
(2014) 03 DEL CK 0120
In the Delhi High Court
Case No : Criminal Appeal 132 of 2006

Santu Dass

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 35
Penal Code, 1860 (IPC) — Section 361 363 376

Citation : (2014) 3 Crimes 65 : (2014) 2 JCC 1169

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Shakti Chand Sharma, for the Appellant; Varun Goswami, APP, for the Respondent

Final Decision : Allowed

Judgement

Indermeet Kaur, J.—This appeal is directed against the impugned judgment and order of sentence dated 30.01.2006 and 31.01.2006 respectively wherein the appellant has been convicted u/s 363 of the IPC and has been sentenced to undergo RI for 2 years and to pay a fine of Rs. 1,000/- and in default of payment of fine to undergo SI for 1 month. The present FIR had been registered at PS Vasant Kunj on the statement of the mother of the victim namely Tulsa Devi examined as PW-2. She had lodged a missing report on 14.10.2002 stating that her daughter was missing since 30.09.2002. Her allegation was that appellant Santu Dass had kidnapped her daughter "R" aged about 16 years from the lawful custody of her parents and had also committed rape upon her. After the recovery of the prosecutrix, the appellant was arrested. The statement of the prosecutrix was got recorded u/s 164 of the Cr.P.C. Challan was filed.

2. The prosecution had examined 10 witnesses in support of its version.

3. In the statement of the accused, he denied his involvement in the offence; his submission was that the prosecutrix was a major and the parties had got married

voluntarily in the Arya Samaj Mandir; there was no force or pressure on the prosecutrix.

4. No evidence was led in defence.

5. The trial Judge on the basis of the aforementioned evidence both oral and documentary had convicted the appellant u/s 363 of the IPC; he had been acquitted of the charge u/s 376 of the IPC. The Court had noted that the victim was aged more than 16 years but less than 18 years; the offence of rape was not made out as in her statement recorded u/s 164 of the Cr.P.C., she had exonerated the accused; moreover she stayed with the accused for several days and there were no explanation given by her as to why and in what circumstances, she had accompanied him and gone from Delhi to Calcutta; there was no force upon her; there was no injury found upon her person. The Court had noted that the prosecutrix was in fact at the age of discretion and was fully able to understand the consequences of her acts. Accordingly for the offence u/s 376 of the IPC, the appellant stood acquitted. However on the point of age of the prosecutrix, the Court had noted that the date of birth of the prosecutrix was proved as 15.04.1986 in terms of Ex. PW-6/A and Ex. P-1 which was a school leaving certificate from Sarvodya Vidyalaya, New Delhi; the transfer certificate was proved as Ex. P-1. The ossification report of the prosecutrix opined her age between 14-17 years. The Court had thus noted her to be minor and being below 18 years of age, the consent of the prosecutrix for the purpose of kidnapping was not material. Accordingly the accused had been convicted u/s 363 of the IPC. He had been sentenced accordingly.

6. On behalf of the appellant, arguments had been addressed in detail. Learned counsel for the appellant at the outset had proceeded to make his submissions on sentence alone; submission being that out of the 2 years period of incarceration which had been ordered against the appellant, he has already suffered imprisonment for one year. However, thereafter, he proceeded to argue the appeal on its merits. It is argued that the age of the prosecutrix was clearly in doubt and the trial Court holding the prosecutrix below 18 years has clearly committed an illegality as the Court had relied upon the school leaving certificate (Ex. PW-6/A) and the transfer certificate (Ex. P-1) which are clearly liable to be disbelieved for the reason that PW-2 (the mother of the victim) in her cross-examination had admitted that they had given a wrong date of birth in Ex. P-1 i.e. the transfer certificate of the prosecutrix. Attention has been drawn to that part of the testimony of PW-2. Further submission being that even the ossification report had opined the age of the prosecutrix as 14-17 years and giving benefit of two years in view of the judgment of the Apex Court reported in Mahabir Parsad Vs. State, this benefit necessarily has to accrue in favour of the accused and the prosecutrix was in these circumstances clearly more than 18 years and thus being a major, no offence u/s 363 of the IPC was made out.

7. Arguments have been refuted by the learned APP for the State. It is pointed out that Ex. P-1 and Ex. PW-6/A can for no reason be disbelieved. The trial Court

had correctly relied upon these documents to hold that the prosecutrix was less than 18 years of age. The impugned judgment does not call for any interference.

8. Arguments have been heard and record has been perused.

9. u/s 363 of the IPC, if any person kidnaps another from lawful guardianship such an act comes within the ambit of that clause. Section 361 defines the offence of kidnapping from lawful guardianship; a minor for the purpose of Section 361 is below 18 years of age if a female and under 16 years if a male. The Supreme Court has time and again reiterated that where a minor is taken out of her lawful guardianship without the consent of the guardian, the offence u/s 363 is made out. Age thus becomes very relevant. In fact for a prosecution u/s 363, age of the girl is a material point because unless it is shown that she was 18 years of age at the relevant time, there could be no case of kidnapping within the meaning of Section 363 of the IPC. The prosecution must prove the age of the prosecutrix on the date of taking away or enticing out of lawful guardianship being below 18 years.

10. In the instant case, what has weighed in the mind of the trial Judge to hold that the prosecutrix was 18 years of age is Ex. PW-6/A and Ex. P-1. Ex. PW-6/A was proved through Subha Gopinathan (PW-6), the Head Clerk from Sarvodya Vidyalaya, Vasant Vihar, New Delhi. She had brought the admission register of the school wherein at serial No. 1225, there was an entry of "R" who had left the school at 28.09.1996 and was admitted in the school on 15.04.1986. The transfer certificate issued by the Vice Principal of the school was proved as Ex. P-1.

11. The ossification report of the prosecutrix was proved through Dr. P. Ramakrishnan (PW-9), the CMO of the Safdarjung Hospital. He had proved the report as Ex. PW-9/A and as per this report, the age of the prosecutrix was between 14-17 years on the date of her examination which was on 31.10.2002 i.e. just around the period of the date of the offence. In his cross-examination, the doctor had explained that this age was calculated on the basis of X ray plates of both the wrists, elbows, shoulders and pelvis; there is a bit of variation in calculating the age but in this case, it would probably be less than 17 years because epiphyses of lower end of radius and ulna had not fused. He denied the suggestion that the prosecutrix was 19 years of age on the date of the offence.

12. The investigating officer, SI P.C. Yadav was examined as PW-10. In his cross-examination, he admitted that the prosecutrix had told him that the accused had taken her to the mandir for marriage and in her statement (Ex. PW-10/A), she had stated that Samay Santu Dass was her husband. He further admitted that after her remand period was over, the prosecutrix preferred to go to the "Nari Niketan" rather than to join the company of her parents.

13. Record shows that in her MLC conducted on 31.10.2002 at the Safdarjung Hospital, the prosecutrix had given her age as 19 years and it has been specifically mentioned that this age has been given by the patient herself. So

also in her medico legal report which was prepared on the same day at the Safdarjung Hospital wherein in history the victim "R" stated herself to be a major and aged 19 years and had married the appellant Santu Dass on 30.09.2002 at the Arya Samaj Mandir, Vasant Vihar with her own consent. Even in her OPD card which was also prepared on the same day again her claim of her age was 19 years. The statement of the prosecutrix was recorded u/s 164 of the Cr.P.C. on the same date. On oath in Court wherein a specific question was put to her by the Presiding Officer, she again stated her age to be 19 years. Ex. P-1 was a school leaving certificate issued by the Vice Principal of the school wherein her date of birth had been noted as 15.04.1986. This document was proved as Ex. P-1. PW-2 in her cross-examination has admitted that this date of birth given of the prosecutrix in Ex. P-1 is an incorrect age. This version of PW-2 in her cross-examination demolishes Ex. P-1. Moreover, it is not as if Ex. P-1 alone can be looked at. This was transfer certificate where date of entry of birth has been depicted as 15.04.1986 admittedly but there is no documentary evidence with PW-2 or any other witness of the prosecution to establish this date as her actual date of birth. In fact in cross-examination PW-2 admitted that this date of 15.04.1986 is a wrong date. This version of PW-2 thus completely demolishes Ex. P-1. Moreover, Ex. P-1 is also not from a Government school; it is of a private school; such an evidence is also not admissible u/s 35 of the Evidence Act.

14. What was thus left with the prosecution was the ossification report of the victim which was proved as Ex. PW-9/A. This ossification report had opined the date of birth of the prosecutrix as between 14-17 years. Trite it is to say that an ossification report only gives an opinion about the approximate age of a person and it cannot be an exact age. Margin of two years has to be given on either side.

15. In Mahabir Prasad (supra) the Court while dealing with the age of the prosecutrix, in this context as held as under:-

On consideration of the entire evidence on record and the judgment cited at the bar, if there can be difference of two years, even in the ossification tests, in that event, the benefit of doubt has to go to the accused.

16. The benefit of this margin has to accrue in favour of the accused. Giving the benefit of two years, the age of the prosecutrix would thus be $17 + 2 = 19$ years.

17. The prosecutrix as noted supra has also at all stages of investigation i.e. at the time when her statement u/s 164 of the Cr.P.C. was recorded as also on all occasions when her medical examination was being conducted has stated her age to be 19 years. In this background, the trial Judge holding that the prosecutrix was less than 17 years of age has clearly committed an illegality.

18. The Apex Court in Sunil Vs. State of Haryana, while examining the school leaving certificate in the context of a conviction u/s 363 had noted where the record did not disclose as to from where the date of birth of the prosecutrix had emanated, such an evidence is full of potholes and loops on which a conviction cannot be sustained.

19. Thus in the instant case as well the version of PW-2 that they had given a wrong date of birth of "R" in Ex. P-1 along with the fact that bony age of the prosecutrix between 14-17 years and giving benefit of two years would be 19 years, coupled with additional fact that all along in the investigation the prosecutrix has categorically given her age as 19 years leads to only one conclusion that conviction u/s 363 of the IPC in this background of this evidence which had been collected by the prosecution is clearly an infirmity. It cannot be sustained. It is accordingly set aside. Appeal is allowed. Bail bonds of the appellant are cancelled. Surety discharged.