



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

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Reserved on: August 02, 2023

Pronounced on: September 04, 2023

+ CRL.A. 506/2003

STATE

..... Appellant

Through: Mr. Tarang Srivastava, Additional
Public Prosecutor for State with Sub
Inspector Niraj Singh, Police Station
Nand Nagri

Versus

SHAMSHAD

..... Respondent

Through: Ms. Inderjeet Sidhu, Amicus Curiae
Counsel on the panel of Delhi High
Court Legal Services Committee

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The present appeal has been filed by the appellant-State challenging the judgment dated 17.10.1998 passed by the learned Trial court in case FIR No.390/1997, registered at Police Station Nand Nagri for the offence punishable under Sections 363/376 IPC.

2. Pertinently, vide decision dated 12.05.2006, the present appeal was heard with other batch of appeals for consideration of the issue as to whether in cases where respondent/accused remained unserved and have been



declared proclaimed offenders, would appointment of Amicus Curiae to represent their interest serve any purpose? On this aspect, this Court vide judgment dated 12.05.2006 held as under:

“Respondent/ accused was prosecuted for the offence under Section 363/366/376 IPC. Vide judgment dated 17.10.1998, trial court held that the prosecution had failed to establish that the prosecutrix was a minor at the time of occurrence and had failed to lead evidence regarding age, based on X-ray and other tests carried out. Trial court held that prosecutrix was in love with the respondent/ accused and had willingly gone with him. Holding that prosecution had failed to prove guilt of accused, he was acquitted.

Appeal was preferred with an application for condonation of delay in which notice was issued. From August, 2001 to March,2002, accused/ respondent could not be served. Service report was that respondent had sold his house and land and left without leaving any address. Interestingly on 23.4.2002, one counsel Mr.Vilas Shan appeared on behalf of respondent. Directions were issued for paper book to be supplied to him. Respondent was thereafter represented by counsel on 15.7.2002 and 23.10.2002. On 24.7.2003, when none appeared on behalf of respondent, the application for condonation of delay was allowed and leave to appeal was granted. Pursuant to grant of leave to appeal, directions were issued to the respondent to furnish bond to secure appearance in the sum of Rs.5,000/-. An application was also moved by the respondent for recalling the order of grant of leave to appeal, which was passed in his absence as also the order condoning the delay in filing appeal. The application was dismissed as having been preferred without any instructions. Non-bailable warrants were also issued against the respondent which have remained unexecuted from 11.12.2003 till date. Attempts to ascertain the whereabouts of the respondent from the neighbourhood as also members of the complainant's family have been of no avail. Respondent remains untraceable.



The question which would arise for consideration in the present appeal is once respondent has been represented in the case in response to a notice issued in leave to appeal, and leave to appeal having been granted and order maintained despite effort by respondent to have it repealed having failed, can the matter be heard without his being served with a notice of hearing of the appeal itself, by appointment of the amicus curiae.”

3. Thereafter, the process under Section 82 Cr.P.C. was initiated against the respondent-accused and consequent upon order dated 18.01.2020 passed by the learned Metropolitan Magistrate declaring him proclaimed offender, this Court vide order dated 30.01.2020 directed appointment of Amicus Curiae to represent the case of respondent-accused in the present appeal.
4. Accordingly, vide order dated 30.01.2020, Ms.Inderjeet Sidhu, Advocate was appointed Amicus Curiae on behalf of respondent in the present appeal.
5. In view of afore-noted facts and circumstances of the present case, the instant appeal challenging the impugned judgment dated 17.10.1998 was heard by this Court.
6. The brief facts giving rise to the present appeal, as have been spelt out in the impugned judgment, are that on 18.06.1997, complainant- Mohd. Sharif, lodged a report with the police that he has nine children out of which his fifth child, daughter, namely, Chandni was missing since the previous day i.e. 17.06.1997. He stated that despite his best efforts, he could not trace his daughter and suspected that one Shamshad/accused-respondent, living in his neighbourhood in a rented house, had kidnapped his daughter. The complainant stated that his daughter was aged 12 years of age. At his



instance, a complaint under Section 363 IPC was registered.

7. During investigation, the prosecutrix was recovered with accused Shamshad on 14.06.1997. The prosecutrix and accused were got medically examined. Bone x-ray of prosecutrix was conducted to determine her age. After completion of investigation, *challan* under Section 366/376 of IPC was filed before the court of learned Magistrate and the case was committed to the Court of Sessions for trial.

8. In support of its case, the prosecution examined as many as 13 witnesses. The statement of accused under Section 313 Cr.P.C. was recorded wherein he denied the allegations levelled against him, however, did not lead any evidence in his defence. The learned Trial court after scrutinising the evidence recorded and material placed before it held as under:

“20. Prosecutrix Chandni who is the backbone of the prosecution has not supported the prosecution case in her examination-in-chief. She has not uttered a single word in her examination-in-chief if accused has committed any wrong acts with her. She was declared hostile by Ld. PP. In cross-examination by Ld. PP she admitted it to be correct that she got recorded to the police in her statement that on 17.6.1997 at about 12.00 noon, accused Shamshad had called her to come near the Masjid. She further admitted it to be correct that when she reached near the Masjid, accused met her there and asked her “Aub Door Door Rehne Se Hum Roz Nahin Mil Sakte Aur Agar Turn Mere Saath Chale Chalo To Hum Tum Shadi Karke Ek Jagah Reh Sakte Hain”. She further admitted it to be correct that she has stated to the police in her statement that accused Shamshad took her to his house at Village Mandoli and had also told her that they will marry after two days. She further admitted it to be correct that accused had



committed sexual intercourse on the night on 17.6.1997 at his house, She further admitted it to be correct that on the next night, accused has again committed sexual intercourse with her. She further admitted it to be correct that on the next day while accused was taking her at the house of his sister at Khajoori and when they were present at the bus stop they were apprehended by the police.

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22. Further, there is nothing on record to show that prosecutrix was minor at the time of occurrence as no documentary proof regarding the age of prosecutrix has been proved on record. It has come on record that bone X-ray of prosecutrix was got done for determining the age of prosecutrix, however, the report was not collected from the hospital by the I.O. which is a clear cut negligence on the part of the I.O. There is also no cogent evidence on record to prove that prosecutrix was kidnapped by accused with the intention to marry her or to compel her to have intercourse. From the testimony of prosecutrix Chandni, it appears that she was in love with accused and she willingly went with the accused as in her examination in chief she deposed that accused came in the afternoon and took her to Mandoli whereas in cross-examination by Ld. PP she admitted it to be correct that accused had called her to come near the Masjid.

23. Considering the totality of the circumstances, I am of the opinion that prosecution has failed to bring home the guilt of accused. Accordingly, accused is acquitted. He be released forthwith if not required in any other case. File be consigned to R/R."

9. During the course of hearing, learned Additional Public Prosecutor appearing on behalf of appellant-State submitted that while passing the impugned judgment, the learned trial court did not appreciate the evidence brought on record and wrongly came to conclusion that prosecution had



failed to bring home the guilt of respondent-accused.

10. Learned Additional Public Prosecutor for State also submitted that the prosecutrix was recovered from the kidnapper/accused and the respondent-accused was arrested and that prosecutrix (PW7) had fully supported the prosecution case and so, the respondent-accused was liable to be convicted. Learned Additional Public Prosecutor for State next submitted that even if it is accepted that prosecutrix was in love with respondent-accused, it cannot be said that she was a consenting party to the rape as at the time of the alleged incident, she was a minor. It was further submitted that acquittal of respondent-accused is devoid of merit and he deserves to be convicted for the offences he has been charged with.

11. To the contrary, learned amicus curiae appearing on behalf of respondent-accused submitted that learned trial court has wisely considered the testimony of witnesses recorded before the trial court and the prosecution has failed to substantiate its case against the respondent-accused and therefore, the impugned judgment acquitting the respondent-accused of the offences charged with, calls for no interference from this Court.

12. The arguments advanced by learned counsel representing both the sides were heard at length. This Court has perused the impugned judgment as well as the testimony of the witnesses recorded by the trial court and other material placed on record.

13. PW-2 Mohd. Sharif who is father of the prosecutrix and complainant of FIR in question deposed that he had seen accused-respondent along with her missing daughter standing on a bus stop and accused was arrested by the police at his instance. Though in his complaint this witness had stated that



his daughter was 12 years of age, however, in his examination, he submitted that he had no documentary proof regarding age of his daughter.

14. PW-3 Smt. Rani, who is the mother of the prosecutrix, in her examination deposed that her daughter was 12 years of age on the day of alleged incident i.e. 17.06.1997 and she suspected that the respondent-accused had taken her daughter away.

15. PW-7 prosecutrix Chandni, who is the primary witness and victim in the present case, deposed that respondent-accused was living in his neighbourhood and he had taken her to the house of one of his friends and trapped her back to her home. She had further deposed that once he was taking her to his sister's house when his parents along with police officials reached at the bus stop, arrested the accused and took both of them to the hospital for medical examination. She had further deposed that they were produced before the learned Metropolitan Magistrate where her statement was recorded. She further stated that respondent-accused did not marry her but had promised to marry her. During her cross-examination, PW-7 prosecutrix had stated that the respondent-accused had told her that they cannot stay away from each other and it is better to get married. She had further admitted that on the night of 17.06.1997, respondent-accused had kept her at his house and made relations with her. She has further stated that accused Shamshad used to first stare her though she had never made a complaint in this respect to her parents and she was friendly with respondent-accused for last 5-6 months. She also stated that she used to meet accused Shamshad near Masjid and other places. She denied the suggestion that she was below 18 years of age at the time of the alleged



incident.

16. Learned trial court in the impugned judgment has noted that Dr. Nalini who had examined the prosecutrix had not been examined, as she had left the services of the hospital and so, the MLC of the prosecutrix could not be proved by the doctor. However, the Record Clerk who had appeared from the hospital to prove the said MLC, had stated that the prosecutrix was not major at the time of incident.

17. After going through the testimony of the aforesaid witnesses, this Court finds that learned trial court has rightly observed that during examination and cross-examination, PW-7 prosecutrix has not uttered a word that the accused had committed any wrong act upon her. We also find that the prosecutrix has admitted that she used to meet accused and the accused had committed sexual intercourse upon her on 17.06.1997. There is no assertion by the prosecutrix that respondent-accused had forced himself upon her or that she had rebelled when he made relations with her and so, it is not misplaced to presume that prosecutrix was a consenting party in making relations with the respondent-accused.

18. Also, the prosecution has presented its case on the ground that the victim girl was 12 years of age, whereas no document was brought on record to show that the girl was 12 years of age and thus a minor, at the time of alleged incident. Even though bone x-ray of the prosecutrix was conducted, however, the report was not collected by the concerned Investigating Officer and thus, prosecution did not place it on record.

19. Upon analysing the testimony of witnesses and having regard to the facts and circumstances of the case, this Court finds that the trial court has



rightly held that prosecution has not been able to prove the guilt of respondent-accused. In our considered view, there is no error in the impugned judgment to substantiate the guilt of respondent-accused and he has rightly been acquitted by the trial court.

20. As has already been noted hereinabove that respondent-accused has been declared proclaimed offender, however, in the interest of justice, an Amicus Curiae counsel from the panel of Delhi High Court Legal Services Committee was directed to be appointed to represent his case. This Court is constrained to observe that it is not only the reason that parents of the prosecutrix could not place on record any document to show that she was 12 years of age, even the prosecution miserably failed to prove that she was a minor, as laxity of not collecting the bone X Ray report and placing it on record, coupled with the lack of ability to overall observe the facts and circumstances of the case, proved fatal to the case of prosecution.

21. With aforesaid observations, the present appeal is accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 04, 2023

r/rk