



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

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CRL.A. 1048/2017

SUNIL

.....Appellant
Through: Ms. Inderjeet Sidhu, Advocate.

versus

STATE

.....Respondent
Through: Ms. Shubhi Gupta, APP for State with
SI Sanjay Meena.
Ms. Sanya Kumar, Advocate for
Victim.
Mr. Himanshu Anand Gupta, Mr.
Shekhar Anand Gupta, Ms. Mansi
Yadav, Ms. Shivani, and Ms. Navneet
Kaur, Advocates for DSLSA.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. By way of the present appeal, the appellant seeks to assail the judgment of conviction dated 12.07.2017 and the order on sentence dated 05.08.2017 passed by the learned ASJ-SFTC (South East), Saket Courts, Delhi in proceedings arising out of FIR No. 370/2010 registered under Sections 366/376/323 IPC at P.S. *Okhla Industrial Area*.

Vide the impugned order on sentence, the appellant was sentenced to undergo RI for a period of 4 years along with payment of fine of Rs.15,000/-



, in default whereof he would undergo SI for a period of 6 months, for the offence punishable under Section 366 IPC; RI for a period of 7 years along with payment of fine of Rs.20,000, in default whereof he would undergo SI for 6 months, for the offence punishable under Section 376 IPC; and SI for a period of 3 months along with payment of fine of Rs.1,000/-, in default whereof he would undergo SI for 1 month, for the offence punishable under Section 323 IPC. All the sentences were directed to run concurrently and the benefit under Section 428 Cr.P.C. was granted to the appellant.

Out of the fine realized in view of the above sentence, an amount of Rs.30,000/- was directed to be paid to the prosecutrix as compensation.

2. Pithily put, the case of the prosecution is that on 11.11.2010, the father of the prosecutrix reported at the police station that his daughter, aged about 15 years, had gone missing. She had been staying with her aunt in a *jhuggi* and left the house on 03.11.2010 without informing anyone. The complainant suspected that the appellant, who lived nearby and had vacated his *jhuggi* on 02.11.2010, had kidnapped his daughter for the purpose of marrying her. On this statement, the subject FIR was registered. On 26.11.2010, the prosecutrix was recovered from the house of the appellant in Village *Mani*, District *Aligarh*, U.P. and was medically examined the following day. In the absence of any birth proof, her bony age was determined to be between 15 years 8 months and 16 years 4 months. In her statement recorded under Section 164 Cr.P.C., she alleged that the appellant forcibly took her away on the pretext of marriage, subjected her to physical assault, and committed sexual assault upon her. The appellant, having initially absconded, was declared a proclaimed offender on 17.07.2012, and



was subsequently arrested on 04.12.2015. Following a potency test, charges were framed against the appellant for the offences punishable under Sections 366/376/323 IPC and Section 174-A IPC on 19.02.2016, to which he pleaded not guilty and claimed trial.

3. The prosecution examined 15 witnesses in support of its case. The prosecutrix herself was examined as PW-1. Her father, uncle, and aunt were examined as PW-2, PW-3, and PW-14 respectively. *Raghbir Singh* and *Vijay Singh*, examined as PW-5 and PW-7 respectively, are public persons from village *Dudupur*, from where the prosecutrix was recovered. Dr. *Chithra* (PW-6) proved the prosecutrix's MLC and Dr. *Sanjeet Nayak* (PW-15) proved the prosecutrix's radiology report and deposed as to her bony age. The I.O. of the case, SI *S. S. Sandhu* was examined as PW-11. The remaining witnesses are police officials who deposed to various aspects of the investigation.

4. Learned counsel for the appellant, while assailing the impugned judgment, contended that the physical relations established between the parties were consensual. He submitted that the prosecutrix's estimated bony age range of 15 years 8 months to 16 years 4 months necessitates that the appellant be given the benefit of the doubt and that the upper age limit of the prosecutrix be treated as true, which the Trial Court failed to do. He contended that, in light of the same, the prosecutrix ought to be considered above the 16-year threshold for consent prescribed by the unamended Section 375 IPC, as it existed at the time of the alleged incident in 2010. Consequently, the alleged acts in question would not constitute the offence of "rape" under the then-prevailing law. He further submitted that the non-



examination of the cousin of the prosecutrix, who, as per the prosecutrix's own admission, accompanied her and the appellant to the appellant's village, is fatal to the prosecution case. He contended that the present case is simply one of a relationship gone sour.

5. The said contentions were opposed by the learned APP for the State and the learned counsel appointed to represent the victim, who supported the impugned judgment. Learned counsel for the victim contended that even if the prosecutrix had accompanied the appellant to his village of her own volition, such an act does not imply consent to the establishment of physical relations. She further submitted that the age of the prosecutrix was not disputed before the Trial Court.

6. The prosecutrix, examined as PW-1, deposed that about six years prior, on the 9th day of the month, she arrived in *Delhi* to live at the house of her *mausi* (maternal aunt). The appellant lived nearby and met her in the street, proposing marriage. About 3 months after she had come to *Delhi*, the appellant took her away under the assurance of marriage to Village *Dudupur, Bulandsehar, U.P.* She lived in the appellant's house in his village for about a month. She stated that during this period, he committed sexual intercourse with her forcibly several times, beat and threatened her, and forced her to perform all household chores. When she asked the appellant to allow her to go meet her parents, he asked her to treat his parents as her own. She stated that after about a month, her father and the police rescued her, at which point the appellant escaped. She exhibited her MLC as Ex. PW-1/A and her statement recorded under Section 164 Cr.P.C. as Ex. PW-1/B.



During cross-examination, she stated that the mother and brother of the appellant along with his family were also living in the house where she was kept by the appellant. There were only two rooms in the house and the entire family lived in the said two rooms. She had told the appellant's family members about the beatings. She stated that the appellant never used to commit sexual intercourse with her in front of his family members. She further stated that she used to go outside the house alone to dispose of buffalo dung but did not attempt to escape at any point. She initially denied having left *Delhi* with the appellant of her own free will and volunteered that the appellant had made her smell some intoxicating substance, but on being confronted with her statement under Section 164 Cr.P.C., she stated it to be correct that she had left the house of her *mausi* of her own free will. She further admitted that her cousin 'S', the daughter of her *mausi*, had also accompanied her and the appellant to the appellant's village, but volunteered that 'S' had returned from there immediately, though she did not know how 'S' had come back home.

7. The father of the prosecutrix was examined as PW-2 and stated that the prosecutrix had come to *Delhi* on 09.08.2010 to live with her *mausi*. He stated that the prosecutrix went missing from that house without informing anyone on 03.11.2010. During the subsequent search, they discovered that the appellant, who lived nearby, had vacated his room the day before, on 02.11.2010. They grew suspicious about the appellant having a role in the disappearance of the prosecutrix and he lodged a complaint with the police on 11.11.2010. From the landlord of the appellant, he came to know about the village of the appellant and the prosecutrix's presence there. On



26.11.2010, he accompanied the police to Village *Dudupur, U.P.*, where he found the prosecutrix cooking food in the house of the appellant. The appellant fled upon seeing the police and the prosecutrix was brought back to Delhi.

In cross-examination, he admitted that it was PW-3, the husband of the prosecutrix's *mausi*, who informed him that the prosecutrix had gone missing and at the same time told him that the appellant may have taken the prosecutrix. He reached their house immediately and took the appellant's phone number from his landlord. He spoke with the appellant on the same day, and the appellant misbehaved with him over the phone. He stated that there was a delay of 8 days in filing the complaint because they were searching for the prosecutrix among relations. Suggestions were put to him that he had deliberately not made a complaint to the police and that he had come to know that the prosecutrix was with the appellant immediately after her disappearance, but he denied the same. He admitted that his daughter's cousin, 'S', had also gone missing along with the prosecutrix. He stated that neither did he tell the police about 'S' being missing, nor did he inquire from the father of 'S' about her being missing. He stated that he had not mentioned in his complaint that the appellant had taken his daughter away with the intent to marry her, but he was confronted with his statement given to the police wherein it was stated so.

8. The *mausa* (maternal uncle) of the prosecutrix was examined as PW-3 and corroborated that she came to live at their house on 09.08.2010. The appellant was their neighbour. After approximately 3 months, the prosecutrix went missing. During the search, they learned the appellant had



vacated his *jhuggi* the day prior to when the prosecutrix went missing. He informed the prosecutrix's father, leading to registration of the subject FIR.

During cross-examination, he stated that the prosecutrix had left the house around 12:00-12:30 PM without informing anyone. He stated that they took the phone number of the appellant from his landlord on the same day as when the prosecutrix went missing, but his number was switched off. He further stated that the father of the prosecutrix had come to *Delhi* 3-4 days after the prosecutrix went missing.

9. The *mausi* (maternal aunt) of the prosecutrix was examined as PW-14 and similarly deposed that the prosecutrix had come from the village in 2010 to live with them, and that the appellant was their neighbour. The appellant vacated his *jhuggi* first, and the prosecutrix went missing the next day. They suspected the appellant and informed the police.

During cross-examination, she admitted that her daughter 'S' and the prosecutrix were the same age and both went missing from her house on the same day. She stated that since her daughter was found on the road, she did not report her daughter as missing to the police. She further stated that they went to the police after they had exhausted their efforts to trace out the prosecutrix, and that she informed the father of the prosecutrix on the next day. She came to know about the appellant having vacated his *jhuggi* one day after the prosecutrix went missing, when she directly approached the appellant's landlord.

10. *Raghbir Singh* and *Vijay Singh*, examined as PW-5 and PW-7 respectively, are public persons from village *Dudupur*, from where the prosecutrix was recovered. They are cited as witnesses in the memo



detailing the recovery of the prosecutrix (Ex. PW-5/A) and their signatures appear on the same. PW-5/*Raghbir Singh* stated that he was in the village when the police came, they told him that they had recovered a girl from the village, but no girl was with them at the time he interacted with them. In cross-examination by the learned APP for the State, he denied that the police had recovered the prosecutrix from the appellant's house in his presence. He further denied or that the recovered girl had told him that the appellant had enticed her for the purpose of marriage and forced her to do housework. He, however, admitted his signature on the concerned recovery memo. PW-7/*Vijay Singh* stated that he was not present in the village, did not know anything about the present case, and had not given any statement to the police. In cross-examination by the learned APP for the State, he denied having joined the investigation along with the I.O. and denied that the prosecutrix was recovered from the appellant's house while he was present. He, too, denied having stated to the police that the prosecutrix had told in his presence that the appellant had enticed and brought her to the village, and then ultimately forced her to do housework. He admitted his signature on the concerned recovery memo.

11. The two medical witnesses examined were Dr. *Chithra* (PW-6) and Dr. *Sanjeet Nayak* (PW-15). PW-6 proved the MLC of the prosecutrix and deposed that no external injury marks were found on the prosecutrix's person. She stated that the hymen of the prosecutrix was found torn, but that there was no fresh tear. PW-15 proved the prosecutrix's radiology report and deposed that as per the report, the bony age of the prosecutrix was between 15.8 and 16.4 years.



12. I have heard the learned counsels for the parties and carefully examined the record.

13. It is imperative that the contentions regarding the age of the prosecutrix be dealt with at the outset. It is the admitted case of the prosecution that the alleged incident occurred between 03.11.2010, when the prosecutrix left her aunt's house, and 26.11.2010, when she was recovered from the village of the appellant. No documents proving the prosecutrix's date of birth were available, in view of which a bone ossification test was conducted on 27.11.2010. The radiology report from the same has been exhibited as Ex. PW-11/F. A perusal of the same, as well as the testimony of Dr. Sanjeet Nayak (PW-15), shows that the prosecutrix's bony age was estimated to be between 15 years and 8 months to 16 years and 4 months.

14. The Supreme Court has held in *Jaya Mala Vs. Home Secretary, Govt. of Jammu & Kashmir & Ors.*¹ that the margin of error in age ascertained by radiological examination is two years on either side. This principle was further reaffirmed in *Rajak Mohammad Vs. State of Himachal Pradesh*², wherein, while seized of a dispute where the prosecution had failed to conclusively prove the minority of the prosecutrix through school records and the radiological examination had estimated her age to be between 17 and 18 years, the Apex Court held that radiological age determination is not precise and extended the benefit of doubt to the appellant who had been convicted for the offence punishable under Section 376 IPC.

15. A Division Bench of this Court in *Court on its Own Motion Vs. State*

¹ (1982) 2 SCC 538

² (2018) 9 SCC 248



*of NCT of Delhi*³ has conclusively held that where the age of the prosecutrix is determined based on a bone age ossification report, the benefit of doubt must be given to the accused and the upper age limit given in the reference range shall be considered as the age of the prosecutrix.

16. Applying the law as expounded above to the facts of the present case, since the radiology report provides an estimated age range of 15 years and 8 months to 16 years and 4 months, the upper extremity of the range must be considered as true. Consequently, the prosecutrix is deemed to have been over the age of 16 years at the time of the incident.

17. Now, it is pertinent to note that at the time of the incident in question, the Criminal Law (Amendment) Act, 2013⁴ had not been brought into force. Article 20(1) of the Constitution mandates that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. This necessitates that the relevant statutory provisions, as they existed at the material time, be examined. The provision defining the offence of “rape”, i.e., Section 375 IPC, as it stood then, is extracted below:-

“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:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

³ 2024 SCC OnLine Del 4484

⁴ Act 13 of 2013



Fifthly.—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

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.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

(emphasis supplied)

18. A plain reading of the provision as it stood then makes it clear that the statutory age of consent at the time relevant to the facts of the present case was 16 years. Consequently, if a woman had attained the age of 16, her voluntary participation in sexual relations would not attract the offence of “rape” under Section 375 IPC (Ref: *K. P. Thimmapa Gowda Vs. State of Karnataka*⁵). Having determined that the upper extremity of the age range of the prosecutrix as provided by the radiological assessment must be treated as true, the prosecutrix must be treated as being over the age of 16 years at the relevant time.

19. Coming to the testimony of the prosecutrix, it is worth mentioning at the outset that the prosecutrix initially disappeared from the house of her aunt on 03.11.2010 and was recovered from the appellant’s house in his village on 26.11.2010, i.e., nearly a month after her initial disappearance. In her cross-examination, she stated that the appellant’s family members, including the appellant’s mother, resided along with them in the same two-room house where she was allegedly kept by the appellant. She has further

⁵ (2011) 14 SCC 475



stated that she used to go outside the house alone to dispose of buffalo dung, but she never attempted to run away or inform anyone else in the village that she was being kept at the appellant's house against her will. Further, she initially stated that she had not left *Delhi* of her own free will, and even put forth an entirely new version of the appellant having made her smell some intoxicating substance; however, on being confronted with her statement under Section 164 Cr.P.C., she admitted that she had left her *mausi*'s house of her own free will.

20. The facts that have come on record indicate that the family members of the prosecutrix were aware that she was with the appellant. It has come out in the testimony of the prosecutrix's father (PW-2) as well as in the testimony of her aunt (PW-14) that they grew suspicious of the appellant having a role to play in the disappearance of the prosecutrix on coming to know that he had vacated his room one day prior to the prosecutrix's disappearance. PW-2 has further deposed that he came to know of the appellant's village and the prosecutrix's presence there after speaking to the appellant's landlord, and that PW-3 had informed him that the appellant may have taken the prosecutrix, which has been corroborated by PW-3. PW-2 even spoke to the appellant over the phone after obtaining his number from the landlord. Notably, PW-2 as well as PW-14 have both also admitted in their respective Court depositions that the prosecutrix and her cousin 'S' had gone missing at the same time.

21. Another key aspect which lends itself to consideration is that 'S' was not examined by the prosecution despite it having come out in the testimony of the prosecutrix (PW-1) that 'S' had accompanied her and the appellant to



the appellant's village. The prosecutrix initially stated in her Court deposition that the appellant had taken her till the main road leading to his village by bus and then to his village on a motorcycle; however, she later added during cross-examination that her cousin 'S' had also accompanied the two of them. She had volunteered that 'S' returned from the appellant's village immediately, though the prosecutrix could not offer any explanation as to how 'S' had returned home.

22. It is then unfathomable as to why, if the family members had come to know about the appellant having taken away the prosecutrix and with the knowledge that 'S' had also gone missing on the same day, there was such a delay in lodging the complaint. It is not clear why the family members did not immediately lodge a police complaint and/or go to the native place of the appellant, especially as the information regarding the village was available with the landlord. Their initial suspicions would have been reaffirmed by 'S', who, as per the testimony of PW-14, was recovered from the road shortly after going missing, making the eight-day delay in filing the complaint even more inexplicable. Further, 'S' was fully aware of the prosecutrix having gone with the appellant, as well as about the appellant's village.

23. Though the prosecution has claimed that the prosecutrix was recovered from the appellant's house in his village in the presence of two witnesses, namely *Raghbir Singh* and *Vijay Singh*, the said fact stands denied not only by the prosecutrix who stated that public persons did not gather at the spot when her father and the police reached the appellant's house, but also by the two aforesaid witnesses themselves, who were



examined as PW-5 and PW-7 respectively. Both witnesses have categorically denied having even seen the prosecutrix, let alone having witnessed her recovery from the house of the appellant. This casts a shadow of doubt over even the recovery of the prosecutrix.

24. Further, there are various inconsistencies in the testimonies of key witnesses, especially *qua* the events leading up to the registration of the subject FIR, such as when the father of the prosecutrix was informed about her disappearance and at what stage the police was contacted and by whom. These inconsistencies further weaken the prosecution case.

25. A perusal of the MLC of the prosecutrix and the testimony of Dr. *Chithra* (PW-6) shows that no external injury marks were observed on the prosecutrix's person. The medical evidence on record, therefore, does not support the prosecution version of the appellant giving beatings to the prosecutrix.

26. Furthermore, as stated before, the prosecutrix herself admitted that she left her aunt's house of her own free will. She remained in the village of the appellant for nearly a month. By her own admission, she was not confined to a room and was free to go outside the house alone to dispose of the buffalo dung. It is further apparent from the record that there were other villagers around; yet, despite this freedom of movement and the presence of other persons in the vicinity, she never attempted to run away or inform anyone that she was being kept at the appellant's house against her will or that the offence of rape was being committed upon her by the appellant.

27. On an overall conspectus of the facts and evidence that have come on record, this Court is of the considered view that the prosecution has failed to



prove the essential ingredients of the offences for which the appellant has been convicted. The benefit of the doubt, in the facts and circumstances of the present case, must go to the appellant.

28. Accordingly, the present appeal is allowed, and the appellant is acquitted of all charges.

29. The personal bond furnished by the appellant stands cancelled and his surety is discharged.

30. A copy of this judgment be communicated to the Trial Court as well as the Jail Superintendent concerned.

**MANOJ KUMAR OHRI
(JUDGE)**

FEBRUARY 02, 2026

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