

Brahamdev Pandit Vs. State (Nct) of Delhi

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Court : Delhi

Decided On : Feb-08-2013

Judge : S. P. Garg

Appellant : Brahamdev Pandit

Respondent : State (Nct) of Delhi

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON :

15. h January, 2013 DECIDED ON :

8. h February, 2013 + CRL.A. 5/2010 BRAHAMDEV PANDITAppellant Through : Mr.Anish Dhingra, Advocate. versus STATE (NCT) OF DELHI .Respondent Through : Mr.M.N.Dudeja, APP. CORAM: HON'BLE MR. JUSTICE S.P.GARG S.P.GARG, J.

1. The appellant- Brahamdev Pandit impugns his conviction in Sessions Case No.9/1/2008 arising out of FIR No.940/2006 registered under Sections 363/376 IPC, PS Ashok Vihar by which he was convicted for committing offences punishable under sections 363/376 IPC. The appellant was sentenced to undergo RI for One year with fine `1,000/and in default of payment of fine he shall further undergo SI for 30 days under Section 363 IPC. He was also sentenced to undergo RI for ten years with fine `5,000/- and in default of payment of fine he shall further undergo SI for six months under Section 376 IPC. Both the sentences were

directed to operate concurrently.

2. Allegations against the accused were that on 24.11.2006 at about 02.00 P.M. from Central Park at J.J.Colony, Wazirpur, Delhi, he kidnapped prosecutrix X (assumed name) aged about 5 years and committed rape upon her. The prosecution examined eleven witnesses in support of its case. In his 313 Cr.P.C. statement, the accused pleaded false implication and stated that he was kept in illegal detention since 25.11.2006. He examined ASI Roshan Lal as defence witness. On appreciating the evidence and considering the rival contentions of both the parties, by the impugned judgment, the accused was convicted. Being aggrieved, he has preferred the present appeal.

3. Counsel for the accused urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The prosecutrix X was aged about 4/5 years and did not understand the facts. Her statement under Section 164 Cr.P.C. was not recorded as she was incapable to understand the questions put to her and give rationale answers. Her testimony before the Court was wavering and she was unable to disclose the incident. When leading questions were put to her in examination-in-chief by the learned Prosecutor, she merely stated that the accused had done wrong act with her. Though hymen was found torn in the MLC, it can happen for number of other reasons. In the MLC, it was alleged that sexual assault was committed by an unknown person. No DNA test was conducted. Forensic Science Laboratory (FSL) report was not exhibited in evidence. Learned APP while supporting the judgment urged that it does not call for interference. The prosecutrix X was recovered from the custody of the accused after number of days. The medical evidence corroborates the testimony of the prosecutrix and there is no reason to disbelieve her.

4. I have considered the submissions of the parties and have examined the record. PW-2 (Vipin Singh), Xs father lodged missing person report (Ex.PW-2/A) on 25.11.2006 stating that his daughter X was missing since 24.11.2006 from central park at J.J.Colony, Wazirpur, Delhi where she had gone to play at 02.00 P.M. and did not return thereafter. Case vide FIR No.940/2006 under Section 363 IPC was registered and the police machinery came into motion. Efforts were made to find

out the whereabouts of the child but in vain. On 28.11.2006, PW-6 (Satinder Singh) went to police post Monak, PS Gharonda, Distt. Karnal, Haryana at about 8 or 08.30 P.M. and informed the police that the accused- Brahamdev Pandit was present with a girl aged about 5/6 years in the room at his tube-well. PW-10 (ASI Ishwar Singh) informed Delhi police. PW-6 (Satinder Singh) stepped in the witness box and deposed that during the last days of November, 2006, the accused had brought a female child aged about 5/6 years at his dera in the fields at about 12.00 noon. The child was quite frightened and crying. The accused claimed himself that he was uncle (chacha), of his labourer (Jamindar). When he made enquiries from the child, she was unable to tell if he was her chacha or mama. On getting suspicion, he informed the police who came at 09.00 P.M. with the parents of the child and he handed over the custody of the child vide memo Ex.PW-2/C. PW-2 (Vipin Singh), Xs father also deposed that prosecutrix X was recovered on 29.11.2006 from Haryana and her custody was taken vide memo Ex.PW-2/C. He had gone with the police in a Maruti car and her daughter was found with the accused at the police station. In his 313 Cr.P.C. statement, the accused did not deny this circumstance. In the cross-examination, DW-1 (ASI Roshan Lal) from PS Gharonda, Distt.Karnal, Haryana admitted that as per Daily Diary (DD) No.22 dated 29.11.2006 (Ex.DW-1/A), the information was received from Bittoo of village Gagsina that accused Brahamdev was present with a girl aged about 6/7 years. From all the statements, it stands established that X was recovered from the custody of the accused at a far away place in the jurisdiction of PS Gharonda, Distt.Karnal, Haryana. The accused did not explain as to how and under what circumstances, he took the innocent child with him without seeking permission of her parents. He did not offer any reason for taking her to such a far away place and not informing her parents. The prosecutrix remained missing for about five days. During this period, the accused did not bother to contact her parents and inform them about her whereabouts. PW-2 (Vipin Singh) had lodged missing person report and the police had flashed wireless message to find out the whereabouts of the child.

5. It is true that statement of the prosecutrix was not recorded under Section 164 Cr.P.C. as she was unable to understand the questions. However, in her deposition as PW-4, she named the accused to have taken her in a rickshaw on

the pretext of taking her to a fair. She stated that the accused made her to sleep with him and did wrong thing with her. Learned APP sought necessary clarifications from the child as to what was wrong thing. The prosecutrix X disclosed that the accused had removed her underwear and his pajama. She felt pain in her abdomen. The child in the age of 4/ 5 years was unable to understand the nature of the act (rape) and to divulge it in detail.

6. The testimony of PW-8 (Dr.Sadhna Gautam) is very crucial. She examined the prosecutrix vide MLC Ex.PW-7/A. It records that the prosecutrix was sexually assaulted by an unknown person after her kidnapping about 5 or 6 days back. She noticed redness over the vulval region and hymen torn with fresh tear. In the cross-examination, she admitted that the injury on the vulval region was possible due to use of hand or fall on hard surface. The accused, however, did not dare to say that he was responsible for the injury by use of hand or she had sustained injuries due to fall. The prosecutrix was recovered from the custody of the accused and she remained with him for 4 or 5 days prior to her kidnapping. Soon after her recovery, she was medically examined and her hymen was found torn with fresh tear. Legitimate presumption/inference can be drawn that she got the injuries on her vulval region and her hymen was torn with fresh tear during her presence with the accused. It was for the accused under Section 106 Evidence Act to explain as to how and under what circumstances, the prosecutrix (a child) who was in his custody sustained injuries on her private parts and how her hymen was found torn with fresh tear. The prosecutrix and the accused were last seen together. This circumstance categorically establishes that it was the accused who was the perpetrator of the crime.

7. I have no reasons to disbelieve the testimony of the prosecutrix and of her parents who had no ulterior motive to falsely implicate the accused. The accused had no reason to take the child with him. Only motive of the accused can be inferred is that he intended to sexually assault the child and which he did. The conviction is based upon fair appraisal of the evidence and no interference is called for.

8. The appellant has been sentenced to undergo RI for 10 years. He committed rape with a child who was 5 years old who did not know its consequence. The Court can well understand the trauma of the child who was taken out of the lawful custody of her parents in a remote place for five days. Similar, was the anxiety of her parents who continued to search her during this period. It is the minimum sentence which is to be awarded under Section 376 (2)(f) IPC and no reduction is possible.

9. In the light of above discussion, conviction and sentence of the appellant are maintained. The appeal is dismissed. The Trial Court record be sent back forthwith. (S.P.GARG) JUDGE FEBRUARY 08 2013 tr

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