at Phagwara, Punjab and the victim was traced with the appellant and he was arrested. Thereafter, medical examination of the victim and appellant was conducted at GTB Hospital, exhibits were collected and seized, statement under 164 Cr.PC was recorded and hence, the appellant was charged for offences under section 363/366/376 IPC and 6 of POCSO Act.

3. It is submitted by learned counsel for the appellant that the appellant is innocent and has been falsely implicated in this case. It is further submitted that the victim voluntarily left her house and made physical relations with the appellant with her consent as they were in a relationship.

4. It is argued by Mr. Yadav, learned counsel for the appellant that the victim was at no time kidnapped by the appellant and there are no allegations of kidnapping in the statement of the victim recorded under section 164 Cr.PC. He states that except a bald statement, there is nothing on record to reflect that the appellant kidnapped the victim or sexually assaulted her. He states that the appellant has been implicated in this case on account of a monetary dispute and the mother of the victim tutored the victim to implicate the appellant in the present case.

5. Mr. Yadav states that the victim was major at the time of incident and there is no record of first school or birth certificate of the victim to prove the



correct age of the victim. He further states that the prosecution witnesses cannot be believed as there are material contradictions in the depositions inter-se with regard to the meeting of the victim with the appellant as well as the manner in which the recovery of the victim has been narrated.

6. On the other hand, it is argued on behalf of the State that PW-1/victim has proved in her testimony that on 28.01.2017, she was kidnapped by the appellant when she was aged about 16 years on the false pretext of marriage and the appellant repeatedly committed rape/penetrative sexual assault upon her.

7. Ms Anu Narula, counsel for the prosecutrix submits that the age of the victim is not in controversy, being 15 years of age at the time of the first incident. She states that the date of birth of the victim has been proved to be 20.01.2001 by witness PW-1/victim, PW-5/her mother and PW-7/In-charge from school and therefore, the victim was minor at the time of the commission of offence.

8. She further states that the appellant himself admitted in his statement that he took the victim to Phagwara, Punjab to marry her and on the basis of this admission, the fact pertaining to kidnapping of victim stands proved.

9. It is argued by the State that the other witnesses have also supported the prosecution story related to kidnapping, commission of rape/penetrative sexual assault repeatedly, recovery of the victim from the possession of the appellant as well as the arrest of the appellant. Ms Anu Narula states that the victim stood firm throughout her testimony and categorically narrated the acts of rape/penetrative sexual assault repeatedly.

10. Ms Anu Narula further argues that the appellant did not dispute the DNA report in his statement under section 313 Cr.PC, wherein it is clearly



stated that the appellant is the biological father of the child and thus, the case of the prosecution stands proved beyond reasonable doubt.

11. I have heard learned counsels for the parties and gone through the documents.

12. In the present case, the age of the victim is of utmost importance. Section 94(2)(i) of the Juvenile Justice (Care and Protection of children) Act, 2015 reads as under-

“Presumption and determination of age-

(1)...

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

...”

13. Hence, there is no requirement of there being a first school leaving certificate or a birth certificate to prove the age of the victim. Any school certificate is sufficient evidence to prove the age of the victim. In the present case, the exhibits which show the date of birth of the victim as 20.01.2001 are as follows-

a. Exhibit PW-7/A:Victim’s school certificate dated 30.03.2017 issued by the school principle

“SCHOOL ID:

Phone: -----



Ref. No. -----

Dated: 30.03.2017

It is certified that as per school record the Date of Birth of -----
---D/O -----is 20.01.2001 (Twentieth of January Two
Thousand One)

Particulars of student are:-

1. Name:- -----
2. Class:- -----
3. DOB:- 20.01.2001
4. Admission No.:-----

C.T. Signature

Vice Principal”

b. PW- 7/B:Admission application form of the victim

**“APPLICATION FORM FOR ADMISSION IN GOVT./GOVT. AIDED
SCHOOL DIRECTORATE OF EDUCATION:-----
(FOR THE SESSION 2015-16)**

NAME OF THE SCHOOL. -----

1. NAME OF THE STUDENT -----
2. GENDER MALE/FEMALE/TRANSGENDER
3. DATE OF BIRTH: IN FIGURES 20 January 2001
IN WORDS 20 January 2001
4. CLASS: -----
5. AADHAR NO. -----
6. (i)NAME OF BANK:-----

(ii)ACCOUNT NO INI THE NAME OF STUDENT/JOINT A/C
WITH MOTHER -----

7. BLOOD GROUP:
8. MOTHER’S NAME: -----
9. FATHER’S NAME: -----
- 10.GUARDIAN’S NAME:
- 11.SC/ST/OBC/GEN.
- 12.RELIGION -----
- 13.OCCUPATION OF FATHER:---- MOTHER:-----



14. ANNUAL INCOME OF FAMILY (FROM ALL SOURCES):-----

15. RESIDENTIAL ADDRESS: -----

16. TELEPHONE NO. MOTHER; ----- FATHER

17. DETAILS OF DATE OF BIRTH CERTIFICATE (PLEASE WHICH ONE OF THE FOLLOWING IS ATTACHED)

A) BIRTH CERTIFICATE ISSUED BY LOCAL BODY

B) HOSPITAL AUXILIARY NURSES AND MIDWIFE (ANM) REGISTER RECORD

C) ANGADWADI RECORD

D) DECLARATION OF THE AGE OF THE CHILD BY THE PARENT OR GUARDIAN"

c. PW-7/C: Admission and withdrawal register

ADMISSION & WITHDRAWAL REGISTER					SCHOOL स्कूल अ. 2015-16									
Sl. No.	Name of the Student	Father's Name	Mother's Name	Date of Birth by (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12)	Religion	Present Residential Address	Telephone No.	Time of Admission	Class	Group	Category	Class of Admission	Class of Withdrawal	Remarks
1				20-01-01										
4887	SHEETAL SHARMA	Manbaha Devi	Devi	11-07-03	Pr.	1015, Chandanpur Navan-Shah	98793 8231	11/07/03	VIA	NIP	Att.			
4888	POOTA RANI	Chatur Singh	Vidya Devi	18-03-02	Laban	1525/144 G.T. Road Khair Village, Shah	982633 0339	18/03/02	VIA	NIP	Att.			
4889	NISHABANI	Rashid Ali	Zeenat Begam	10-01-02	Laban	J-38/30 J3 colony welcome-Sectam - Dui, Shah	981041 9157	10/01/02	VIA	NIP	Att.			
4890	PAYAL	Mr. Rajish Kumar	Rajbala	07-07-04	Laban	61/ No. TTSB B. Railway Colony, Shah	85866 82360	07/07/04	VIA	NIP	TC			TC issued on 10/07/04 on parent request. C.A. 3/04/11
4891	SHIVANI	Anil	Rekha	02-04-04	Laban	E49/236 J.M.C. Jafarabad Shah	750321 9757	02/04/04	VIA	NIP	TC			
4892	BARITA	Chhetri Lal	Seema	01-07-02	Pr.	B-54, Galia No. 2 Indira Niketan, Baharpur, Shah	98998 73761	01/07/02	VIA	NIP	TC			
4893	SAMIA PARVEEN	Mr. Iqbal Ahmad	Mumtaz Begam	11-08-02	Laban	J86/30 welcome medical, Sectam, Dui, Shah	98998 9161	11/08/02	VIA	NIP	Att.			
4894	ALISHA	Rafat	Shamima	28-11-03	Tailor	253, Ramhila Ground, Makenah, Najaf, Shah	971866 7778	28/11/03	VIA	NIP	Att.			



14. These exhibits show the date of birth of victim as 20.01.2001. Therefore, it is established that the victim was a minor, i.e. 15 years of age at the time of the first incident, being in July/August 2016 and the same stands duly proved.

15. The offence of kidnapping is defined under section 361 IPC as *“Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”*

16. In the present case, the victim was taken away from the lawful guardianship of her parents without their consent and she was recovered with the appellant at Phagwara, Punjab. Therefore, the offence of kidnapping by the appellant stands established.

17. The argument made by the learned counsel for the appellant that the relationship of the appellant and the victim was consensual is immaterial as a minor is incapable of giving consent. Section 375 of IPC reads as-

“375. Rape--A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

...

Sixthly.—With or without her consent, when she is under eighteen years of age.”

18. The victim, at the time of commission of first offence, was 15 years of age. The Supreme Court in **“Satish Kumar Jayanti Lal Dabgar v. State of Gujarat”** [(2015) 7 SCC 359] opined that-



“11.....Having regard to her age, the trial court concluded that it was a case of kidnapping as her consent was immaterial inasmuch as being a minor she was not capable of giving any consent at that age. Likewise, since sexual intercourse had been virtually admitted and proved as well by medical evidence, the same would clearly amount to rape. Apart from the admission of the accused himself, the factum of sexual intercourse was proved by medical examination and Dr Raj Kamal, who had examined the victim as well as the accused, had deposed to this effect.

14. The first thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

“375. Rape.—A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions—

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

15. The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-



called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16. Once we put the things in right perspective in the manner stated above, we have to treat it as a case where the appellant has committed rape of a minor girl which is regarded as a heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as a mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind the Protection of Children from Sexual Offences Act, 2012.”

19. The submission made by learned counsel for the appellant that there are contradictions in the depositions cannot be given much weightage. The Supreme Court in “**Appabhai v. State of Gujarat**” [1988 Supp SCC 241] observed that-

“13....The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by



the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

..”

20. In the case at hand, the alleged discrepancies which have been pointed out regarding (i) collection of the report on the next day (in contrast to collection of the report in the next hour), (ii) police making enquiries from the doctor (in contrast to the police not making enquiries from the doctor), (iii) mother not leaving the victim alone due to security reasons (in contrast to the mother remaining at the shop from 8:30 am till 8:30 pm), etc are of a minor character and do not call into question the veracity of the prosecution's story.

21. Most importantly, even the FSL Report clearly establishes the offence of rape committed by the appellant upon the victim because it is clearly states that the appellant is the biological father and the victim is the biological mother of the child.

22. Additionally, the appellant in his statement under section 313 Cr.PC has admitted as under-

“Q.21) What else do you have to say?

Ans. I am innocent. I knew victim since 2013 as we were living in the same area i.e. Sukhchain Nagar, Phagwara in Punjab. I and victim were having love affair. Victim has voluntarily left with me to Phagwara, Punjab. I made physical relation with victim with her consent. When we were about to marry each other at Punjab, parents of victim came with the police and arrested me. Victim has been tutored by her mother and she has deposed against me under pressure of her parents. I have been falsely implicated in this case.”



23. In view of the clear testimony of the appellant, all the alleged offences against him stand duly proved.

24. Hence, I find no fault or irregularity in the order of Addl. Sessions Judge and I am not inclined to interfere with the impugned order dated 21.11.2019 and the order on sentence dated 28.11.2019 passed by the Ld. Trial Court, ASJ-06, (POCSO), Shahdara District, Karkardooma Courts, Delhi in SC No. 123/2017 arising out of FIR No. 26/2017, under section 363/366/376 IPC and section 6 of POCSO Act, registered at PS Shahdara.

25. The appeal is accordingly dismissed.

JASMEET SINGH, J

JANUARY 19, 2023/dm

Click here to check corrigendum, if any

