

* **HIGH COURT OF DELHI : NEW DELHI**

Judgment reserved on: February 08, 2010
Judgment pronounced on: February 16, 2010

+ **Crl. A. No. 19/2004**

% Vishnu Kumar ... Appellant
Through: Mr. H.P. Aditya, Advocate

versus

The State
(Delhi Administration) ... Respondent
Through: Mr. R.N. Vats, Additional Public
Prosecutor for the State

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
 2. To be referred to Reporter or not?
 3. Whether the judgment should be reported in the Digest?
- } No.

SUNIL GAUR, J.

1. Award of minimum sentence of seven years with fine, for the offence of rape and of three years with fine, for the offence of kidnapping of the prosecutrix (PW-1) aged about fourteen and a half years in February, 2001, is assailed by the appellant/accused in this appeal. Both these substantive sentences were not ordered by trial

court to run concurrently, but while entertaining this appeal, it stands clarified vide order of 31st July, 2006 of this Court that these two substantive sentences have to run concurrently.

2. As the prosecution version goes, on 10th February, 2001, a report was lodged by the father (PW-2) of the prosecutrix (PW-1), regarding missing of his daughter Durgesh @ Pooja (PW-1) since 9th February, 2001, and on this report, FIR No. 73/2001 under Section 363 of the IPC was registered at Police Station Rohini, Delhi. The investigation of this FIR, led to the recovery of the prosecutrix (PW-1) and the apprehension of the appellant/accused from his native place. They were got medically examined and the statement of the prosecutrix (PW-1) under Section 164 of the Cr.P.C. was recorded. Charge-sheet under Section 376 and 363 of the IPC was placed before the Court concerned and the appellant/accused had claimed trial for these offences. Recording of evidence began with the deposition of the prosecutrix (PW-1), followed by the evidence of her father (PW-2). PW-4 - Mother of the prosecutrix (PW-1) had also deposed in this case. The medical evidence was also led to prove the MLCs of the prosecutrix (PW-1) and the

accused herein. Official witness was also examined by the Trial Court to prove the birth certificate Ex.PW.10/A of the prosecutrix (PW-1). ASI Dharampal (PW-13) had investigated this case.

3. The plea taken by the appellant/accused before the trial Court was of prosecutrix (PW-1) being a consenting party, as she was in love with him. According to the appellant/accused, father of the prosecutrix (PW-1) was opposed to the marriage of the appellant/accused with the prosecutrix (PW-1). However, no evidence was led by the appellant/accused in his defence before the trial Court.

4. The trial of this case ended in the conviction of the appellant/accused, which is impugned herein.

5. Both the sides have advanced their respective contentions. The recorded evidence has been re-appreciated and the decisions cited have been perused.

6. The foremost contention advanced on behalf of the appellant/accused is regarding the age of the prosecutrix (PW-1). It is pointed out that prosecutrix (PW-1) in her evidence has admitted that she does not know her date of birth and the same is the stand of her father (PW-2), who had stated in his evidence that the prosecutrix (PW-1) was

the youngest, i.e., sixth child and he stands contradicted by the official witness (PW-10), who has clearly stated in his evidence that the prosecutrix was the fifth child in the family.

7. Appellant's counsel had sought to contradict the date of birth given in the Birth Certificate (Ex. PW-10/A) of the prosecutrix (PW-1), by drawing the attention of this Court to the certified copy of the order of trial Court of 16th April, 2001, declining bail to the appellant/accused, wherein Investigating Officer had disclosed the date of birth of the prosecutrix (PW-1) as 13th October, 1984. According to the counsel for the appellant, Birth Certificate (Ex.PW.10/A) is of one Durgesh and it cannot be said to be of the prosecutrix (PW-1), who is known as Pooja. Reliance has been placed upon decisions reported in **1992 JCC 376, and 1994 Crl.L.J. 1216**, by learned counsel for the appellant to contend that where there is discrepancy regarding the age of the prosecutrix (PW-1) then the benefit of doubt has to go to the accused.

8. The testimony of the prosecutrix (PW-5) has been reappraised in the light of the pertinent observations made by the Apex Court in *Dildar Singh vs. State of Punjab*, **AIR 2006 SC 3084**, which are as under:-

“In the normal course of human conduct an unmarried girl who is victim of sexual offence would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the first information report.”

9. I have thoughtfully pondered over the submissions advanced. Testimony of the prosecutrix (PW-1) has to be read as a whole and upon doing so, I find that in her deposition, she has not given her date of birth but has stated that she was aged 14 years and she was studying in sixth standard in the school. Her cross-examination by the defence does not go to show that she was aged sixteen years or more on the date of this incident. PW-2 – Father of the prosecutrix (PW-1) does not give the date of birth of the prosecutrix (PW-1) but had produced her birth certificate - Ex. PW-10/A, before the police.

10. It is true that the prosecutrix (PW-1) and her father (PW-2) state in their evidence that prosecutrix (PW-1) was

the youngest child of the family, but from their depositions, it could not be shown that prosecutrix (PW-1) was aged sixteen years or more on the date of this incident. Therefore, nothing turns on the stray utterance of official witness (PW-10) regarding prosecutrix (PW-1) being fifth child of her family.

11. Birth Certificate (Ex. PW-10/A) of prosecutrix (PW-1) gives her date of birth as 13th October, 1986. Meaning thereby, that the prosecutrix (PW-1) was aged about fourteen and half years on the date of this incident. The deposition of the official witness (PW-10) proving the Birth Certificate (Ex. PW-10/A), virtually remains unchallenged. However, Birth Certificate (Ex. PW-10/A) is sought to be discredited by relying upon certified copy of bail order, wherein one Sub-Inspector Anand Kiran had orally disclosed the date of birth of the prosecutrix (PW-1) mentioned in one certificate as well as in school record is 13th October, 1984. It is a matter of record that Sub-Inspector Anand Kiran (PW-9) is not the main Investigating Officer of this case and he has not been confronted with the alleged statement made by him at the hearing of the bail application on 16th April, 2001. The Birth Certificate (Ex. PW-10/A) in question, was in fact, not seized by ASI

Anand Kiran (PW-9) but was taken into possession by the main Investigating Officer (PW-13). In any case, contents of the bail application cannot be given precedence over and above documentary evidence, i.e., Birth Certificate (Ex. PW-10/A), which stands conclusively proved on record.

12. Appellant/accused cannot be now heard to say that the Birth Certificate (Ex. PW-10/A) is of one Durgesh and not of the prosecutrix (PW-1), because Investigating Officer (PW-13), who had seized this Birth Certificate (Ex. PW-10/A) has not been cross-examined by the defence on this aspect. Furthermore, prosecutrix (PW-1) has clarified in her evidence that she was known as Durgesh in the school. Birth Certificate (Ex. PW-10/A) indicates that the name of the father of Durgesh mentioned therein is Netrapal, who is the father of the prosecutrix (PW-1). There is no cross-examination of the prosecutrix (PW-1) or her father (PW-2) that there is any other child in the family by the name of Durgesh. In fact, PW-2 - father of the prosecutrix (PW-1) gives her name as Durgesh @ Puja. It has not been suggested to any of the witnesses that the Birth Certificate (Ex. PW-10/A) in question does not relate to the prosecutrix (PW-1).

13. Taken in the right perspective, there is no controversy, inconsistency or discrepancy regarding the age of the prosecutrix (PW-1) and so, the reliance placed upon the decisions reported in **1992 JCC 376 and 1994 Cr.L.J. 1216**, is clearly misplaced. Upon re-appreciation of the entire evidence on record, this Court finds that the trial court has rightly arrived at a conclusion that the prosecutrix (PW-1) was aged about fourteen and half years on the date of this incident.

14. Since this court concurs with the finding of the trial court regarding the age of the prosecutrix (PW-5), therefore, the question of consent need not be gone into, as the consent of the prosecutrix in cases where she is below sixteen years, is immaterial.

15. In the light of the aforesaid, reliance placed upon decisions reported in 1997 (1) RCR 85; 1998 (2) JCC (DELHI) 122, 2003 II AD (S.C.) 358; 2003 II AD (DELHI) 777; 2009 (3) JCC 2002 and 2010 (1) JCC 292; is of no avail.

16. In the ultimate analysis, this Court is of the considered opinion that the conviction and the sentence imposed upon the appellant/accused is well merited and it

calls for no interference by this Court. This appeal is without merit and is dismissed. Bail bonds of the appellant/accused are forfeited. Trial court to ensure that he is taken into custody to serve out the sentence, as awarded by it.

17. This appeal as well as pending application, if any, are accordingly disposed of.

Sunil Gaur, J.

February 16, 2010
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