

(2018) 12 DEL CK 0088
In the Delhi High Court
Case No : Criminal Appeal No. 793 Of 2000

Rishi Kapoor Alias Rishi

APPELLANT

Vs

State Of Delhi

RESPONDENT

Date of Decision : 12-12-2018

Acts Referred:

Indian Penal Code, 1860 — Section 302, 376
Code of Criminal Procedure, 1973 — Section 389

Citation : (2018) 12 DEL CK 0088

Hon'ble Judges : R.K. Gauba, J

Bench : Single Bench

Advocate : Jabbar Hussain, Kewal Singh Ahuja

Final Decision : Disposed Off

Judgement

1. The appellant was tried in the court of the Sessions (in Sessions case 53/2000) on the charge for the offence under Section 376 of the Indian Penal Code, 1860 (IPC), the gravamen thereof being that on 14.03.1994, he with the assistance of co-accused Tinka had committed rape by engaging the prosecutrix, a girl aged 11 years to forcible sexual intercourse in Golta Park, Subzi Mandi area. By judgment dated 27.11.2000, he was held guilty, as charged, on the basis of evidence that had been led by the prosecution, it including the evidence of the prosecutrix (PW-2) and her mother (PW-3) besides the medico legal record including MLC (Ex. PW14/A) prepared by Dr. H.K. Arora and gynae report (Ex. PW14/B) prepared by Dr. Sagarika Sarkar, each of whom had examined the prosecutrix as medical officers working at that point of time in Hindu Rao Hospital. By subsequent order dated 01.12.2000, the trial judge awarded rigorous imprisonment for three years with fine of Rs.2500/- as the punishment with further direction that, in the event of default in payment of fine, he would undergo further simple imprisonment for a period of six months.

2. The appeal against the above mentioned judgment of conviction and order on sentence came up before this court on 19.12.2000. Taking note of the fact that

the learned trial judge had suspended the sentence under Section 389 Cr. PC, a learned single Judge of this court, by his order dated 19.12.2000, enlarged the appellant on bail pending hearing on the appeal. The appeal has come up for hearing almost 18 years after it having been admitted.

3. The learned counsel for the appellant made a feeble attempt to argue that the accusations against him should not be believed on the basis of testimony of PW-1 or PW-2 for the reason the co-accused (juvenile) had been acquitted in a separate inquiry by the Juvenile Justice Board, the evidence of the same set of witnesses having been disbelieved, reliance being placed on the judgment dated 26.06.2000 of the said forum. At the same time, the learned counsel submitted that since the evidence on record clearly shows that the appellant was 17 years old, at the time of the commission of the offence, the benefit of amended law relating to juvenile justice, where-under he would now be treated as a juvenile, he being a person below 18 years, should be accorded in the matter of consequences, placing reliance on the view taken by the Supreme Court in *Abdul Razzaq Vs. State of U.P.*, (2015) 15 SCC 637.

4. Having heard the learned counsel on both sides and having perused the trial court record, this court finds no merit in the first above noted contention. The failure of the prosecution case against the juvenile is no reason why the evidence led by the prosecution in the trial before the court of Sessions should be disbelieved. This case has to be decided on the merits of the evidence led before it.

5. The evidence of PW-2 (the prosecutrix) about she having been forcibly taken from public way by the appellant and she being subjected to forcible sexual intercourse has been duly corroborated by the medical record. As per the MLC (Ex. PW14/A), the prosecutrix then a girl aged 14-16 years was found on 15.03.1994 with signs of penetrative sexual assault, her hymen having been recently torn. It may be noted that her radiological age was opined to be 14-16 years, as per the report (Ex. PW9/A) of Dr. C.P. Sharma. But, nothing turns on this in as much as the suggestion given by the appellant to the prosecutrix during her cross-examination to the effect she had been visiting him earlier also was denied. The above said suggestion infact implied that the sexual intercourse was consensual. There is no reason why this plea should be accepted in the face of categorical statement of the prosecutrix that she was forced into the act. The evidence of the prosecutrix is duly corroborated by the word of her mother (PW-3) who upon learning about the incident had immediately taken the matter to the police.

6. Thus, while affirming the finding of guilty and endorsing the conclusion that the appellant was liable to be convicted on the charge under Section 376 IPC, the other plea having a bearing on the consequences to follow has to be considered.

7. The evidence presented before the trial court included the radiological opinion (Ex.PW13/C) that the appellant was 17 years old on the date of the commission

of the offence. This fact was accepted by the trial court and has been noted particularly in the order of sentence passed on 01.12.2000.

8. The offence which is the subject matter of the present case was committed on 14.03.1994. At that point of time, Juvenile Justice Act, 1986 governed the field. The Juvenile Justice (Care and Protection of Children), Act 2000 came to be enacted and brought into force with effect from 28.02.2001. The said law was subsequently amended at least twice and has since been replaced by the Juvenile Justice (Care and Protection of Children) Act, 2015. Be that as it may, immediately after the appeal at hand had been presented, the Act of 2000 had come to be enforced. In terms of the amended law as introduced in February 2001, the expression "juvenile" would mean a person who had not completed eighteen years of age and the expression "juvenile in conflict with law" would similarly mean a juvenile who is alleged to have committed an offence and had not completed eighteen years of age as on the date of commission of such offence. By virtue of Section 7-A, which was inserted in the Act of 2000, by amendment introduced with effect from 22.08.2006, the claim of juvenility could be raised before any court for benefit of the amended law to be taken any time, there being inclusion of a special provision to take care of pending cases, including at the stage of appeal (Section 20).

9. In Abdul Razzaq (supra), the petitioner had been found guilty of the offences under Section 302 IPC and sentenced to life imprisonment by the court of Sessions. The conviction and sentence was confirmed by the High Court in appeal and the special leave petition, followed by a review petition, was dismissed by the Supreme Court, the last order having been rendered on 20.07.2010. The claim of the said person being a juvenile on the date of commission of the offence, upon inquiry, was found to be correct.

10. Against the above said backdrop, the Supreme Court noted the ruling in an earlier decision reported as Jitendra Singh alias Babboo Singh and Anr. vs. State of Uttar Pradesh, (2013) 11 SCC 193 laying down as under :-

"80. The settled legal position, therefore, is that in all such cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the court concerned will continue and be taken to their logical end except that the court upon finding the juvenile guilty would not pass an order of sentence against him. Instead he shall be referred to the Board for appropriate orders under the 2000 Act. Applying that proposition to the case at hand the trial court and the High Court could and indeed were legally required to record a finding as to the guilt or otherwise of the appellant. All that the courts could not have done was to pass an order of sentence, for which purpose, they ought to have referred the case to the Juvenile Justice Board.

81. The matter can be examined from another angle. Section 7-A(2) of the Act prescribes the procedure to be followed when a claim of juvenility is made before any court. Section 7-A(2) is as under:

"7-A.Procedure to be followed when claim of juvenility is raised before any court.-

(1)***

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

82. A careful reading of the above would show that although a claim of juvenility can be raised by a person at any stage and before any court, upon such court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have (sic no) effect. There is no provision suggesting, leave alone making it obligatory for the court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal court. Applying the maxim *expressio unius est exclusio alterius*, it would be reasonable to hold that the law insofar as it requires a reference to be made to the Board excludes by necessary implication any intention on the part of the legislature requiring the courts to set aside the conviction recorded by the lower court. Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the court concerned to alter or set aside the conviction. That perhaps is the reason why this Court has in several decisions simply set aside the sentence awarded to the juvenile without interfering with the conviction recorded by the court concerned and thereby complied with the mandate of Section 7-A(2) of the Act.

11. It was also noted that in *Union of India Vs. Ex-GNR Ajeet Singh*, (2013) 4 SCC 186 had held that :-

19. The provisions of the JJ Act have been interpreted by this Court time and again, and it has been clearly explained that raising the age of "juvenile" to 18 years from 16 years would apply retrospectively. It is also clear that the plea of juvenility can be raised at any time, even after the relevant judgment/order has attained finality and even if no such plea had been raised earlier. Furthermore, it is the date of the commission of the offence, and not the date of taking cognizance or of framing of charges or of the conviction, that is to be taken into consideration. Moreover, where the plea of juvenility has not been raised at the initial stage of trial and has been taken only on the appellate stage, this Court has consistently maintained the conviction, but has set aside the sentence.

12. Following the said rulings, in case of *Abdul Razzaq (supra)* while leaving the conviction undisturbed, the sentence awarded against him was set aside. On being asked, the learned Additional Public Prosecutor submitted that he had nothing to say in the face of the ruling in *Abdul Razzaq (supra)*.

13. The facts and circumstances being similar to the case of Abdul Razzaq (supra), the same dispensation is followed in the present case. The benefit of amended benevolent law on juvenility has to be accorded. Thus, while maintaining the conviction, the sentence of the appellant is set aside.

14. The appeal is disposed of in above terms.