

Mohar Singh @ Pappu Vs. State

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Court : Delhi

Decided On : Sep-19-2002

Reported in : 103(2003)DLT421

Judge : O.P. Dwivedi, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 363, 366, 376/34, 506 and 506/34

Appeal No. : Criminal Appeal No. 86 of 1999

Appellant : Mohar Singh @ Pappu

Respondent : State

Advocate for Def. : Santosh Kohli, Adv.

Advocate for Pet/Ap. : Dinesh Mudgil, Adv

Disposition : Appeal allowed

Judgement :

O.P. Dwivedi, J.

1. By this order, I propose to dispose of two connected appeals arising from the judgment of conviction dated 29th January, 1999 and order of sentence dated 30th January, 1999 passed by learned Additional Sessions Judge, New Delhi thereby

convicting the appellants under Section 363/34, IPC and sentenced them to undergo RI for three years and to pay a fine of Rs. 2,000/- each and in default of payment of fine to undergo SI for two months in Sessions Case No. 76/1995 under Sections 363/366/376, IPC Police Station, Kalkaji, FIR No. 415/92.

2. Briefly stated, the prosecution case is that on 31st July, 1992 complainant Rakesh lodged a report to the effect that his daughter, namely Geeta aged 13 years is missing from his house since 29th July, 1992 evening. She had also taken away her clothes and Rs. 400/-. In the said report he expressed suspicion on the appellant Mohar Singh @ Pappu who resides in his neighborhood. On this report, a case under Sections 363/366, IPC was got registered vide FIR No. 45/1992 Police Station Kalkaji, New Delhi. On 2nd August, 1992 Geeta, prosecutrix was recovered from the jhuggi of Mohar Singh @ Pappu. Pie was arrested. Geeta was got medically examined. Her bone age was opined to be between 14.5 to 15.8 years. Statement of Geeta was recorded under Sections 161 and 164, Cr.P.C. wherein she made allegations of rape against all the accused persons. Accordingly, accused persons were arrested under Sections 363/366/506/376/34, IPC. After completing the investigation, challan was submitted to the Court. All the accused persons were charged under Sections 363/366/34, IPC. They were separately charged under Section 376, IPC also. Bal Kishan and Prahlad were further charged under Section 506/34, IPC.

3. In proof of its case, prosecution examined Geeta PW1, her father Rakesh PW 2, M.S. Rawat, Medical Record Technician of AIIMS, New Delhi, PW 3 (also produced as PW 4), Mr. D.C. Anand, Presiding Officer, Labour Court PW 5, Smt. Kamlesh Khanija, Principal, M.C.D. Primary School, DDA Slum Kalkaji, New Delhi PW 6, H.C. Satya Pal PW 7, SI Raj Singh PW 8. Besides, H.C. Liyaqat Ali, Duty Officer PW 9.

4. After careful consideration of submissions of learned Counsel for the parties in the light of material on the record, learned ASJ came to the conclusion that age of the prosecutrix was about 16.5 years at the time of alleged incident. Accused persons were exonerated of the charge under Section 376, IPC as prosecutrix in her statement before the Court did not say anything in this regard against the

accused persons. They were however, convicted only under Section 363/34, IPC for having kidnapped the minor girl and sentenced accordingly. Feeling aggrieved, the appellants have preferred these appeals.

5. This appeal has been pressed mainly on the ground that there was no reliable evidence from the prosecution side regarding the date of birth of prosecutrix (sic.) medical opinion giving her bone age between 14.5 to 15.8 years could not be made the sole basis for fixing the age of the girl as 16.5 years because there is always a margin of error of two years on either side. Further in this case the doctor, who gave the opinion with regard to the bone age of the prosecutrix has not been examined in the Court. thereforee, the said opinion was not admissible in evidence.

6. Having given my thoughtful consideration to the submissions made by learned Counsel for the parties in the light of material on the record and the case-law cited at the Bar, I think the challenge is well-founded. In the case of *Shanti v. State*, reported in 1991 (3) RCR 476 (Delhi), and *Mani Ram @ Ramesh v. State* 1990 (3) RCR 136 (Delhi), it has been held by this Court that if the X-ray reports on the basis of which the opinion regarding bone age has been given, has not been produced before the Court, the opinion of the doctor cannot be accepted and that if the doctor who gave the opinion regarding the bone age of the prosecutrix is not examined in the Court, his opinion cannot be admitted in evidence. Moreover, there is always a margin of error of two years on either side. Different High Courts have taken a similar view on the point. Reference can be had to the cases of *Balasaheb v. The State of Maharashtra* ; *Sheela Bai and Anr. v. State of M.P.* (1997) CCR 538 : 1997 (2) Crimes 461, and *Paramjit Singh v. State of Himachal Pradesh* . In the present case, Dr. Sanjay Hak who had given the opinion PW 4/A regarding the bone age of the prosecutrix has not been examined in the Court, so defense had no opportunity to cross-examine him on the question of his opinion with regard to bone age. thereforee, opinion regarding bone age of the prosecutrix Geeta becomes inadmissible in evidence. Besides, there is always a margin of error of two years on either side. If margin of two years is given on the higher side, age of the prosecutrix can be above 18 years. The benefit of doubt in such a situation always goes to the accused. The appellants, thereforee, will be entitled to

be given benefit of doubt as regard the age of prosecutrix Geeta at the time of alleged incident because it cannot be said with certainty that the girl was below 18 years of age at the time of incident.

7. The only other evidence of date of birth was School Leaving Certificate PW 6/A, wherein date of birth is given as 22nd August, 1979. Ms. Kamlesh, Principal who was examined as PW 6 stated that Rakesh (PW 2), father of the girl had submitted the birth certificate. Rakesh PW 2 stated that he is illiterate and had given the age of girl at the time of admission in the school by approximation. So this evidence was rightly rejected by learned ASJ being of no help in fixing the exact age of the prosecutrix Geeta at the time of incident

8. Once it is found that prosecution has failed to prove with certainty that the age of the prosecutrix was below 18 years at the time of incident, the only question which remains to be considered is whether she was taken by force or she went of her own accord. On this point, learned ASJ found the testimony of the prosecutrix unreliable. She has deposed that she was standing at the door of her house when she was threatened by the accused Mohar Singh to accompany him and that is why she accompanied him and kept on roaming here and there with him. Her statement does not inspire confidence because her father Rakesh PW 2 himself stated that girl had taken away some clothes and a sum of Rs. 400/- which shows that she had willingly gone with the accused Mohar Singh after taking Rs. 400/- and some clothes. PW 1 Geeta however denies this. Not only that she did not raise any alarm or protest for two-three days during which period she remained in Chanderlok Park as stated by her. The accused made her to sleep in the park only. She could raise alarm to attract the attention of the public. It is not possible to believe that she got no opportunity to attract attention of the people in a crowded city like Delhi. In cross-examination, she deposed that accused had taken her to various places like Pahar Ganj, village Garhi and Chanderlok Park but she never raised any alarm. In these circumstances it can be safely concluded that she roamed with the accused persons of her own accord and since she has not been proved to be minor, accused persons are entitled to be given benefit of doubt. Accordingly, both the appeals are accepted. The impugned order of conviction and sentence is hereby set aside. Appellants are acquitted.

Both appeals stand disposed of.

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