

(2019) 04 DEL CK 0031
In the Delhi High Court
Case No : Criminal Appeal No. 1186 Of 2016

Raja

APPELLANT

Vs

State (G.N.C.T Of Delhi)

RESPONDENT

Date of Decision : 02-04-2019

Acts Referred:

Indian Penal Code, 1860 — Section 363, 376
Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4
Code Of Criminal Procedure, 1973 — Section 161, 164, 313

Citation : (2019) 04 DEL CK 0031

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Amit Singh Chauhan, S.S. Chauhan, Rajni Gupta

Final Decision : Disposed Off

Judgement

Mukta Gupta, J

1. Raja challenges the impugned judgment dated 27th April, 2016 convicting him for offences punishable under Section 363 IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') and the order on sentence dated 29th April, 2016 directing him to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.2,000/-, in default whereof to undergo simple imprisonment for a period of two months, for offence punishable under Section 363 IPC and rigorous imprisonment for a period of seven years and to pay a fine of Rs.3000/-, in default whereof to undergo simple imprisonment for a period of three months, for offence punishable under Section 4 of POCSO Act.

2. Assailing the conviction, Learned Counsel for the appellant contends that there are material contradictions in the various statements given by the prosecutrix. In her statement before the doctor on 30th June 2016 she stated that she went with Aryan and stayed with him in Delhi till 26th June 2013. Thereafter, they went to Kanpur and she had voluntary sexual intercourse with him thrice. Her

statements under Section 164 Cr.P.C. and Section 161 Cr.P.C. were both recorded on 1st July 2013. In her statement recorded under Section 164 Cr.P.C. she stated similarly as she did in her statement to the doctor while in her statement under Section 161 Cr.P.C. she stated that about a year ago she received a SMS mistakenly on her phone from Aryan whereafter she started speaking with Aryan frequently and they became friends. She met him on 22nd, 23rd and 24th June 2013. She also met his friend Raja on 24th June 2013 and all of them went to Jama Masjid. Thereafter, Raja took her to Saharanpur, Uttar Pradesh.

3. Learned counsel further contends that in the initial statement of the prosecutrix only Aryan was named. In her statement recorded under Section 161 Cr.P.C. she stated that on 24th June 2013 Raja took her to Saharanpur and took a room on rent. He established physical relations with her and told her that he would marry her. In her statement before the counselor on 2nd July, 2013, she mentioned that on 24th June 2013, Raja and she went to Kanpur and stayed in a hotel for three days while in her statement before the doctor and her statement recorded under Section 164 Cr.P.C. she stated that she went to Kanpur with Aryan. She stated that even though Raja took two separate rooms, she stayed in Raja's room. In her examination-in-chief, she stated that when she was with Raja in Kanpur, Aryan had called her and she told him that she was with her parents. She stated that she had initially named Aryan as she was in love with Raja.

4. Learned counsel also submits that the age of the prosecutrix has not been proved as only the photocopy of the birth certificate has been placed on record. No CCTV footage has been recovered even though CCTV was installed at the metro station from where she allegedly travelled with Raja. Cash memo of the hotel in Saharanpur was in the name of Raj Kumar which falsifies the story of the prosecutrix with respect to the incident that took place in Saharanpur. Gaurav has not been examined as a witness. The evidence with respect to mobile numbers 9871473417, 9540884424 and 8377955234 cannot be looked into since the mobile phones had not been seized and neither of the numbers were in the name of Raja nor any witness has stated in his testimony that Raja was using the aforesaid mobile numbers. Raja has not been identified by the hotel boy in the test identification parade. Offence of kidnapping is not made out. Reliance is placed upon the decision of the Supreme Court reported as AIR 1965 SC 942 S. Vardarajan v. State of Madras.

5. Learned APP for the State on the other hand submits that the counselor's report Ex.PW-20/A is not admissible in evidence. As per the entry register of the hotel proved vide Ex.PW-11/A, room no.12 was allotted in the name of Raja and the cash memo Ex.PW-11/B was signed by Raja. Raja has been identified by Raju (PW-12) even though no test identification parade was conducted.

6. Sequence of events leading to the prosecution case are that on 26th June, 2013 at about 7:00 P.M., mother of the prosecutrix went to the police station and got her statement (Ex. PW-3/A) recorded wherein she stated that she has been staying near Bharat Ghar, Sai Nagar, Meethapur Extension, Delhi with her

children on rent since five months and her husband does not stay with her but keeps coming now and then. Her husband gives her money sometimes for her livelihood and that of the children. She had not been able to work since many days because of her sickness. Therefore, her elder daughter (prosecutrix herein), who was 15 years 4 months old, used to work with her nani at Kothi No. G-26, 2nd Floor, Lajpat Nagar -III. On 22nd June, 2013, prosecutrix left from the Kothi and went away somewhere. She neither came to her nor did she go to her father or any other relative. Landlady of the kothi informed her about the prosecutrix leaving on 22nd June, 2013. She doubted that some person had lured her and taken her away. Thus, her daughter be searched. On the basis of the aforesaid statement, FIR No. 191/2013 (Ex.PW-2/A) was lodged at PS Lajpat Nagar for the offence punishable under Section 363 IPC.

7. SI Rajveer Singh (PW-18) got a notice issued vide Ex. PW-18/B. Phones of prosecutrix's family and of suspects were put on surveillance. On 30 th June, 2013, mother of prosecutrix informed the police on phone that prosecutrix had returned back to her house. Thereafter, she produced her at the Police Station. Prosecutrix was taken to hospital and was medically examined. Further investigation was handed over to W/SI Narender Kaur on 1st July, 2013. W/SI Narender Kaur got the statement of the prosecutrix recorded under Section 164 Cr.P.C. Co-accused Aryan, after being identified by the prosecutrix, was arrested vide arrest memo Ex. PW-1/A. His personal search was conducted vide Ex. PW-7/A. His disclosure statement was recorded vide Ex. PW-22/B. Birth certificate of prosecutrix was obtained from her mother and was seized vide seizure memo Ex. PW-7/C. Prosecutrix had also made allegations against Raja who had taken her to a hotel in Saharanpur and had established sexual relations with her in Hotel Prakash. On 2nd July 2013, Raja was arrested vide arrest memo Ex. PW-1/C.

His personal search was conducted vide memo Ex. PW-22/D and his disclosure statement was recorded vide Ex. PW-7/D. Raja was also sent for medical examination. On 4th July, 2013, Raja escaped from police custody and a separate case was registered vide FIR No. 201/2013 on the complaint of SI Rajbir. Later on, he was apprehended in Bihar. Since the prosecutrix refused for her internal examination, no exhibits were sent to FSL. Call details of the mobile phones of prosecutrix, Raja and Aryan were obtained.

8. On completion of investigation, charge sheet was filed for offences punishable under Sections 363/376 IPC and Sections 3/4 of POCSO Act. Vide order dated 11th November, 2013, charge was framed under Section 4 of POCSO Act and in alternative under Section 376 IPC against Aryan and Raja. Vide the impugned judgment Aryan was acquitted for the offences charged, however Raja was convicted and sentenced as noted above.

9. Prosecutrix was examined as PW-1 in Court. She deposed that she resided in Delhi since her childhood and her mother was a housewife. She used to go along with her maternal grandmother to a Kothi at Lajpat Nagar, New Delhi where she worked as a housemaid. The owner of the Kothi, gave her a mobile having no.

9990186360 to facilitate talking with her. About a year back, the date and month she did not remember, she received a message. She contacted the person who had sent the message. The person revealed his name as Aryan. She spoke to him several times on the phone that day. One of his friends namely Raja also used to talk to her on the same mobile phone. She voluntarily stated that she spoke to Raja twice. After about 2 months of receipt of SMS, one day Raja called her on the phone and asked her to come to Central Market, Lajpat Nagar. She went there and met him at about 10:00 P.M. and then he took her to India Gate where they remained all night. On the next morning, he dropped her at Mool Chand Metro Station. He asked her to come to the metro station in the evening and he would pick her up from there. She went there in the evening, he again picked her up and took her to Jama Masjid in a TSR where they wandered the whole night. The next day, again, when they were at Jama Masjid, Raja asked her to tell her mother that she was with her friends and would return in a week. She refused to tell her mother. When Raja could not get a hotel room because of heavy amount asked by the hotelier, he took her to Kanpur by train and hired a room in a hotel where they stayed for three days. He had sexual intercourse with her thrice on the pretext of marrying her. On the second day, when Aryan called her to inquire where they were, she told him that she was with her parents. They left that place, stayed overnight at the railway station and left for Delhi in the morning. On reaching Delhi they went to Chattarpur Mandir, where they wandered till night. It was a Saturday. Raja went to get some money and returned after half an hour. He brought her to her colony where the son of the landlord apprehended her and Raja fled away. She went to her home whereafter her mother called the police. During her cross-examination she stated that it was true that Raja had no intention to marry her and had established physical relations with her on the pretext of marriage. She denied the suggestion that Raja did not commit any wrong with her or that she had gone with him voluntarily.

10. Dr. Latika Chawla (PW-4), Senior Resident, AIIMS hospital, New Delhi stated that on 30th June, 2013, she had medically examined the prosecutrix and prepared the MLC Ex. PW-4/A. She did not find any apparent injury on her and the prosecutrix refused for internal examination.

11. Surender Kr. Sharma (PW-11) Manager, Prakash Hotel, Saharanpur stated that as per their record, Raja stayed in the hotel from 26th June 2013 to 29th June 2013 along with a girl. Copy of the hotel record was proved vide Ex. PW-11/A. Copy of the receipt of payment made by Raja was proved vide Ex. PW-11/B. During his cross examination, he stated that Raja handed over a copy of the voter I.D. as his identity which was not seized by the police.

12. Raju (PW-12) stated that in July 2013, he was working as an attendant at Prakash Hotel, Saharanpur. He corroborated the testimony of Surender Kr. Sharma (PW-11). During his cross-examination he stated that he went to the room of Raja only once. He saw the prosecutrix with the appellant when they

came down. He doesn't remember the date when they came to the hotel. CCTV Camera had been installed in the hotel which was not inspected by the police.

13. Explanation of the appellant in his statement under Section 313 Cr.P.C. was that he was innocent and has been falsely implicated. The appellant led defence evidence by examining Smt. Amreen as DW-1 who stated that one Suraj had come to her house with a girl whose name she later came to know as 'S' the prosecutrix when Raja was not at home.

14. As regards objection of learned counsel for the appellant to the photocopy of the date of birth having been exhibited, it may be noted that no objection at the time of exhibition of the said document was taken and hence the document has been properly exhibited. Ex.PW-3/B the date of birth certificate of the prosecutrix was put to Raja in his statement under Section 313 Cr.P.C., to which he stated that he did not know.

15. The relevant issue in the present appeal would be whether conviction of the appellant can be based on the testimony of the prosecutrix. In her statement under Section 164 Cr.P.C. the story of the prosecutrix is totally different stating that she had first befriended Aryan and had gone to different places with him including India Gate on Saturday and to various other places and finally to Kanpur where they stayed in a hotel and established physical relations. However, in the Court she exonerated Aryan and took the name of the appellant and stated that she met Raja along with Aryan on 24th June, 2013. Thereafter they went to Jama Masjid and it was crowded because it was "Jumme Ki Raat". However, 24th June 2013 was a Monday and not a Thursday. She stated that Raja offered to drop her and thus she and Raja went to New Delhi Railway Station from where he took her to Saharanpur, took a room on rent and established relationship. Raja promised to marry her and on 24th June, 2013 Raja dropped her outside her house.

16. The State proposes to use the entries in the register of Prakash Hotel, Saharanpur to prove stay of Raja with the prosecutrix to corroborate her version. Surender Kumar Sharma, the Manager of Prakash Hotel who exhibited the records did not identify Raja as the person who stayed in the hotel nor is the hand-writing in the Register attributed to the appellant. Raju the attendant in his examination-in-chief stated that Raja came to stay in their hotel in July, 2013 accompanied by one girl, however in his cross-examination he admitted that there were several customers everyday and there were 25 rooms and he had seen Raja with the girl only once when they came downstairs and that he could not identify all those customers. The identification of Raju cannot be thus the basis of corroboration of the testimony of the prosecutrix in Court.

17. In view of the marked difference in the statements of the prosecutrix recorded under Section 161/164 Cr.P.C., before the Doctor and in the Court, it would be unsafe to base the conviction of the appellant solely on the same. The appellant is thus entitled to the benefit of doubt. Consequently, the impugned

judgment of conviction and order on sentence are set aside.

18. Appeal is disposed of. Superintendent Mandoli Jail will release Raja forthwith if not required in any other case.

19. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

20. TCR be returned.