

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 9th August, 2018
Delivered on: 17th August, 2018

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CRL.A. 835/2016

JITENDER SINGH

..... Appellant

Represented by: Mr. Anurag Jain, Mr. Vinit Malhotra, Ms. Ayush Sharma, Mr. Tarun Khanna and Mr. Rahul Dubey, Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Represented by: Mr. Ashok K. Garg, APP for State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal Jitender Singh challenges the impugned judgment dated 26th July 2016, whereby he was convicted for offences punishable under Sections 363/366/342/376 IPC and the order on sentence dated 1st August 2016 directing him to undergo rigorous imprisonment for the period of three years and to pay a fine of ₹3000/-, in default whereof to undergo simple imprisonment for a period of fifteen days for the offence punishable under Section 363 IPC, rigorous imprisonment for a period of five years and to a fine of ₹3000/-, in default whereof to undergo simple imprisonment for a period of fifteen days, for the offence punishable under Section 366 IPC, rigorous imprisonment for the period of one year and a fine of ₹1,000/- in default whereof to undergo simple imprisonment for a period of seven days for the offence punishable under Section 342 IPC and rigorous imprisonment for a period of eight years and to a fine of ₹5000/-, in default whereof to undergo simple imprisonment for a period of one

month, for the offence punishable under Section 376 IPC.

2. Assailing the conviction, learned counsel for the appellant submits that since the date of birth of the prosecutrix has been proved to be 1st September 1995, the alleged offences are not made out as the prosecutrix was not a minor on the date of incident.

3. Per contra, learned APP for the State submits that the impugned judgment and order on sentence suffers from no illegality and the appellant has been rightly convicted on the testimony of the prosecutrix, her father, Dr. Nishu Dhawan (PW-18) who proved the MLC of the prosecutrix and DNA report (Ex.PX).

4. Process of law was set into motion on 26th June 2012 at around 9:50 P.M. when information was received regarding the missing of prosecutrix S @ D from her house at around 6:30 P.M. Aforesaid information was recorded vide DD No. 53-A (Ex.PW6/A) which was handed over to HC Raj Kumar (PW-6). On 4th July 2012, father of the prosecutrix (PW-2) got his statement recorded with HC Raj Kumar (PW-6) vide Ex.PW-2/A wherein he stated that on 26th June 2012 at about 6:30 P.M., his daughter/prosecutrix had gone to the nearby tailor to get her suit altered and when she did not come back, he went to the police station to get a missing complaint registered but since he did not have any proof of her age as she has always been staying with her maternal grandfather in his village and had also studied there, only a DD Entry was lodged. He had called for her proof of age which shows that she was born on 9th July 1996. He stated that he tried looking for his daughter but could not find her. She was 16 years old, height was 5'3", fair complexion, thin, black eyes, long black hair, face was longish and was wearing a salwar-suit of green colour with black slippers. He

expressed his apprehension that someone had taken away his daughter.

5. On the basis of the aforesaid statement, FIR No. 148/12 (Ex.PW1/A) was registered for the offence punishable under Section 363 IPC. Further investigation was handed over to SI Ram Chander (PW-12) who searched for the prosecutrix but he could not find her. On 14th July 2012, father of the prosecutrix (PW-2) came to the police station with the prosecutrix. SI Ram Chander (PW-12) recorded the statement of father of the prosecutrix under Section 161 Cr.P.C. who stated that Jitender had done 'galat kaam' with the prosecutrix.

6. Thereafter, investigation was handed over to SI Sarita (PW-15) who recorded the statement of the prosecutrix and her father under Section 161 Cr.P.C. Prosecutrix was then sent to DDU Hospital where she was medically examined and the doctor on duty handed over four sealed parcels containing clothes and sample of prosecutrix and one sample seal of DDU Hospital, CMO. The same were taken in possession vide seizure memo Ex.PW-12/A. The prosecutrix was then produced before Child Welfare Committee (CWC) and on 17th July 2012 her statement under Section 164 Cr.P.C. was recorded vide Ex.PW-3/A.

7. On 19th July 2012, Jitender surrendered before the court. After taking permission from the court, he was interrogated and arrested vide arrest memo Ex.PW-8/A. His personal search was conducted vide Ex.PW-8/B and disclosure statement was made vide Ex.PW-8/C. Jitender was medically examined at Sanjay Gandhi Hospital and his samples were collected from the hospital in sealed condition with sample seal. SI Sarita (PW-15) prepared site plan at the instance of Jitender vide Ex.PW-15/A.

8. Age certificate of the prosecutrix was collected from her school. By

the order of CWC vide Ex.PW-14/A, MTP of the prosecutrix was conducted and samples of prosecutrix from DDU Hospital along with sample seal of DDU Hospital, CMO were seized vide seizure memo vide Ex.PW-9/A. The samples duly sealed with sample seals were sent to FSL. After completion of investigation, charge-sheet was filed and vide order dated 19th December 2012 charge for offences punishable under Sections 363/366/328/342/376/506 IPC was framed.

9. Prosecutrix (PW-3) deposed that in the year 2012 she was studying in 10th class in a school at Firozabad, Uttar Pradesh. She was born on 9th July 1996 and had come to Delhi about 2-3 months prior to the incident. Jitender, who had come to Delhi and was living in Dwarka, used to teach in her school in Uttar Pradesh. On 26th June 2012, she had gone from her house to Saraswati Stitching Center. Jitender called her from the center and gave her some sweet to eat and after eating it she became a little drowsy. Jitender then took her to Dwarka at a house where he had sexual intercourse with her against her wish. She requested Jitender not to rape her but he raped her. She was kept in that house for about 8 days and during that period Jitender had sexual intercourse with her against her will. Jitender used to give her some medicines with water after which she used to remain unconscious. Thereafter, Jitender took her to a house in Meerut and kept her there for 2-3 days where also he continued to rape her. From Meerut, he took her to Etah where a friend of her maternal grandfather saw her and when she told him everything, he took her to her maternal grandparents' house at Sonie Village, Uttar Pradesh. Her maternal grandparents informed her parents and brought her to Delhi. In her cross-examination, she stated that she had known Jitender for the last 2-3 years from the date of incident. She used to

take tuition from Jitender in her house and Jitender was known to her family. In the month of March 2012, she came to know about her pregnancy. She denied the suggestion that Jitender had not met her on 26th June 2012 or that no such incident had ever taken place. She stated that in her statement to the police she did not mention the fact of the first forced sexual intercourse by Jitender on her. When the occurrence of this case was reported to the police, she had already come across the factum of her pregnancy which was four months old at that time.

10. Praveen Kumar (PW-4), Clerk, Inter College, Post Office Nangla Dheer, Distt. Firozabad, Uttar Pradesh brought the summoned record pertaining to the date of birth of the prosecutrix and as per her school record (Ex.PW-4/A), her date of birth was 9th July 1996.

11. Dr. Nishu Dhawan (PW-13), CMO, DDU Hospital stated that she was deputed to prove the MLC Ex.PW-13/A. On 14th July 2012, Dr. Kirti Rana Dey had examined the prosecutrix and prepared her MLC. No injuries were found on the body of the prosecutrix. She was referred to Department of Gynecologist for detailed examination. She identified the handwriting and signatures of Dr. Kirti Rana Dey.

12. Dr. R.K. Sarin (PW-16), Director FSL conducted the examination of samples and proved the detailed report as Ex.PW-16/A. He also proved the report for DNA Analysis vide Ex.PX and as per the DNA profiling (STR analysis) performed on the exhibits 'A' (blood sample of Jitender) and '4' (Fetus of prosecutrix), it was sufficient to conclude that the source of exhibit 'A' was the biological father of the source of exhibit '4'.

13. Dr. Sunita Seth (PW-17), Specialist (Obs. & Gyne.), DDU Hospital was deputed to depose on behalf of Dr. Parul Mehra who conducted the

gynecological examination of the prosecutrix. As per the examination, vitals were stable, per abdomen soft, uterus just palpable. As per local examination, hymen admitted two fingers, no fresh injuries were found, no bleeding. As per vaginal examination, uterus 12 weeks anti-verted soft. MLC was proved vide Ex.PW-13/A. During her cross-examination, she stated that it was correct that there was no external or internal injury or mark of struggle seen on any part of the prosecutrix. There were no bite marks or lacerations seen on the body of the prosecutrix.

14. Jitender in his statement recorded under Section 313 Cr.P.C. stated that he had been falsely implicated in the present case on the complaint of the father of the prosecutrix as he found out that prosecutrix and he had a love affair since the time when prosecutrix was a student and he was a teacher at the Inter College. Father of the prosecutrix got the information that the prosecutrix and Jitender wanted to marry each other and were both regularly in touch through mobile phones 8010456421 and 8010283115. They were in conversation through mobile numbers 8800184374 and 9711997482 and other mobile number which started from 92. He stated that these three numbers belonged to the father of the prosecutrix who personally met him and told him to end relations with the prosecutrix. When the father of the prosecutrix came to know that the prosecutrix was pregnant and she wanted to get married to him, father of the prosecutrix asked the prosecutrix to file false and frivolous criminal case against him. When the prosecutrix remained adamant on her wish, father of the prosecutrix got registered a DD entry to falsely implicate him in criminal case and to avoid social stigma on the family as his unmarried daughter was pregnant. Father of the prosecutrix did not approve of it because of the caste and status difference between the

two families.

15. Onkar Singh (DW-3), Head Master, Prathmik Vidhyalaya, District Firozabad, Uttar Pradesh deposed that as per the Original Admission Register, prosecutrix was admitted in Class 1st on 13th September 2002. As per school records (Ex.DW-3/A), her date of birth was 1st September 1995.

16. Chander Shekhar (DW-5), Nodal Officer, Bharti Airtel Ltd, New Delhi deposed that he was unable to produce the call record for the number 8800184374 for the period from 1st January, 2012 to 1st July, 2012 as the same had been destroyed. He stated that the records remain saved in their system for one year only and thereafter it is destroyed. Photocopy of the customer application form relating to mobile No. 8800184374 was exhibited vide Ex.DW-5/A and as per the form mobile No.8800184374 was allotted in the name of the father of the prosecutrix.

17. Yogesh Tripathi (DW-7), Nodal Officer, Reliance Communication Ltd., New Delhi proved the CDR of the mobile number 8010283115 for the period from 1st May 2012 to 30th June 2012 vide Ex.DW-7/1 and proved that the mobile number was issued in the name of Sanjeev Singh. He also stated that application form for the mobile No. 8010456421 was in the name of Sanjeev Singh but the call detail record could not be produced as the same had already been destroyed.

18. Dr. Sachidanand (DW-8) deposed that he was working as Consultant Radiology at N-2 Imaging Center since December, 2011. He reported the skiagram of left elbow AP view of the prosecutrix vide Ex.DW-8/A and as per the report, external and internal epicondyles fused and bone age was more than 17-18 years.

19. Pradeep Singh (DW-10), Alternate Nodal Officer, Vodafone Mobile

Services Pvt. Ltd. deposed that the mobile number 9711997482 was in the name of father of the prosecutrix. Customer Application form was proved vide Ex.DW-10/A. The call detail record from 1st January 2012 to 1st July 2012 were not available as the same had been destroyed.

20. As opposed to the prosecution demonstrating that the date of birth of the prosecutrix was 9th July, 1996 the appellant in his defence examined Onkar Singh, Head Master of the school where the prosecutrix was first admitted in class 1st on 13th September, 2002 where her date of birth was mentioned as 1st September, 1995. The prosecution has not been able to elicit anything from the cross-examination of Onkar Singh to show that the records proved by the appellant's witnesses were incorrect or tampered with. Hence the date of birth of the prosecutrix as mentioned in the first school attended being 1st September, 1995 has to be accepted as the correct date of birth. The alleged offence as per the case of the prosecution took place on 26th June, 2012 when the prosecutrix went missing from her house. Thus as on the date of alleged offence the age of the prosecutrix was more than 16 years and she could have in terms of the law applicable as on 26th June, 2012 consented to sexual intercourse and the offence would not be rape. Though in her evidence the prosecutrix stated that the appellant forcefully took her away and committed intercourse against her will and forcibly, in her examination the prosecutrix admitted that in the month of March, 2012 she came to know about her pregnancy. As per medical examination of the prosecutrix conducted on 14th July, 2012 the fetus was 12 weeks old thus conceived in early April.

21. From the evidence on record it is thus apparent that the sexual intercourse between the prosecutrix and the appellant took place not only

after she was allegedly kidnapped on 26th June, 2012 but prior thereto. In her evidence the prosecutrix is silent as to whether the appellant committed rape on her contrary to her wishes prior to 26th June, 2012. Further the version of the prosecutrix that she was taken from one place to another is also not trustworthy for the reason even as per the prosecutrix the two of them moved to different places and lived in different houses giving sufficient time to the prosecutrix to object to the act of Jitender. There is no allegation of the prosecutrix that Jitender committed rape on her on the threat to kill her or any of her family members.

22. In view of the defence evidence led by the appellant and his stand that after the father of the prosecutrix came to know about the pregnancy of the prosecutrix he cooked up a story appears to be a plausible defence, the appellant is entitled to the benefit of doubt and is thus acquitted of the charges framed.

23. Impugned judgment of conviction and order on sentence are set aside. Appeal is disposed of.

24. Copy of this order be sent to Superintendent Central Jail Tihar for updation of record. Superintendent, Jail is also directed to release the appellant forthwith if not required in any other case.

25. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 17, 2018
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