

(2016) 05 DEL CK 0246

In the Delhi High Court

Case No : CRL.A. 775 of 2015 and Crl.M.B. 863 of 2016

Munna

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 18-05-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 376

Citation : (2016) 8 ADDelhi 118

Hon'ble Judges : Mukta Gupta, J.

Bench : Single Bench

Advocate : Mr. Ajay Verma, Ms. Divya Chugh, Advocates DHCLSC, for the Appellant; Ms. Rajni Gupta, APP, for the State

Final Decision : Disposed Off

Judgement

Mukta Gupta, J.—Vide the judgment dated November 21, 2014 Munna has been convicted for the offences punishable under Sections 376 and 363 IPC and directed to undergo rigorous imprisonment for a period of 10 years and a fine of Rs. 15,000/- for offence punishable under Section 376 IPC and rigorous imprisonment for a period of 7 years and a fine of Rs. 7000/- for offence punishable under Section 363 IPC vide order on sentence dated November 25, 2014.

2. Learned counsel for the appellant challenging the conviction contends that in the statement recorded under Section 164 Cr.P.C. when the girl was in the protective custody and on satisfaction by the learned Magistrate, there is no allegation whatsoever of any kind either in regard to kidnapping or rape. However, in the testimony recorded before the Court the prosecutrix has made material improvements. The prosecutrix has given an entirely new version in the statement before the Court and thus the same cannot be relied upon. There is no corroboration to the statement of the prosecutrix for the reason when the MLC of the prosecutrix was prepared she refused to undergo gynecological examination. The motive for false implication is apparent from the testimony of Bhagwan Das

PW-2 the father of the prosecutrix who stated that the appellant was a tenant in his house and the cross-examination of the prosecutrix who admitted that Munna was a tenant in their house and did not pay rent for seven to eight months. Though it is the case of the prosecution itself that the appellant with the prosecutrix was apprehended at Lakhimpur, no record whatsoever of the said apprehension has been produced. Further this version fortifies that the so-called arrest of the appellant at ISBT Anand Vihar was shown falsely. Even accepting that the prosecutrix was a minor at the time of the incident, there is no material on record whatsoever to show that appellant committed the offence of rape or kidnapping.

3. Learned APP on the other hand contends that the prosecutrix in her statement before the Court has clarified that when her statement under Section 164 Cr.PC was recorded she was under pressure and thus non-implication of Munna in her statement under Section 164 Cr.P.C. would not render the deposition of the prosecutrix in the Court nugatory. To prove the age of the prosecutrix, prosecution examined PW-7 Ms. Suman Goswami the teacher of the concerned school who produced the admission register Ex.PW-7/A, copy of admission form Ex.PW-7/B and the copy of the school leaving certificate of the previous school Ex.PW-7/C which documents prove the date of birth of the prosecutrix to be December 20, 1994 and thus on the date when the prosecutrix left the home i.e. August 28, 2009 her age was 14 years and 8 months. Thus, her consent, if any, is immaterial.

4. Process of law was set into motion by PW-2, father of the prosecutrix on August 29, 2007 recording DD No.19A regarding the missing of his daughter. As PW-2 suspected Munna Verma for having enticed away his daughter, FIR No.153/2009 was registered under Section 363/376 IPC. After the prosecutrix was recovered on September 01, 2009 her statement was recorded under Section 164 Cr.P.C. on September 02, 2009 by the learned Metropolitan Magistrate wherein she stated as under:

"Her parents scolded her on Friday on the issue of key. On Saturday at 4.00 PM she went for tuition. Thereafter on her own she went with someone. From there she had come with the Police to Kanjhawala Police Station."

5. The prosecutrix was taken for medical examination wherein alleged history of running away from home on August 28, 2009 and being recovered by the Police on September 01, 2009 was noted as told by Lady Constable Sheela. Both the prosecutrix and the father stated that they were not willing for gynae examination or to give the under-garments of the prosecutrix for examination.

6. Before Court prosecutrix deposed that Munna had taken her to his house at Lakhimpur, U.P. where he kept her the whole night and committed rape on her. On the next day Munna took her to the Court for the purpose of marriage in the morning hours, however the marriage could not be registered because she was aged 16 years and the Court staff refused to register the marriage. Someone

informed the Police, so she and Munna were apprehended and taken to Police Station Bheera, District Lakhimpur, U.P.

She did not inform her address to anyone because Munna had threatened her not to disclose the same. She informed to the police officer, telephone number of Seema, a lady in whose house Munna used to live and work. Police informed Seema who in turn informed her parents. She and Munna were brought by Delhi Police officials to PS Kanjhawala where Munna was taken into custody. She was taken for medical examination but on the advice of her father she refused to undergo internal examination and the endorsement in this regard was on the MLC. She also admitted that her statement under Section 164 Cr.P.C. Ex.PW-1/A was recorded by the learned Magistrate. On a leading question being put by the learned APP with regard to her statement under Section 164 Cr.P.C. she stated that "I was not in a proper mental state at that time and had been intimidated by Munna". In cross-examination the prosecutrix admitted that Munna was a tenant in their house and had not paid rent and ration charges for about 7-8 months which amounted to Rs. 8,000/- and therefore the tenanted room was got vacated from him where after he started living in the house of Seema. She was also confronted with her statement recorded under Section 161 Cr.P.C. which showed that on all aspects she has made material improvements before the Court.

7. Naveen Gupta PW-6 the learned Metropolitan Magistrate, who recorded the statement of the prosecutrix under Section 164 Cr.P.C. had questioned the prosecutrix with regard to any kind of pressure, threat or coercion while she was giving her statement on which the prosecutrix specifically stated that she was giving the statement voluntarily. There is an endorsement of the learned Metropolitan Magistrate that after brief questioning of the prosecutrix he was satisfied that she was in a free state of mind and was making the statement voluntarily, thus he recorded the statement.

8. As regards the offence punishable under Section 363 IPC is concerned it has been proved that on August 28, 2009 the prosecutrix left her house and was recovered from Lakhimpur with the appellant. Though the case of the prosecution is that the two of them were apprehended while sitting at Anand Vihar Bus Terminal when the search for the prosecutrix and Munna was made, however the same appears to be falsely shown in view of the statement of the prosecutrix. Be that as it may, even at Delhi prosecutrix was in the company of Munna. The prosecutrix being minor and in view of the material on record, the offence of kidnapping is clearly made out.

9. However, as regards the offence punishable under Section 376 IPC there is no averment in the statement under Section 164 Cr.P.C that the prosecutrix was subjected to sexual intercourse. In the Trial Court record the statement under Section 161 Cr.P.C. dated September 01, 2009 Mark DX-1 is not available however it is to be noted that the prosecutrix has been confronted with the said statement. She was confronted with that portion of the statement where the fact that Munna had broken the SIM card of her mobile phone was not recorded. She

was also confronted with her statement dated September 01, 2009 wherein the fact that he had kept her the whole night in the house at Lakhimpur was not noted. Even the fact that on the next day Munna took her to the Court for the purposes of marriage was not noted.

10. Indubitably the prosecutrix is not an accomplice and if her statement is reliable then conviction can be solely based on her statement. However, it is to be noted that the prosecutrix has made substantial improvements in her statement before the Court and she has been confronted with major portions of her deposition in the Court which were not found in her previous statements. Thus, in the absence of any corroboration to her deposition which has been materially improved in Court it would be unsafe to base the conviction of the appellant for offence punishable under Section 376 IPC. A Court can return a finding of guilt for offence punishable under Section 376 IPC only if the prosecution is able to first prove beyond reasonable doubt that the accused committed the offence where after the next step is of ascertaining the consent in case the prosecutrix is major.

11. Supreme Court in the decision reported as (2012) VI AD (S.C) 112 : (2012)7 SCC 171 Narender Kumar v. State (NCT of Delhi) held-

"28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character.

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide *Tukaram v. State of Maharashtra* [(1979) 2 SCC 143 : 1979 SCC (Cri) 381 : AIR 1979 SC 185] and *Uday v. State of Karnataka* [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : AIR 2003 SC 1639].)

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. The conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to

accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected."

12. Consequently, the conviction of Munna for offence punishable under Section 376 IPC is set aside, however his conviction for offence punishable under Section 363 IPC is maintained. Considering the facts and circumstances of the case the sentence for offence punishable under Section 363 IPC is modified to rigorous imprisonment for a period of three years and to pay a fine of Rs. 5000/- in default whereof to undergo simple imprisonment for a period of one month.

13. Appeal is accordingly disposed of. Application for suspension of sentence is dismissed as infructuous.