
(2013) 07 DEL CK 0438

In the Delhi High Court

Case No : Criminal Appeal 1175 of 2010

Srikant @ Babu @ Rohit

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 09-07-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2013) 07 DEL CK 0438

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

Bench : Single Bench

Advocate : S.S. Singh, for the Appellant; Rajdipa Behura, APP for the State, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—This Appeal tells once more the story of a runaway young couple which runs into rough weather. It is a well known fact that where the girl is firm inspite of the pressure from her family, the boy comes through with flying colours and their elopement becomes a success story but where the girl succumbs to the pressure of the family, the boy remains in prison for years without any ray of hope. The Appellant Srikant faces rigorous imprisonment for one year and fine of Rs. 2,000/- for the offence punishable u/s 363 IPC and rigorous imprisonment for five years and a fine of Rs. 5,000/- or in default of payment of fine to undergo SI for five months for the offence punishable u/s 376 IPC in spite of the Trial Court's findings that the sexual intercourse with the prosecutrix was very much with her consent. The learned ASJ found that in view of the love letters Exs. PW-3/DA-1 to PW-3/DA-13 which were in prosecutrix's handwriting and the manner in which she eloped there could not be any question of the sexual intercourse being without her consent. The learned ASJ found his hands tied in view of the fact that he found the age of the prosecutrix to be about 15 years and four months on the alleged date of elopement. Thus, the Appellant was held guilty for the offence punishable under Sections 363/376 IPC

although it was the prosecutrix who took the lead in the elopement. The Appellant is in custody since the time of his arrest, that is, on 16.12.2009. The prosecution version is extracted from Paras 2 to 8 of the impugned judgment hereunder:-

2. In nut shell, case of the prosecution is as under:

Present case was registered by the police of P.S. Barakhamba Road on the statement of complainant Sh. Ranjit Singh, father of prosecutrix "X" (assumed name). In his statement to the police, complainant disclosed that he was residing at MS2/14 Atul Grove Road, New Delhi and was working as driver at Post Office, Meghdoot Bhawan, Delhi. On 10.12.2009, his daughter "X" aged about 16 years had left for her school N.P. Bengali School at around 8.00 AM but did not return from the school thereafter. On the basis of the said information missing report vide DD No. 26A was recorded on 11.12.2009 by the police of PS Barakhamba Road.

3. The complainant further disclosed that he had made efforts to search the prosecutrix but she could not be traced. The complainant suspected Rohit to have kidnapped the prosecutrix with an intention to marry her. The complainant also disclosed to the police involvement of one Smt. Chanda in the incident.

4. On 10.12.2009, SI Ashutosh was posted at PS Barakhamba Road. On that day, he recorded above statement of complainant Ranjit Singh. He made his endorsement and got the present case registered. He prepared site plan at the instance of complainant. Efforts were made to trace the prosecutrix at different places but she could not be traced.

5. Further case of the prosecution is that on 15.12.2009, Charanjit brother of the prosecutrix informed SI Ashutosh that he had received telephone from village Chhijarsi, UP. On the basis of said information, SI Ashutosh along with HC Narpat, Charanjit, Pradeep Kumar maternal uncle of prosecutrix and Smt. Asha Rani grandmother of the prosecutrix reached village Chhijarsi at around 6 AM. At around 6.15 AM Charanjit informed the police that he had traced the prosecutrix on the main road of the village. On that, SI Ashutosh alongwith HC Narpat reached there and recovered the prosecutrix and prepared necessary memo. Prosecutrix was brought at police station from there.

6. Further case of the prosecution is that prosecutrix was got medically examined. She was produced before the Ld. Metropolitan Magistrate and her statement u/s. 164 CrPC was got recorded.

7. On the same day at around 5.00 PM, the accused was found present near Azad Apartment, near CNG Pump. On the identification of Charanjit Singh, he was arrested and interrogated. Motorcycle and bag which the accused was holding at that time containing some clothes were seized and necessary memos were prepared. The accused was got medically examined.

8. During further investigation, IO collected age certificate from Nagar Palika

Girls Senior Secondary School, Gole Market. He recorded statements of concerned witnesses at different stages of investigation. He got sent the exhibits to FSL and subsequently SI Birendra Singh whom the investigation was assigned, collected the report from FSL. After completion of investigation, he filed the challan against the accused for the commission of the offence punishable U/s. 363/366/376 IPC in the Court of Ld. M.M.

2. In order to establish its case, the prosecution examined 17 witnesses. On appreciation of evidence, the learned ASJ found that the prosecutrix "X" had herself eloped with the Appellant. The sexual intercourse committed on her by the Appellant was with her consent. The Trial Court observed that since the prosecutrix was aged 15 years and 4 months on the date of the commission of the offence, the consent being immaterial, the Appellant was guilty of taking out the prosecutrix from the lawful guardianship of her parents and also for committing rape on her. The Appellant was convicted and sentenced as stated earlier.

3. The only ground raised at the time of hearing of the Appeal is that the age of the prosecutrix at the time of the elopement was 18 years and in any case more than 16 years. The learned counsel for the Appellant urges that the learned ASJ fell in grave error in accepting the prosecutrix's age on the basis of the entry made in the school admission register on the basis of an Affidavit given by the father of the prosecutrix. The learned counsel for the Appellant contends that the learned ASJ summoned CWs 1 & 2 Rattan Singh and Mukesh Kumar from the Nagar Palika Girls Middle (NPGM) School, Gole Market, New Delhi as Court witnesses to fill in the lacuna in the prosecution case and the Appellant was even deprived of the opportunity to rebut the testimony of these two Court witnesses. The learned counsel argues that from cross-examination of CW-2 Mukesh Kumar it was established that the paper on which the Affidavit was sworn, was purchased on 20.04.1997, that is, more than a year before the admission of the prosecutrix in NPGM School on 02.04.1998 in Class I. The learned counsel very strenuously canvassed before me that if the date of birth as stated on the date of purchase of the stamp paper for the Affidavit is accepted, then the prosecutrix was aged only two years and seven months on that date. It is unbelievable that the parents would purchase a stamp paper for an Affidavit for the admission of the child in the first standard when the child is just two years and seven months. It is urged that she should be at least nearly four years old but somehow the prosecutrix could not get admission in the year 1997. Thus, in all probabilities the prosecutrix was aged more than four years at the time of purchase of the stamp paper for the Affidavit, that is, in April, 1997 and thus her age was at least 16 years and four months on the date of the alleged offence.

4. The learned counsel contends that whenever there is doubt about the age it is the duty of the prosecution to get the ossification test done. In the absence of ossification test in the peculiar facts of this case, it will be highly unsafe to rely on the Affidavit given at the time of the admission in the school with regard to

the prosecutrix's age. A number of love letters Ex. PW-3/DA-1 to Ex. PW-3/DA-13 were proved while recording the testimony of the prosecutrix. The learned counsel states that all these letters would go a long way to show that the prosecutrix was in love with the Appellant and had prompted him (the Appellant) to take her along with him. She had even suggested to the Appellant as to where and how should he come to the school on the motorcycle to take her (the prosecutrix) with him.

5. I have no manner of doubt about the findings reached by the learned ASJ that the prosecutrix eloped with the Appellant and had sexual intercourse with him out of her free will.

6. Admittedly, ossification test was not done to determine the prosecutrix's age. In DD No. 25-A which have got recorded by Ranjit Singh, father of the prosecutrix, her age was mentioned as 16 years. Even in his testimony as PW-2 in the Court while narrating the incident he (father of the prosecutrix) gave her age as 16 years at the time of the incident and did not mention the date of birth. In the MLC of the prosecutrix, initially the age was written as 16 years which was struck off to make it 15 years. There was no occasion for the defence to cross-examine PW-2 on the aspect of the prosecutrix's age. The prosecutrix herself had also given her age as 16 years on the date she was examined in the Court, that is just within four months of the incident. The documentary evidence with regard to the prosecutrix's age on the basis of the school first attended was elicited by the learned ASJ by examining CW-1 Rattan Singh and CW-2 Mukesh Kumar as Court witnesses. As stated earlier, Mukesh Kumar CW-2 admitted in his cross-examination that the admission form was signed by Kiran Jeet Kaur, mother of the prosecutrix. He deposed that the stamp paper for swearing the Affidavit was purchased on 20.04.1997. Obviously, the stamp paper for the purpose of the Affidavit was purchased by the father of the prosecutrix to get her admitted in the school on 20.04.1997. If I accept the age of the prosecutrix as mentioned in the school record on the basis of the Affidavit (that is 15.09.1994), the prosecutrix was only 2 years and a little less than seven months on the date the stamp paper was purchased. It is difficult to believe that a child of two years and seven months would be admitted in any class in any school leave aside in the Ist standard in a Government school. The contention raised on behalf of the Appellant that the prosecutrix was in fact much elder than her age as stated in the Affidavit cannot be easily brushed aside.

7. Admittedly, no date of birth certificate from the Municipal Corporation was either given at the time of the admission of the prosecutrix in the school or during the investigation/trial of the case.

8. In similar circumstances a learned Single Judge of the Punjab and Haryana High Court in Sunil Kumar alias Bholu Vs. State of Haryana, held that although the date of birth reflected in the school leaving certificate or school admission register is a relevant piece of evidence but it would be unsafe to rely on the same in the face of other infirmities. In the instant case, in view of the purchase

of the stamp paper for swearing of the Affidavit on 20.04.1997, it would be highly unsafe to believe that 15.09.1994 was the date of birth of the prosecutrix. From the purchase of the stamp paper on 20.04.1997 it becomes very doubtful that the prosecutrix was really born on 15.09.1994. Since no ossification test has been done to determine the bone age of the prosecutrix, the benefit of doubt in case of proven consent must go to the Appellant. His conviction u/s 376 IPC, therefore, has to be set aside.

9. As far as conviction u/s 363 IPC is concerned, the Trial Court had observed that there was prosecutrix's consent to sexual intercourse the Appellant had with her. I have stated hereinbefore that the love letters Exs. PW-3/DA-1 to PW-3/DA-13 were written by the prosecutrix to the Appellant not only expressing her love for the Appellant but also suggesting the ways as to how he (the Appellant) could take her away. Thus, it was not the Appellant who took the prosecutrix out of keeping of the lawful guardianship of her parents but it was the prosecutrix who lured the Appellant to take her away. A perusal of the love letters Exs. PW-3/DA-1 to PW-3/DA-13 also shows that the prosecutrix was more than willing to accompany the Appellant, and she happily travelled with him and stayed with him for six days.

10. In similar circumstances, a learned Single Judge of this Court in Ramvir v. State, Criminal Appeal No. 460/1999 decided on 04.11.2009 had observed that it would be difficult to hold that offence of kidnapping punishable u/s 363 IPC was made out against the Appellant.

11. In view of the above discussion, the Appeal must succeed; the same is accordingly allowed.

12. The impugned judgment and order on sentence are hereby set aside. The Appellant is acquitted of the charges for which he has been convicted. Appeal is allowed in above terms.