

Akil Ahmad Vs. State

Akil Ahmad Vs. State

SooperKanoon Citation : sooperkanoon.com/1138962

Court : Delhi

Decided On : Apr-28-2014

Judge : Indermeet Kaur

Appellant : Akil Ahmad

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment reserved on :03.04.2014. Judgment delivered on :28.04.2014. CRL.A. 494/2000 AKIL AHMAD Through: Appellant Mr. H.M. Singh and Ms. Shabana, Advs. Versus STATE Through: .Respondent Ms. Fizani Hussain, APP CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 The appellant is aggrieved by the impugned judgment and order of sentence dated 31.07.2000 & 04.08.2000 respectively wherein he has been convicted under Sections 363/366/376 of the IPC. For the offence under Section 376 of the IPC, he has been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo RI for 1 year; for the offence under Section 366 of the IPC, he has been sentenced to undergo RI for a period of 5 years and to pay a fine of Rs.3,000/- and in default of payment of fine, to undergo RI for 9 months; for the offence under Section 363 of the IPC, he has been sentenced to undergo RI for a period of 3 years and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo, RI for 6 months. Benefit of

Section 428 of the Cr.PC had been accorded to the appellant. 2 The version of the prosecution is that on 11.08.1997, the accused had taken the prosecutrix S forcibly to Rohini where she was kept at his relatives house till 22.08.1997. The accused had committed rape upon her in this intervening period; the prosecutrix was a minor aged about 15 years. 3 Missing report about the victim being missing from her house had been recorded vide DD No.5-A on 20.08.1997 by the mother of the victim Khursheed (PW-4). 4 Investigation revealed that on 22.08.1997, the victim and the accused had got married as per Muslim rites and the nikahnama was proved by Hasin Ahmed (PW-8); the marriage was performed by the Qazi Bismil Nijami who had been examined as PW-12 also affirming this fact. 5 In the statement of the victim recorded under Section 161 of the Cr.P.C., she had stated that she had gone with the accused of her own free will; this was reiterated by her in her statement under Section 164 of the Cr.P.C. before the learned Metropolitan Magistrate (PW-10). In both these statements, she had given her age as 18 years. On oath in Court, she had however given a different version and had stated that the accused had forcibly taken her and she was only 15 years of age at that time; he had raped her. 6 The victim was examined by Dr. Sangeeta Gupta (PW-2) on 28.08.1997. No injury mark was noted on her body but bleeding from the vagina was noted. Her MLC was proved as Ex.PW-2/A. X-ray was advised. Dr. Gopesh (PW-9) had proved the X-ray report of the victim opining her age to be 14-17 years. 7 The Investigating Officer SI Ravinder Kumar Malik (PW-14) had completed the investigation. 8 In the statement of the accused recorded under Section 313 of the Cr.P.C., he had pleaded innocence; submission being that the parties had got married voluntarily in the presence of Qazi; the prosecutrix was major on the date of the incident. 9 No evidence was led in defence. 10 On the basis of the aforementioned evidence collected by the prosecution, the accused was convicted and sentenced as aforementioned. 11 On behalf of the appellant, arguments have been addressed by Mr. H.M. Singh, Advocate. It is pointed out that this is clearly a case where the prosecutrix had voluntarily accompanied the accused and had married him of her will; the fact that she was major on the date of the incident is clear from her version recorded under Section 161 of the Cr.PC as also her statement under Section 164 of the Cr.PC wherein she has given her age as more than 18 years; the trial Judge relying upon the testimony of the mother of the

victim who was admittedly an illiterate lady to conclude that the prosecutrix was a minor has committed an illegality. The trial Court has also committed an illegality in ignoring the ossification report. On all counts, the appellant is entitled to a benefit of doubt and a consequent acquittal. 12 Arguments have been refuted by the learned public prosecutor. It is pointed out that the judgment of the trial Court does not call for any interference and the age finding returned by the trial Judge holding the victim to be less than 16 years is based on the unchallenged testimony of PW-4 (the mother of the victim) wherein she had explained and detailed the manner in which her children were born and that is how she has arrived at a finding that her daughter was less than 16 years of age on the date of the incident. 13 Arguments have been heard. Record has been perused. 14 The star witness of the prosecution is PW-5. She had admittedly left her home on 11.08.1997. On 28.08.1997, the prosecutrix had voluntarily gone to the police station and gave her statement Ex.PW-5/DA. This statement has been perused. In this statement, she has stated that she had gone with the accused of her own free will and she had got married with him on 22.08.1997; she had given her age as 18 years. On the same date, the victim was medically examined by PW2 and her MLC has been proved as Ex.PW-2/A. As noted supra, no injury marks were found on her body. In this MLC, in the history given by the patient, the victim has stated that she was 19 years of age and she had married a boy Akil on 23.08.1997. The statement of the prosecutrix was recorded under Section 164 of the Cr.PC by the learned MM (PW-10) who on oath had proved it as Ex.PW-10/A. Even in this statement, the prosecutrix has categorically stated that she had gone with the accused voluntarily; she had given her age as 19 years. This statement was recorded in the chamber of the Judge. On oath in Court, the version of the prosecutrix was however different. She had on oath stated that on 11.08.1997, the accused had forcibly taken her away and lived with her as her husband; he had physical relations with her; she was not allowed to leave the house of the relative of the accused where she was kept; she denied that any marriage/nikah was performed. She however admitted that she had made her statements both under Section 161 as also under Section 164 of the Cr.P.C. before the Magistrate. In her cross-examination, she however stated that this statement was given under pressure. 15 PW-4 was the complainant and the mother of the victim. She had lodged the

missing report of her daughter (Ex.PW-4/A) on 20.08.1997 wherein she has stated the age of her daughter as 15 years. On oath in Court, she had reiterated that her daughter was 15 years of age at the time when she went missing with the accused; the accused had taken her away forcibly. In her cross-examination, she admitted that she is an illiterate lady; she had three children; she does not remember the date of birth of any of her children; she was also not clear as to whether she had three children or five children; her elder son Ishrar had completed 26 years; this was her second marriage; her husband has expired about 15 years back; her son Jabbar was 17 years old and is younger to Ishrar by 6 years; her daughter Mobin is younger by another 4- years to Ishrar; her daughter S (the prosecutrix) was born in Meerut; she studied for 2 years at the Madrasa. 16 In this context, PW-5 has given different picture. She has admitted that she is not educated. She has stated that her elder brother Jabbar is elder by 2 years; she has one sister Mobin and another brother Abrar who is aged 15 years. This version of PW-5 does not state anything about there being any elder brother by the name of Ishrar; PW-4 in this context in her examination in chief has stated that she had three children but has gone by to give details of five children. It has also come on record that both PW-4 and PW-5 were illiterate and uneducated although PW-5 had studied at Madrasa school for about 10-12 months. Testimony of Investigating Officer SI Ravinder Kumar Malik (PW-14) is also relevant in this regard. He has admitted that in the first statement given by the prosecutrix, she has given her age as 18 years; the nikahnama proved as Ex.PW-8/A mentions her date of birth as 19 years. PW-14 has further admitted that although he had asked the mother of the prosecutrix on documentary evidence about the age of the victim but none could be produced; he admitted that PW-4 did not tell him the specific age or date of birth of the prosecutrix S. He admitted that in the course of investigation, he had got done the ossification test of the prosecutrix to determine her age. 17 The statement of PW-9 is also relevant. He has proved the ossification report of the prosecutrix as Ex.PW-9/A evidencing her age to be between 14-17 years. 18 Record thus shows that there is no documentary evidence qua the age of the prosecutrix except the report of the ossification test which has opined her age to be between 14 to 17 years. The oral versions of the witnesses qua the age of the victim are conflicting. PW-4 has given the age of her daughter S as 15 years

but she being an illiterate and uneducated lady candidly admitted that she did not remember the date of birth of any of her children and having given the age of Ishrar as 26 years whereas PW-5 has given his age as 15 years, all goes to show that PW-4 was not really in the knowhow or knowledge about the age of her children which included the victim S. The oral version of the prosecutrix on this count is also contrary and conflicting. In her statement under Section 161 of the Cr.PC as also under Section 164 of the Cr.PC she has given her age as 18 years; in her MLC Ex.PW-2/A, this has been reiterated; in nikahnama (Ex.PW-8/A), her age mentioned is 19 years. The nikahnama was a genuine document; it was produced by the prosecution itself; PW-8 was a witness to this nikahnama who was an independent witness; there was also no suggestion given to him that he would be deposing falsely for any purpose; the Qazi who had performed the nikah had also been examined as PW-12. This document thus shows that the prosecutrix was aged 19 years on that day. It was only in her version on oath in Court that the prosecutrix decided to give a different age and stated her age to be 15 years. This oral version being totally conflicting and contrary could not have been relied upon and the one line finding given by the Sessions Judge stating that in these circumstances he would rather rely upon the version of PW-4 than the ossification report is clearly an illegality as it is based on no cogent material. 19 In this background, where there were conflicting oral versions, it was incumbent upon the trial Judge to have looked into the ossification report which had opined the age of the victim between 14-17 years. An ossification report is not conclusive on the age of a person; it is only an approximate factor but no doubt a useful guiding factor. 20 The Apex Court in AIR 1982 SC1297 Jayamala Vs. Home Secretary, Govt. of J.

& K. in the context of margin of error in ascertaining the age on a radiological report has inter-alia noted as under:

However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

21 In 1999 (1) Crimes 1 Mahabir Prasad Vs. State the Court while dealing with the age of the prosecutrix, it was held:

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.

22 Thus relying upon the ossification report as the oral evidence necessarily has to be discarded for being unreliable and granting the margin of two years in favour of the accused, the prosecutrix was admittedly a major on the date of the offence being more than 18 years of age. 23 The appellant has been convicted under Sections 363/366/376 of the IPC. Section 361 defines the offence of kidnapping. The expression used in Section 361 is whoever takes or entices any minor. The prosecutrix is a major. Offences under Sections 363/366/376 for which the appellant has been sentenced are clearly not made out. Not only is there a clear evidence which is to the effect that the victim was a major on the date of the incident; it has also come on record that she had gone with the appellant voluntarily and had entered into a nikahnama and admitted all these facts and thereafter turned turtle for reasons best known to her in Court. 24 In this background, benefit of doubt must accrue in favour of the appellant. Giving him benefit of doubt, he is acquitted of all the aforementioned offences. 25 Appeal is allowed and disposed off in the above terms. **INDERMEET KAUR, J** APRIL28 2014 A

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com