

(1989) 01 DEL CK 0059

In the Delhi High Court

Case No : Criminal Appeal No's. 140, 151 and 154 of 1987

Brij Mohan

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 30-01-1989

Acts Referred:

Citation : (1989) 38 DLT 15 : (1989) 1 RCR(Criminal) 307

Hon'ble Judges : H.C. Goel, J

Bench : Single Bench

Advocate : B.G. Singh and Sunti Sharma, for the Appellant;

Judgement

H.C. Goel, J.

(1) These are three appeals by three co-accused of the same case. I shall dispose them of by this single judgment. The prosecution case stated in brief is that Brij Mohan and Hari Ram, two of the three appellants, are the neighbours of Saroj Bala, prosecutrix. In the evening of October 3, 1984 the prosecutrix Saroj Bala had gone to the shop of one Prithvi near her home in Subzi Mandi for shopping. Brij Mohan, appellant, met her there at about 7.30 P.M. and told her that her brother Sunil had met with an accident and that she "should accompany him to Hindu Rao Hospital where her brother Sunil was admitted for treatment. The Prosecutrix went with Brij Mohan on foot to Hindu Rao Hospital which is quite near to her house. One jeep was standing outside the Hindu Rao Hospital. Hari Ram, appellant, was sitting in that jeep. The other appellant Rajesh was at the steering wheel of the jeep. Brij Mohan gagged the mouth of the prosecutrix and with the help of Hari Ram he put Saroj Bala in the jeep. She was driven to a factory premises at some distance She was taken to one room in the factory premises by Brij Mohan appellant. The other two appellants, Hari Ram and Rajesh, stayed in the other room. Brij Mohan appellant is then stated to have committed rape on Saroj Bala. Saroj Bala was then told by Brij Mohan and Hari Ram that they had taken her photographs and if she told about the incident to anyone, she would be defamed. All the three appellants then brought Saroj Bala

back by the same jeep and left her near her house. Saroj Bala narrated the entire occurrence to her parents. Her father Om Prakash took Saroj Bala to the police station on the next day where she lodged the F.I.R. Ex. Public Witness 1/A As per the prosecution Saroj Bala was born on October 18, 1968 i.e. that she was 15 days less than 16 years on the date of occurrence. All the three appellants denied the entire prosecution version. The learned Additional Sessions Judge convicted all the three applicants for the offence punishable u/s 366 Indian Penal Code. Brij Mohan was also convicted for the offence of rape as punishable u/s 376 Indian Penal Code. All the three appellants were sentenced to three years "R.I. for the offence u/s 366 I.P.C. Brij Mohan was also sentenced to seven years" R.I. u/s 376 Indian Penal Code. The two sentences awarded to him were made to run concurrently.

(2) I have heard Bawa Gurcharan Singh, learned counsel for the appellant Brij Mohan and Mr. O.N. Vohra, learned counsel for Rajesh appellant. None appeared for Hari Ram appellant at the hearing of his appeal. No appearance was also put in on behalf of the State in any of the three appeals.

(3) The first question that arises for consideration in these appeals is the question as to what was the age of Saroj Bala prosecutrix. PW1, on October 3, 1984, the date of occurrence. The learned Additional Sessions Judge relied on two documents namely, Ex. Public Witness 3/B, a photo copy of the admission form submitted to the Municipal Corporation Primary School, Malka Ganj, Delhi, at the time of joining of the first standard class by Saroj Bala on July 26, 1974, and Ex. Public Witness 3/A, a photo copy of an alleged affidavit of Om Prakash, father of Saroj Bala, submitted to the school when she was got admitted to that school. In both these documents the date of birth of Saroj Bala is given as October 18, 1968. The learned Additional Sessions Judge has clearly erred in relying on this evidence of the prosecution and in holding that the prosecutrix was below 16 years of age on the date of occurrence. The first thing to note is that no birth certificate of Saroj Bala from the Ghaziabad Municipal Committee has been produced on the record where Saroj Bala was stated to have been born. The parents of Saroj Bala have admittedly been living at Delhi and the reason for not furnishing an entry from the birth register of the Delhi Municipal Corporation as given by Om Prakash, PW4, father of the prosecutrix, is that Saroj Bala was born at his in-laws place at Ghaziabad. He further stated that he had got births of his other children recorded at the Municipal Corporation, Delhi, but as Saroj Bala was born at Ghaziabad, her birth was not got entered by any one at the Ghaziabad Municipality. It is not quite possible to say as to how far Om Prakash was speaking the truth in this regard, namely, that Saroj Bala was born at Ghaziabad and if that be so, that her birth was not get recorded with the Ghaziabad Municipality. However, the fact remains that in the absence of the cogent evidence of an entry from the birth registers, the other evidence of the prosecution had to be scrutinised carefully and strict proof of the age of the prosecutrix was required. As regards the evidence of the prosecution consisting of the date of birth as given by Om Prakash in the admission form and the

alleged affidavit, copies of which are Ex. Public Witness 3/A respectively, so far as this alleged affidavit is concerned, that is not attested by any Magistrate or an Oath Commissioner etc. and as such this document is not an affidavit at all. It may at best amount to a declaration of Om Prakash, Public Witness 4. father of the prosecutrix. That also shows the casual manner in which the school authorities dealt with the question of the admission of Saroj Bala to the school, inasmuch as they did not bother to see that the admission form of Saroj Bala was accompanied by a proper affidavit regarding her date of birth, which it appears must have been required to be furnished at the time of admitting the child to the school. in the absence of the admission form having been accompanied by the affidavit of Om Prakash and Om Prakash not having disposed as Public Witness 4 that either of these documents was signed by him or bore his signatures, not much value could be attached to the declaration of Om Prakash in the so- called affidavit or in the admission form as to the date of birth of Saroj Bala. Next, Om Prakash in his statement as PW4 stated that he has got five children and Saroj Bala was his third child. Whereas he was able to give the date of birth of his eldest child Mukesh, as May 20, 1964, he was unable to give the date of birth of his second child i.e. son Rajesh Kumar. The fact that he was not able to give the date of birth of his second son thus lends some credence to the contention of the accused that he could not be in a position to give the date of birth of Saroj Bala as well from memory which he so purported to do in his statement as Public Witness . 4 Then the more important thing to note is that the age of Saroj Bala, prosecutrix, as per the said school record is not supported by the evidence of the determination of her bony age as determined radiologically .That evidence is in fact in conflict with her age as per the said school record. In the present case as per the statement of Dr. J.R. Dass, Public Witness . 16, based on the skiagrams of the prosecutrix Saroj Bala as taken by him. Ex. Public Witness 16/B-1 to B-4 and his report Ex. Public Witness 16/A, Saroj Bala, prosecutrix, had completed 16 years of age, but had not completed 18 years of age.

(4) It is a matter of common knowledge that the ages given at the time of admission of children to schools in quite a larger number of cases did not use to be correct and precise. The parents or guardians used to give these dates by approximation- There has also been a tendency to give the age of the child on lower side if the child had already become of an age higher than that as was the upper limit for admission to the first primary class of the school. This tendency was marked in uneducated families belonging to poorer section of the society to which the prosecutrix appears to belong. It is a settled law that in the absence of cogent evidence such as of birth entry, the determination of age scientifically i.e. by ossification test should be preferred to other evidence, including an entry in the school register, unless that is found to be flawless and convincing so as to place implicit faith therein. It was under these circumstances that the school later started insisting on affidavits in support of the age of the child to be furnished by the parents/guardians of the children at the. time of admission of

the child to the school. Lately it was found that some people used to furnish false affidavits in this behalf. Therefore, most of the schools now insist on having an entry from the birth register in support of the age of child. Keeping all this in view and the fact that in the present case the admission from of the prosecutrix was accepted by the school authorities even though the purported affidavit in support of the age of the child was not in order, which shows the casualness with which the matter was treated. I am of the view that the evidence of the entry as per the school register of the prosecutrix was not all a convincing evidence. Same is the position with regard to the statement of the father of the prosecutrix. They ought to have been discarded by the learned trial court and the only cogent material regarding the determination of the age of the prosecutrix was the opinion of Dr. J.R. Dass, PW16. According to him the prosecutrix had completed 16 years of age, but had not completed 18 years as on October 5, 1984, the date on which he took the skiagrams of the prosecutrix. Thus, according to this evidence the prosecutrix may just be marginally below 18 years of age. Now, it is also a settled law that the determination of age on ossification test is not quite accurate and there may be a margin of about 1 year to 2 years on either side. It is also a settled law that the benefit of doubt has to be given in favor of the accused in the matter of determination of age of the prosecutrix on such medical evidence. Thus, making "a margin 1" years of even less on the higher side the prosecutrix could certainly be above 18 years of age on the date of the occurrence. It is accordingly held that the prosecution had failed to prove that the prosecutrix was below 16 years or even below 18 years of age on the date of occurrence.

(5) Now, as regards the conviction of Brij Mohan for the offence of rape as punishable under S. 376 Ipc, the learned Additional Sessions Judge has based his conviction on the sole un-corroborated testimony of Saroj Bala, prosecutrix. "The learned trial court did not all Consider or refer to the other most material evidence in that regard, including the medical evidence and the report of the Central Forensic Science laboratory. Ex. Public Witness 13/H. The statement of lady Dr. (Mrs) Kamini Kapur. Public Witness 15, and her report Ex. Public Witness 15/A given on the M.L.C., Ex. Public Witness 10/A as prepared by another doctor namely. Dr. Ashok Jaiswal, Public Witness 10, shows that Saroj Bala was found having an old torn hymen. This report of Dr. (Mrs) Kapur bears the date 10.10.1984. Saroj Bala was, however, referred to the gynaecologist by Dr. Ashok Jaiswal, Public Witness 10, on October 4. 1984. Dr. Kamini Kapur has not stated in her statement or in her cryptic report the date on which she examined Saroj Bala. It was for the prosecution to have clarified the position in this regard on the record, which it failed to do. Anyhow, Dr. Kamini Kapur has stated that the old torn hymen might have been a month old. Dr. Kamini Kapur has not stated anything either in her statement or in her report if she found any visible mark of injury or any other sign suggesting the commission of sexual intercourse with Saroj Bala by force or otherwise on October 3, 1984. Besides that as per the report of the Senior Scientific-cum-Assistant Chemical Examiner, Central Forensic

Science Laboratory, Government of India, Ex. Public Witness 13/H, no semen could be detected on any of the clothes of the prosecutrix or of Brij Mohan appellant that were forwarded to him. In such a situation namely, when Saroj Bala was not under 16 years of age and was found to have indulged in sex prior to the date of occurrence and the medical evidence not suggesting the commission of sexual intercourse with Saroj Bala, and further no semen having been found on any of the clothes of either of the prosecutrix or of Brij Mohan-appellant, the trial court ought to have scrutinised the statement of the prosecutrix minutely and carefully and should have sought corroboration of the same and ought not to have put implicit faith in the statement of the prosecutrix implicate as has been done by the trial court to find out if Saroj Bala may be a consenting party if she was subjected to sexual intercourse. Apart from the above, there are other facts and circumstances appearing on the record which went to show that the commission of rape with Saroj Bala was not proved on the record beyond a reasonable doubt. The first thing to note is that as per the case of the prosecution itself Saroj Bala returned home after the occurrence at about 9.30 p.m. on October 3, 1984. She narrated the entire occurrence to her father, Om Prakash (Public Witness 4), who then lodged the D.D. Entry No 20 at the police station at 10.45 p.m. on that very date, a copy of which is Ex. Public Witness 13/ A. In this report Om Prakash (Public Witness 4) did not state anything about the commission of rape on his daughter Saroj Bala or about her having been kidnapped or abducted by any of the accused persons. All that he stated in this report was that Brij Mohan and Hari Ram, appellants, had followed Saroj Bala on that day and he apprehended that they may not do any mischief to her. This is the first version of Om Prakash, Public Witness 4, himself. Si Om Prakash, Public Witness 13, has stated that on receipt of a copy of D.D. Entry No. 20 he went to the house of Om Prakash PW. The prosecutrix was present in her house, but Om Prakash did not allow him to meet her during the night. According to him, Om Prakash again came to the police station next day accompanied by Saroj Bala and then he recorded his statement Ex. PW1/A at about 12.00 noon which he is the F.I.R. of the case. Om Prakash, Pw 4, in his cross-examination has stated that he had told the police that the accused persons were harassing his daughter, but he did not tell the entire story to the police as narrated to him by his daughter as that was a matter affecting their reputation. This Explanation of Om Prakash, Public Witness 4, is hardly convincing. If Om Prakash Public Witness and his daughter wanted to avoid the incident coming to the notice of the people by lodging an F.I R. about the same, nothing has been stated as to how they changed their mind and then decided to lodge the F.I.R. about the alleged incident the very next day. Thus, all these circumstances certainly throw a doubt on the case of the prosecution as narrated by the prosecutrix and as allegedly stated by the prosecutrix also to her father, Om Prakash, soon after the occurrence and that certainly lent support to the contention of the accused persons that the prosecutrix and her father have improved upon their complaint as lodged on the night of 3rd October, 1984 and that the whole episode as narrated by the prosecutrix was a made up affair. Next, it has come in the

statement of the prosecutrix Saroj Bala herself that there are residential quarters near the staircase leading to Hindu Rao Hospital where she was bodily lifted and put in the jeep forcibly. Had Saroj Bala been so put in the jeep, she would have resisted the same and would have tried to raise hue and cry. She is, however, silent if she raised any kind of alarm at that time or anywhere else on her way from near the Hindu Rao Hospital to the factory or at the factory premises which is also in an inhabited locality or on her journey back to her house. It is also worth-noting that according to Saroj Bala her father had been telling her that Brij Mohan and his family members were not good persons and she should not go to their house. If that be so, then Saroj Bala would not have been easily taken in by Brij Mohan so as to take him on his words and believe that her brother was lying injured at Hindu Rao Hospital and to accompany Brij Mohan to the hospital and at least without first informing the members of her family at her nearby house. All these things clearly went to suggest that if Saroj Bala was taken by the accused persons or by any of them as alleged by her or was subjected to sexual intercourse, all that must be with her consent. In conclusion, it is held that the learned trial court has grossly-erred in convicting Brij Mohan appellant for the offence of committing rape as punishable under S. 376 of the Indian Penal Code.

(6) As regards the conviction of the three appellants under S. 366 I.P.C. It is not clear from the impugned judgment of the trial Court if they found guilty of having Kidnapped Saroj Bala from out of her parents' lawful guardianship or they were found to have abducted Saroj Bala by playing deception and/or force on her. As regards kidnapping, that charge was not sustainable in view of my finding above that Saroj Bala was not proved to be below 18 years of age. Regarding the charge of abduction I have observed above that if Saroj Bala was taken by the three appellants or by any of them, that must be with her consent. The learned trial court was thus in error in convicting the three appellants under S. 366 Indian Penal Code .

(7) So far as the conviction of Rajesh, appellant, is concerned, apart from the above, the learned trial court was also in error in having held that the identity of Rajesh Kumar as the person who drove Saroj Bala in the jeep to the factory and back to her house stood established from the statement of Saroj Bala by her identifying Rajesh Kumar as that person in the court. Rajesh Kumar as admittedly not known to the prosecutrix. His name and description was also not given in the F.I. R. No test identification parade for getting Rajesh Kumar identified from the prosecutrix was conducted during the investigation of the case. According to the statement of Saroj Bala Public Witness I, herself there was darkness at the place from where Hari Ram took her, as also at the place where the jeep was parked near the Hindu Rao Hospital, as according to her there was a breakdown of electricity. His name does not find place even in the D.D. Entry, copy of which is Ex. Pw 13/A. Then again Si Om Prakash, Public Witness 13, has stated that the prosecutrix had given him the name of the driver of the jeep as "Beetay". Nothing has been brought on the record to show that Rajesh Kumar

was also known as "Beetay". Under these circumstances the prosecution could not be deemed to have established the identity of Rajesh appellant with the person who may have driven the jeep and for that reason itself Rajesh deserved to be acquitted in the case. In conclusion I accept the appeals of the three appellants. set aside their convictions and sentences as awarded to them and acquit all the three appellants for the offence under S. 366 Indian Penal Code . as also Brij Mohan appellant under S. 376 Indian Penal Code .