
(2019) 05 DEL CK 0441

In the Delhi High Court

Case No : Criminal Leave Petition No. 294 Of 2018

State Of Delhi

APPELLANT

Vs

Kuldeep @ Rahul @ Tinku & Ors

RESPONDENT

Date of Decision : 07-05-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 363, 366, 368, 376, 506
Code Of Criminal Procedure, 1973 — Section 378(3)

Citation : (2019) 261 DLT 493 : (2019) 2 JCC 1718

Hon'ble Judges : Manmohan, J; Sangita Dhingra Sehgal, J

Bench : Division Bench

Advocate : Rajat Katyal, P.K.Dhaka

Final Decision : Dismissed

Judgement

Manmohan, J

1. The present leave petition has been filed under Section 378(3) of the Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.P.C.")

challenging the judgment dated 23rd February, 2018 passed by the learned Additional Sessions Judge, Special Courts (POCSO), South District, Saket

Courts, New Delhi, acquitting the respondents-accused in FIR No. 252/2009 registered with Police Station Neb Sarai under Sections

363/366/368/376/506/34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The trial court has held that even though the prosecutrix was just a few months short of becoming an adult, she was sensible and aware of the

intention of the accused and had accompanied the accused out of her own free will and consent as well as stayed with the accused for one and a half

months voluntarily. In support of its conclusion, the trial court has relied upon

the Supreme Court judgement in *Shyam & Anr. vs. State of*

Maharashtra, AIR 1995 SC 2169, wherein it has been held as under:-

“In her statement in Court, the prosecutrix has put blame on the appellants. She has deposed that she was threatened right from the beginning

when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be difficult

to dislodge, but having regard to her conduct, as also the manner of the so-called “taking”, it does not seem that the prosecutrix was truthful in that

regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or

that her whereabouts would be under check by both the appellants/ accused and that they would emerge at the scene abruptly to commit the offence

of kidnapping by “taking” her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the

parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have been tied to the

bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not

touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, That he was taking her

away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down

from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing

party to go with Shyam the appellant on her own and in that sense there was no “taking” out of the guardianship of her mother. The culpability of

neither Shyam, A-1 nor that of Suresh, A-2, in these circumstances, appears to us established. The charge against the appellants/ accused under

Section 366, I.P.C. would thus fail. Accordingly, the appellants deserve acquittal. The appeal is, therefore, allowed acquitting the appellants.”

3. Learned counsel appearing on behalf of the State submits that as the prosecutrix was a minor on the date of the incident, the issue of her consent

would be irrelevant and immaterial. He submits that the offence of kidnapping as provided under Indian Penal Code is complete when a minor is taken

away from the custody of lawful guardian without the consent of such guardian.

4. Learned counsel for the State/petitioner further submits that the judgment of the Apex Court in *Shyam & Anr. (supra)* was wrongly applied by the trial court to the present case, inasmuch as in the present case the accused-respondent had also been charged under Section 376 IPC. He emphasised that the benefit of age of discretion had been given in *Shyam & Anr. (supra)*, to an accused who was charged under Section 366 IPC and not under Section 376 IPC.

5. Per contra, learned counsel appearing on behalf of the respondents submits that a learned Single Judge of this Court in *Rameshwar Giri vs. State, (2014) 211 DLT 508* has held that the observation of the Apex Court in *Shyam & Anr. (supra)* are applicable to a case, even where the accused-respondent has been charged under Section 376 IPC.

6. A perusal of the paper book reveals that the trial court after an exhaustive analysis of the evidence on record has correctly concluded that the prosecutrix had voluntarily gone with the accused-respondent No. 1 and she had never raised an alarm or tried to run away from the place where she had been allegedly kept by respondent No. 1.

7. The trial court has heavily relied upon the testimony of PW-8, Aas Mohammad, who was the driver of the vehicle in which the accused-respondent No. 1 had allegedly taken away the prosecutrix from Delhi to Ghaziabad on 17th October, 2009. Not only the driver of the vehicle had identified the prosecutrix in Court but he had also stated that he had not noticed any quarrel between the accused and the prosecutrix during the journey.

Consequently, the taxi driver substantiated the contention of the defence that it was a case of consent and the prosecutrix had on her own volition accompanied the respondent-accused.

8. Further, the bone age test report proved by PW-7 Dr.Venu Madhav R.K., Sr. Resident, Department of Radiology, AIIMS, New Delhi, showed that on the date of the incident the bone age of prosecutrix was between 14.5 years to 16.5 years. The margin of error in age ascertained by the radiological examination is two years on either side. (See: *Shweta Gulati &Anr. vs. The State Govt. of NCT Of Delhi* 2018 SCC Online Del 10448,

Maru Ram v. Union of India: 1981 (1) SCC 107, *Smt. Triveniben&Ors vs State of Gujarat &Ors*: 1989 (1) SCC 67,8 *Jyoti Prakash Rai @ Jyoti*

Prakash vs State Of Bihar:2008 (15) SCC 223, *Ram Suresh Singh vs Prabhat*

Singh @ Chhotu Singh &Anr: 2009 (6) SCC 681).

9. Since this Court can add two years to the age of the prosecutrix, it is of the opinion that it would not be proper to assume and presume that the

prosecutrix was a minor on the date of the incident. Consequently, while determining the age of the victim, the benefit of doubt in the age estimated by

the bone ossification test would have to go to the accused.

10. Keeping in view the aforesaid Ossification report as well as the fact that the prosecutrix had voluntarily accompanied the accused, this Court is of

the view that it is not a fit case for grant of leave to appeal. However, the issue of law raised by the petitioner-State is left open. Accordingly, the

present leave petition is dismissed.