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Rahul Dev Mandal @ Rahul vs.state

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Court : Delhi

Decided On : Dec-02-2019

Appellant : Rahul Dev Mandal @ Rahul

Respondent : State

Advocate for Pet/Ap. : Mr. Aditya Vikram

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. 1117/2015 Judgment Reserved :

18. 11.2019 Date of Decision :

02. 12.2019 IN THE MATTER OF RAHUL DEV MANDAL @ RAHUL ..... Appellant Through: Mr.Aditya Vikram and Mr.Avinash, Advocates. STATE Versus Through: Ms.Radhika Kolluru, APP for State. ..... Respondent CORAM: HON'BLE MR. JUSTICE MANOJ KUMAR OHRI1 The appellant has instituted the present appeal assailing the judgment of conviction dated 01.06.2015 and order on sentence dated 06.06.2015, passed by Addl. Sessions Judge in FIR No.201/2013, registered under Sections 363/366/376 IPC and 4 POCSO Act, 2012 P.S. Chankyapuri whereby the appellant was convicted for the offence under Section 376 IPC and Section 4 POCSO Act, 2012 and was sentenced to undergo RI10years and to pay a fine of Rs. 10,000/- under Section 376 IPC, in default whereof to undergo SI for 8 months.

2. The brief facts as noted by the trial court are reproduced herein below:-

"CRL.A. 1117/2015 Page 1 of 9 2. The facts in brief are that Sh. Hari Kishan, father of the prosecutrix reported on 12.11.2013 that his younger daughter (prosecutrix) aged about 13 years had gone to a shop on the said day at about 12:30 p.m. for making some purchase, but had failed to return. He also expressed a suspicion that the accused Rahul had enticed and taken her away. On his complaint, FIR under Section 363 IPC was registered. Investigations were done by SI Shyam Lal Dagar, who flashed messages for tracing the prosecutrix and also filled up the missing person form. Father of the prosecutrix handed over the report card, according to which the date of birth of the prosecutrix was 05.02.2001.

3. SI Shyam Lal Dagar along with Ct. Dharmender, went to District Godda, Jharkhand on 19.11.2013 in search of the accused and the prosecutrix. On 20.11.2013, Rameshwar, brother of the prosecutrix produced her in PS before SHO and SI Prem Lata conducted the investigations. She took the prosecutrix to RML Hospital and for her medical examination to be conducted. She refused to return to her house and she was sent to Bapnu ghar, Bhagwan Dass Road, New Delhi. On 21.11.2013, SI Prem Lata produced the prosecutrix before CWC, Mayur Vihar. The statement of prosecutrix and her brother Rameshwar were recorded. Prosecutrix stated that she had met the accused Rahul two years back when he had come to live in their Jhuggi, as a tenant. She started talking to him. Her parents got the jhuggi vacated from the accused. He then took another jhuggi on rent in the vicinity where, he lived for about four months. During this period, they used to meet and at times even in the night. About one month before the date of incident, the accused shifted to a jhuggi in Sector 21, Dwarka, but they continued to talk to each other. The accused then told her on 12.11.2013 at about 12:00 noon, that she would have to accompany him. Accordingly, he came near Gopi Ka Dhaba, Vivekanand Camp and contacted the prosecutrix. She left her house on the pretext of going to a shop and met the accused who took her to Dwarka in an auto. She remained with the accused in his Jhuggi till 19.11.2013 as his wife and he also did Dushkarm with her. During this period, accused took her to Sai Baba Mandir and forcibly married, for which she had no proof. On 19.11.2013, the accused left her near Bapu CRL.A. 1117/2015 Page 2 of 9 Dham and fled away.

She walked back to her house. On the next date i.e. on 20.11.2013, she was produced before SHO, PS Chanakya Puri by her brother Rameshwar and her medical examination was got done. 3. Initially, the appellant could not be traced and later came to be arrested on 15.01.2014 from his native village. After completing the investigation, the charge-sheet was filed under Sections 363/366A/376 IPC and Sections 4 & 6 POCSO Act, 2012. The trial court framed the charges under Sections 363/366/376 IPC and Section 4 POCSO Act, 2012, to which appellant pleaded not guilty and claimed trial. In support of its case, the prosecution examined total of 10 witnesses during trial.

4. I have heard Mr. Aditya Vikram, learned counsel for the appellant and Ms. Radhika Kolluru, learned APP for the State and I have also gone through the records of the case. The trial court has acquitted the appellant under Sections 363 & 366 of IPC and the same has attained finality as the same was not challenged by the State. AGE OF THE CHILD VICTIM5 To prove the age of the child victim, the prosecution has examined the father of the child victim as PW-1. The father of the child victim proved the age of the child victim through a Report Card (Ex. PW1/C). The prosecution has also examined Mohd. Shoaib, the Assistant Teacher as PW-6. He produced and exhibited the admission/withdrawal Register (Ex. PW6/A), the admission form (Ex. PW6/B), the affidavit submitted by the father at the time of the admission, (Ex. PW6/C) and the letter issued by the Head Master of the School (Ex. PW6/D). As per the School records, the child victim was admitted in 1st Class on 13.07.2006 CRL.A. 1117/2015 Page 3 of 9 vide admission No.869G and her date of birth was mentioned as 05.02.2001. The child victim had also mentioned the same date of birth during her testimony. The incident in the present case is dated 12.11.2013. As such, on the date of the incident, the child victim was less than 13 years of age. Learned counsel for the appellant has contended that the child victim has mentioned her age as 16 years in the MLC as well as at the time of recording of her statement under Section 164 Cr.P.C. It is relevant that no question/suggestion was put to the child victim during her cross-examination with respect to her age.

6. The child victim appeared as PW-2, she deposed that earlier the appellant used to reside in the Jhuggi for about one and half year, where they developed their

friendship. When her parents came to know about this, the appellant was made to vacate the house. The appellant thereafter shifted to a room opposite their Jhuggi and subsequently shifted to Dwarka. The child victim remained in touch with the accused on phone. On 12.11.2013, the appellant asked the child victim to meet at Dhaba of Gopi, Vivekanand Camp at 12:00 noon. After roaming around for some time the, appellant took her to his Jhuggi at Dwarka, where she remained with him for one week. It has come in the testimony of the child victim that during the aforesaid one week, they had sexual intercourse every day. It was stated that the physical relationship was established against her will and consent.

7. Learned counsel for the appellant contended that there are apparent contradictions in the statement of the child victim recorded during the investigations and her testimony before the Court. He has referred to the history of assault recorded in the MLC of the child victim as well as her CRL.A. 1117/2015 Page 4 of 9 statement recorded under Section 164 Cr.P.C., where it has been stated that the sexual relations of the child victim with the appellant were made with her consent and it was stated by the child victim that she also married the appellant. He thus urged that the present case being a case of consensual sex, no offence punishable under Section 376 IPC is made out. He has also referred to the noting in the MLC of the child victim where she and her mother had refused the internal medical examination of the child victim. He also pointed out that no FSL examination has taken place in the present case.

8. During trial, the appellant denied the case of the prosecution. It was suggested during the cross-examination of the child victim that the appellant had not committed any rape on her. He further denied the factum of meeting the child victim on 12.11.2013 or having any sexual relations with her. At the time of recording of his statement under Section 313 Cr.P.C., the appellant admitted that he was arrested from village Gudha, Jharkhand, in the presence of Vakil Yadav and Laxman Mandal (both examined as PW-8 during the trial). ANALYSIS9 As per the prosecution case, a missing complaint was lodged by Hari Kishan with respect to missing of his daughter i.e., the child victim herein on 12.11.2013, which was registered as DD No.16A (Ex. PW10/A). In the aforesaid complaint itself, the name of the appellant was mentioned.

10. In terms of evidence which has come on record, the age of the child victim has been proved to be little over 12 years & 09 months at the time of the incident. It is seen that at the time of recording of her CRL.A. 1117/2015 Page 5 of 9 statement under Section 164 Cr.P.C. as well as while giving history of assault given at the time of recording of her MLC, the child victim had stated that sexual relations were established between her and the appellant albeit on the basis of her consent. During her testimony before the court, she deposed that on 12.11.2013, the appellant asked her to meet near Dhaba of Gopi whereafter the appellant took her to his room in Dwarka, Sector-21. The appellant used to have sexual relations with her every day against her will and consent. On 19.11.2013, the appellant left her at Bapu Dham Road and went away. The appellant during trial did not even contest the age of the child victim .No such question or suggestion was given during the cross examination of the child victim.

11. In all her statements made either during the time of investigation or before the court, the child victim had stated that the appellant had sexual relations with her during the time she remained with him. The moot question is whether the consent of a minor aged about less than 13 years can take the case out of the purview of the Section 376 IPC.

12. The appellant was charged under Section 363, 366, 376 IPC and Section 4 of POCSO Act, 2012. The charge under Section 363 and 366 IPC were held to be not made out and the appellant was convicted only under Section 376 and Section 4 POCSO Act.

13. Section 375 IPC defines rape and reads as under:-

"375. Rape.-. A man is said to commit rape if he - (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or xxx CRL.A. 1117/2015 Page 6 of 9 Sixthly.-. With or without her consent, when she is under eighteen years of age. 14. Section 2(d) of POCSO Act defines child as any person below the age of 18 years.

15. In State of Punjab v. Rakesh Kumar, reported as (2008) 12 SCC33 it was held as under:-

"6. Undisputedly, the victim was less than 16 years of age at the time of occurrence. Evidence also shows that the victim and the accused were in love and the victim admitted that she had sexual intercourse with the accused because of that. That of course has no relevance because of her age being less than sixteen years. 16. Similarly, in Satish Kumar Jayanti Lal Dabgar Vs. State of Gujarat reported as (2015) 7 SCC359 it was held as under:-

"15. The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance. CRL.A. 1117/2015 Page 7 of 9 16. Once we put the things in right perspective in the manner stated above, we have to treat it as a case where the appellant has committed rape of a minor girl which is regarded as a heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as a mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind the Protection of Children from Sexual Offences Act, 2012. 17. The prosecution has proved that the child victim was less than 13 years of age and in view of the settled position of law, the consent of such a child is immaterial.

18. In so far as contention of the learned counsel for the appellant regarding absence of corroboration in terms of MLC or FSL examination report is concerned,

it is noted that the child victim while giving history of incident at the time of recording of her MLC, stated that she had changed her clothes, took a bath as well as passed stools since the last episode of sexual intercourse which had occurred two days prior. Even otherwise, it has been repeatedly held that the sole testimony of the prosecutrix if inspires confidence and found to be believable and creditworthy can be the basis for conviction. Reference in this regard is made to the decision of the Supreme Court rendered in The State of Himachal Pradesh Vs. Manga Singh reported as 2018 SCC Online SC2886 as under:-

"11. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under CRL.A. 1117/2015 Page 8 of 9 the given facts and circumstances. Minor contradictions or small discrepancies should not a be a ground for throwing the evidence of the prosecutrix.

12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence. As a general rule, there is no reasons to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court. CONCLUSION19 In view of the consistent statements of the child victim that the appellant had sexual relations with her and the age of the child victim was found to be below 13 years, I find no illegality, perversity or infirmity in the judgment of the trial court. The conviction and order on sentence under Section 376 IPC passed by the trial court are upheld. Accordingly, the appeal is dismissed.

20. Copy of this judgement be sent to the trial court as well as to the concerned Jail Superintendent for information and necessary compliance. (MANOJ KUMAR

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