

(2013) 03 DEL CK 0103
In the Delhi High Court
Case No : Crl. A. 738/2009

Ramesh

APPELLANT

Vs

State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

Citation : (2013) 03 DEL CK 0103

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—This Appeal is directed against a judgment dated 08.05.2009 and an order on sentence dated 13.05.2009 passed by the learned Additional Sessions Judge ("ASJ") in Sessions Case No. 196/2007 FIR No. 271/2005 P.S. Sultan Puri whereby the Appellant was held guilty for the offences punishable under Sections 376 /363 IPC. He was sentenced to undergo rigorous imprisonment for 07 years and to pay a fine of Rs. 2,000/- or in default to undergo SI for two months for the offence punishable u/s 376 IPC. He was further sentenced to undergo rigorous imprisonment for 03 years and to pay a fine of Rs. 1,000/- or in default to undergo SI for one month for the offence punishable u/s 363 IPC. The learned counsel for the Appellant raises a very short submission. He says that it was consensual sex as the prosecutrix was in love with the Appellant. Referring to the statement of the prosecutrix recorded u/s 164 Cr.P.C. and her testimony in the Court as PW 3, the learned counsel urges that there is material contradiction in the two versions as to the manner in which the prosecutrix was recovered and restored to her parents. The learned counsel states that the prosecutrix happily remained with the Appellant for over a month. She travelled to the Appellant's village and always had an opportunity to disclose to the passersby, to the neighbours and the villagers if she had been forcibly taken and sexual intercourse was committed on her without her consent. The learned counsel, therefore, argues that although the Appellant has already

served his sentence of imprisonment but his stand has to be vindicated that he has not done anything wrong.

2. I have gone through the statement u/s 164 Cr.P.C. made by the prosecutrix. Admittedly, there is a major contradiction as to the manner of recovery of the prosecutrix in this statement and prosecutrix's version in the Court as PW 3. At the same time, the prosecutrix was not confronted with her statement u/s 164 Cr.P.C. to elicit the information. Moreover, assuming that the prosecutrix was a consenting party, the same is not going to make any material difference in the outcome of the case as it was the prosecution's version throughout, that the prosecutrix was about 14 years, that is, less than 16 years of age and thus, incapable of giving any consent.

3. I have before me the testimony of the prosecutrix (PW 3), her father Ghyasi Ram (PW 4), her mother Shakuntala (PW 5). The prosecutrix on the date of her examination in the Court on 01.12.2006 gave her age to be about 15 years. PW 4 gave her age as 15 years at the time of the offence and PW 5 gave the age as 12-13 years. No specific suggestion was given to either of these three witnesses that the prosecutrix was above 16 years. The prosecution also examined Smt. Vijaya Sikka (PW 10), Principal, MCD Primary School who proved the Date of Birth Certificate as per the admission register to be 02.04.1992. Thus, on the date of the offence, that is, 06.01.2005, the prosecutrix was only about 13 years.

4. It is urged by the learned counsel for the Appellant that the prosecution ought to have determined the prosecutrix's age by leading some scientific evidence in the shape of ossification test. I am not inclined to agree with this contention. First, because no suggestion was given to any of the material witnesses that the prosecutrix was above the age of 16 years and, second the ossification test was not required to be done in view of the entry in the school admission register unless the same was challenged by the Appellant.

5. In State of Chhattisgarh Vs. Lekhram, the Hon'ble Supreme Court held that the register maintained in a School is admissible evidence to prove the date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act, 1872. In Kamlesh & Ors. v. State & Ors., (W.P. (CrI) 1278/2009) decided on 02.02.2010, this Court held that no reliance can be placed on the report of an ossification test in the face of unimpeachable documentary evidence regarding the age of the prosecutrix. In the circumstances, it is established that the prosecutrix was aged only about 14 years at the time of the sexual intercourse committed upon her. Even if the prosecutrix consented to such an act, the same amounted to rape in view of Section 375 sixthly.

6. The Appeal, therefore, has to fail; the same is accordingly dismissed. Pending Applications stand disposed of.